

Lessons to be Learned from the Ricci Supreme
Court Decision: Equal Employment Opportunity is
the Objective

By

William H. Truesdell, SPHR
President
The Management Advantage, Inc.

&

Dan A. Biddle, Ph.D.
President
Biddle Consulting Group, Inc.

July 6, 2009

Lessons to be Learned from the Ricci Supreme Court Decision: Equal Employment Opportunity is the Objective

The recently released U.S. Supreme Court opinion in the case of Ricci v DeStefano (the City of New Haven, Connecticut) has made it clear that opinions and supposition are not sufficient to support employment decisions based on race. Specifically, in this situation, the City administered two promotional examinations with the intention of selecting people for the positions of Fire Department Lieutenants and Fire Department Captains. Then, after learning that the test had substantial adverse impact on minority candidates, they threw out the results primarily on that basis alone, coupled with limited information that the tests might not have survived a “possible” disparate impact challenge.

The Selection Procedure

The foundation for the City’s selection procedure is an agreement with its fire fighters’ union that only a written test and an oral interview will be used as the selection devices. The final ranking of candidates is weighted 60% on the written test and 40% on the oral interview. Although that weighting came about as a result of negotiations with the union, it was apparently not based on job analysis research. The City’s charter requires promoting only from the highest scoring three candidates, called the “Rule of Three.” A previous state court ruling said the City may not use “banding” to establish those top three candidates. “Banding” is the practice of collecting all of the individuals with the same composite scores (rolled up to the next highest round number) together into a band and then selecting the top three bands. That could result in many more than three individuals being in the top three positions¹. The City was also prohibited from using adjustments to individual composite scores based on race due to the Court’s decision in *Chicago Firefighters Local 2 v. Chicago*. So it was left with its plan to develop and apply written and oral tests that were job related.

The Tests

New Haven hired an outside, Chicago-based consulting firm that specializes in development of employment screening procedures like the written and oral tests desired by the City of New Haven. The selection of the consultant was made through a competitive bidding process. The City agreed to pay their new vendor \$100,000 for the project.

The testing consultants “began the test-design process by performing job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions.” They interviewed incumbent captains and lieutenants and their supervisors. “They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, [the consultants] wrote job-analysis questionnaires and administered them to most

¹ Test score banding is an acceptable practice that has been widely supported in state, federal, and federal appeals courts. The USSC did not rule against banding in this case; however, the decision did state that if banding was adopted *after the selection process for the sole purpose of making the minority test scores appear higher*, it would have violated Title VII’s prohibition of adjusting test results on the basis of race.

of the incumbent battalion chiefs, captains, and lieutenants in the Department.” At each stage of the job analyses the consultant “oversampled minority firefighters to ensure that the results...would not unintentionally favor white candidates.”

Then the consulting firm developed written examinations to measure the candidates’ job-related knowledge. For each test, a list was prepared consisting of training manuals, Department procedures, and other materials to be used as resources for the test questions. The list of sources was approved by the Fire Department’s executives. Then, using only material from the approved sources, the consultants developed multiple-choice test questions for each position. Each test had 100 questions and, according to Civil Service Bureau rules, was written “below a 10th grade reading level.”

The consulting firm then developed the oral examinations. Those concentrated on job skills and abilities. They included hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. “Candidates [were] presented with these hypothetical situations and asked to respond before a panel of three assessors.” All assessors came from outside Connecticut and were superior in rank to the positions being tested. They were battalion chiefs, assistant chiefs, and chiefs from departments of similar sizes to New Haven’s throughout the country. “Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels contained two minority members.”

The examinations were administered in November and December 2003. The results were:

<u># Completing the Examination</u>	<u>Total</u>	<u>White</u>	<u>Black</u>	<u>Hispanic</u>
Lieutenant Examination	77	43	19	15
Captain Examination	41	25	8	8
<u># Passing the Examination</u>	<u>Total</u>	<u>White</u>	<u>Black</u>	<u>Hispanic</u>
Lieutenant Examination	34	25	6	3
Captain Examination	22	16	3	3

Under the “Rule of Three,” the top 10 candidates were eligible for an immediate promotion to the eight open lieutenant positions. All 10 were White. Subsequent vacancies would have allowed at least 3 Black candidates to be considered for promotion to lieutenant. Seven captain positions were vacant at the time of the examination. Under the “Rule of Three,” 9 candidates were eligible for an immediate promotion to captain, 7 Whites and 2 Hispanics.

The Evidence

The City's contract with its consulting firm called for the consultants to prepare a technical report that described the examination processes and methodologies, and analyzed the results. The consulting firm was ready to "provide respondents with detailed information to establish the validity of the exams, but respondents did not accept that offer." Instead, the City's legal counsel said to the consultants that he was concerned the tests had discriminated against minority candidates. Here is exactly where the City's actions (and the case) went afoul—the actual validity of the test, as presented by original test developers, challenged by the plaintiffs, and then weighed by the court, was *not allowed into the record*.

This left the court to make conclusions about the validity of the test without even the "owner's manual" of the test. In fact, it would appear that the courts limited most of the evidence upon which the decision was based.

This is an important distinction, because in virtually every Title VII *testing case*, a three-step process is followed whereby (1) the adverse impact is substantiated, (2) validity is argued, and then (3) alternatives with less adverse impact are weighed. It would be difficult to find a typical disparate impact case where each of these steps was *not* involved. The second step (validity) involves a *judicial process* whereby the employer (in this case the City) musters a validity report in defense of their testing practices. Various standards (such as the Uniform Guidelines and professional standards) are addressed, the job analysis results are tallied, test blueprints are reviewed and justified, and the key elements for content validity are substantiated (see the Uniform Guidelines, Section 14C1-9).

After the defense levies their "best validity case," the plaintiff is afforded an opportunity to rebut the validity findings. Possible flaws are put forth, alternatives are suggested, and evidence contrary to validity is presented. Following this typical process, both experts would file declarations, undergo a series of depositions and then prepare their evidence for trial.

At trial, experts would typically be challenged by each opposing counsel regarding their expertise relevant to the case (a process called *Voir Dire*). During the *Voir Dire* process, each expert's background and expertise is challenged by the opposing counsel and weighed by the court. If the expert passes this process, they are then allowed to submit testimony to serve two important functions for the "triers of fact and law": (1) the scientific function, whereby they collect, test, and evaluate validity evidence and frame opinions based on that evidence; and (2) the forensic function, where they communicate the opinion and its basis to the judge and jury. If the expert survives the *Voir Dire* process, they are then allowed to testify in court. After revealing their opinions based on the substantiated evidence, their opinions and testimony are submitted to thorough review process at trial, where the expert testifies before the Court, is cross examined by the opposing counsel, and then gives redirect testimony before the Court so the Court could consider the evidence and opinion supplied by the expert.

None of these steps were followed in the Ricci case. By contrast, consider what occurred in the Ricci case:

- The validity study from the original developers of the test was “blocked from evidence” by the City.
- Experts were not certified, examined, and cross-examined.
- No opposing expert reports were filed and evaluated.
- No expert depositions were taken by either side.

In fact, the only “testimony” weighed by the USSC in this case was offered at the Civil Service Bureau (CSB) hearing by three professionals, *only one of whom actually looked at the test*. The first, Dr. Christopher Hornick (an Industrial-Organizational Psychologist), spoke to the CSB by telephone. Dr. Hornick had not “stud[ied] the test at length or in detail” and had not “seen the job analysis data.” While Dr. Hornick offered very useful insights and provided recommendations, his review cannot be construed as “expert evidence.” In fact, it is next to impossible to admit expert evidence under the Federal Rules of Evidence unless the expert has *reviewed data to form reliable opinions*².

The second professional (a fire program specialist for the Department of Homeland Security and a retired fire captain from Michigan), did look at the test, but was not a testing expert. The third expert, a professor at Boston College whose “primary area of expertise” was “not with firefighters per se” but in “race and culture as they influence performance on tests and other assessment procedures”), expressly declined the CSB’s offer to review the examinations. None of these experts submitted declarations. None went through the Voir Dire process. None testified in court and went through the direct, cross, re-direct, and re-cross examinations.

Our point in making these distinctions is only to highlight that the key emphasis of the Court’s ruling is that the City did not have a strong basis *in evidence* to justify throwing out the test results based on a “clear imminent danger of a guaranteed Title VII lawsuit.” This only begs the question: “What was in the evidence?” The decision states, “... the record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate” and continues:

The City could be liable for disparate impact discrimination only if the examinations 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... We conclude there is no strong basis **in evidence** to establish that the test was deficient in either of these respects. We address each of the two points in turn, based on the record developed by the parties through discovery—a record that concentrates in substantial part on **the statements various witnesses made to the CSB.**” [Bold emphasis added.]

² The second author does not disagree with the opinions offered by Dr. Hornick at the CSB; the only point being made here is that offering opinions on the phone without having reviewed the test is a far distance from the expert evidence rules required for submitting evidence in Federal Court.

Continuing with this position, the ruling also states:

The City, moreover, turned a blind eye to evidence that supported the exams' validity. Although the City's contract with [its consultant] contemplated that [the consultant] would prepare a technical report consistent with EEOC guidelines for examination-validity studies, the City made no request for its report. After the January 2004 meeting between [the consultant] and some of the city-official respondents, in which [the consultant] defended the examinations, the City sought no further information from [its consultants], save [an] appearance at a CSB meeting to explain how it developed and administered the examinations. [The consulting firm] stood ready to provide respondents with detailed information to establish the validity of the exams, **but respondents did not accept that offer. ."** [Bold emphasis added.]

The Supreme Court Justices place a clear caveat on their opinion by stating, "*On the record before us*, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results."

The Key Problem

In a word... "politics."

According to City procedures, the Civil Service Bureau (CSB) had to certify the test results and top candidates that they produced. Over a series of several public meetings many people presented arguments on both sides of the question about that certification.

City officials, including the City's Legal Counsel and the Mayor argued that since Blacks were excluded from the final list of best-qualified candidates that the test results should be thrown out: "...even the District Court admitted that 'a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Rev. Boise] Kimber and other influential leaders of New Haven's African-American community.'" "On one occasion, '[i]n front of TV cameras, he [Kimber] threatened a race riot during the murder trial of the Black man arrested for killing White Yalie Christian Prince. He continues to call Whites racist if they question his actions.'"

"Four days after the CSB's first meeting, Mayor DeStefano's executive aid sent an email to [the City's Chief Administrative Officer, Karen] Dubois-Walton, [the City's Director of Human Resources, Tina] Burgett, and [the City's Corporate Counsel, Thomas] Ude... The message clearly indicated that the Mayor had made up his mind to oppose certification of the test results (but nevertheless wanted to conceal that fact from the public):"

"I wanted to make sure we are all on the same page for this meeting tomorrow....[L]et's remember, that these folks are not against certification yet. So we can't go in and tell

them that is our position; we have to deliberate and arrive there as the fairest and most cogent outcome.”

“Taking into account all the evidence in the summary judgment record, a reasonable jury could find the following. Almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action **before making any real assessment of the possibility of a disparate-impact violation.**” ... “**Taking this view of the evidence, a reasonable jury could easily find that the City’s real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.**” [Bold emphasis added.]

The City argued that its process for testing and selection was flawed. Yet, it was the employer that had negotiated that process with its union. It was the employer that had refused to accept validity information from its testing preparation consultant. And, it was the employer that had decided the question of validity based on political demands of key City power brokers rather than on psychometric science and sound legal opinion.

The Court’s Decision

The court’s key ruling is: “...under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an 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 continues to state, “...there is no evidence – let alone the required strong basis in evidence – that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. *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.”

The Lessons

Human Resource professionals can take several lessons away from this ruling by the nation’s highest Court.

Lesson #1: The Ricci case DOES NOT change the law as it relates to the burden-shifting requirements outlined in Title VII.

Lesson #2: Valid and legally defensible tests will, at times, have adverse impact against protected groups.

Lesson #3: Design a system of selection that is legally defensible and based on sound testing/validation principles.

Lesson #4: Implement the selection system and use statistical analysis to evaluate the results from a psychometric (test development) perspective as well as for identifying adverse impact.

Lesson #5: Listen to the test validation and development experts. Fight against any political influences that would change the results or dismiss the process all together. Let the results stand on their own if it can be demonstrated they are “job-related for the position in question and consistent with business necessity.”

Lesson #6: Have competent legal counsel guide your organization through the application of the “*strong basis in evidence*” standard if your organization wishes to take discriminatory action that is designed to prevent a broader discriminatory result.

Lesson #7: Everyone has a race and is protected under Title VII. Do NOT simply throw-out an exam if the results are not what are expected or desired. There also needs to be a “*strong basis in evidence*” to support a lack of test validity/defensibility (e.g., see McDonald v. Santa Fe Transportation, 427 U.S. 273, 1976, which held that Title VII, whose terms are not limited to discrimination against members of any particular race, prohibits racial discrimination in private employment against white persons upon the same standards as racial discrimination against nonwhites).

Case Citation: RICCI ET AL. v. DESTEFANO ET AL., No. 07–1428. Argued April 22, 2009—Decided June 29, 2009

<http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf>

Case Citation: McDONALD v. SANTA FE TRANSPORTATION, 427 U.S. 273 (1976)

Held: Title VII, whose terms are not limited to discrimination against members of any particular race, prohibits racial discrimination in private employment against white persons upon the same standards as racial discrimination against nonwhites.

<http://supreme.justia.com/us/427/273/>