Police Sergeant Exam Candidates: NJ Civil Service is on Sound Footing

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The recent action taken by the United States Department of Justice (DOJ) against the state of New Jersey and the New Jersey Civil Service Commission alleges a "pattern or practice of employment discrimination" against Black and Hispanic police sergeants' candidates, in violation of Title VII of the Civil Rights Act of 1964. In the complaint, for the written promotional exam for the rank of police sergeant, the DOJ calculated the pass rates as follows:

White candidates — 89% pass rate
Hispanic candidates — 77% pass rate
Black candidates — 73% pass rate

In order to constitute "employment discrimination," invoking the "disparate impact" provision of Title VII, the Equal Employment Opportunity Commission (EEOC) requires a selection or pass rate that is less than 80 percent of the rate for the group with the highest rate. In this regard, 29 *C.F.R.* § 1607.4(D) provides in pertinent part:

> D. *Adverse impact and the "Four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. * * *

The foundation for the DOJ complaint is that the difference between the pass rate of Hispanic and Black candidates and that of white candidates is "statistically significant." Yet, the 77% pass rate for Hispanic candidates is 86.5% of the pass rate for the group with the highest rate. The 73% pass rate for Black candidates is 82% of the pass rate for the group with the highest rate. This means that the minority pass rate, which in both cases is greater than 80%, should *not be regarded as evidence of adverse impact,* and hence is not statistically significant.

Clarifying the Issues: Ricci v. Destefano

To place these numbers in perspective, and to clarify the various issues and legal principles implicated by the DOJ action, the recent "reverse discrimination" case decided by the United States Supreme Court is very helpful. In *Ricci v. Destefano,* 129 *S.Ct.* 2658 (2009), white and Hispanic firefighters successfully sued the City of New Haven, Connecticut, alleging that the City violated the Civil Rights act by refusing to certify the results of a promotional examination, based on the city's belief that the use of the exam results might have a disparate impact on minority firefighters. "The City rejected the test results solely because the higher scoring candidates were white." *The United States Supreme Court held that this was improper.*

Background

"In the fire department of New Haven, Connecticut—as in emergency-service agencies throughout the Nation—firefighters prize their promotion to and within the officer ranks. An agency's officers command respect within the department and in the whole community; and, of course, added responsibilities command increased salary and benefits. Aware of the intense competition for promotions, New Haven, like many cities, relies on objective examinations to identify the best qualified candidates."

In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain. Promotion examinations in the City of New Haven "were infrequent, so the stakes were high. The results would determine which firefighters would be considered for promotions during the next two years, and the order in which they would be considered. Many firefighters studied for months, at considerable personal and financial cost."

"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. In the end the City took the side of those who protested the test results. It threw out the examinations."

The "Reverse Discrimination" Suit

Various White and Hispanic firefighters "who likely would have been promoted based on their good test performance sued the City and some of its officials." The action alleged that, "by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII of the Civil Rights Act of 1964, 78 *Stat.* 253, as amended, 42 *U.S.C.* § 2000e et seq., and the Equal Protection Clause of the Fourteenth Amendment. The City and the officials defended their actions, arguing that if they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters."

The United States Supreme Court rejected the City's position and held that "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." Here, since the City could not meet that threshold, its action in discarding the tests "was a violation of Title VII."

Similarities, Issues and Principles

Similar to the hundreds of cities, and most of our counties in New Jersey, the City of New Haven, Connecticut, operates in accordance with a Civil Service Merit System. The system requires that promotions to the classified civil-service ranks of lieutenant and captain be made by selecting the most qualified individuals, as determined by job-related examinations. "After each examination, the New Haven Civil Service Board (CSB) certifies a ranked list of applicants who passed the test. Under the charter's 'rule of three,' the relevant hiring authority must fill each vacancy by choosing one candidate from the top three scorers on the list. Certified promotional lists remain valid for two years."

The promotional exams for the lieutenant and captain positions contained written and oral components. "To sit for the examinations, candidates for lieutenant needed 30 months' experience in the Department, a high-school diploma, and certain vocational training courses. Candidates for captain needed one year's service as a lieutenant in the Department, a high-school diploma, and certain vocational training courses."

An outside contractor (Industrial/Organizational Solutions, Inc.) (I.O. Solutions) was hired to develop and administer the examinations. (I.O. Solutions has also been used by New Jersey for the Entry Level Law Enforcement Exam). Similar to the extraordinary efforts taken by New Jersey Civil Service officials, the Illinois-based I.O. Solutions strived to fit the examinations to the Connecticut firefighters "by performing job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions." As had been done in New Jersey, representatives from I.O. Solutions 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 company wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department." And similar to the New Jersey efforts, at every stage of the job analyses, I.O. Solutions took great effort to ensure that the results would not unintentionally favor white candidates.

"With the job-analysis information in hand, I.O. Solutions developed the written examinations to measure the candidates' job-related knowledge." All candidates knew what subjects would be tested. Using the approved subject materials, the company drafted a multiple-choice test for each position. Each test had 100 questions, and each was written below a 10th-grade reading level. After the exams were prepared, "the City opened a 3-month study period. It gave candidates a list that identified the source material for the questions, including the specific chapters from which the questions were taken." Thereafter, the oral portion of the exams were administered. The oral portions concentrated on job skills and abilities, including such areas as incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things.

"Candidates took the examinations in November and December 2003. Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics."

White lieutenant candidates — 58.1% pass rate
Black lieutenant candidates — 31.6% pass rate
Hispanic lieutenant candidates — 20% pass rate

"Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics."

White captain candidates — 64% pass rate
Black captain candidates — 37.5% pass rate
Hispanic captain candidates — 37.5% pass rate

Based on the test results, the Connecticut officials were concerned that the tests had discriminated against minority candidates. When the leader of the I.O. Solutions team was contacted, he stated that, under federal law, "a statistical demonstration of disparate impact," standing alone, "constitutes a sufficiently serious claim of racial discrimination to serve as a predicate for employer-initiated, voluntar[y] remedies—even . . . race-conscious remedies." Nonetheless, a finding of an adverse impact is only "the beginning, not the end, of a review of testing procedures."

At a meeting of the New Haven Civil Service Board (CSB), the members considered certifying the results. "Although they did not know whether they had passed or failed, some firefighter-candidates spoke at the first CSB meeting in favor of certifying the test results." Said one candidate, "[e]very one of the questions on the written examination came from the [study] material. . . . [I]f you read the materials and you studied the material, you would have done well on the test." Frank Ricci (the plaintiff herein) stated that the questions were based on well known "rules and procedures" and on " 'nationally recognized' materials that represented the 'accepted standard[s]' for firefighting." Ricci stated that he had "several learning disabilities, including dyslexia"; and that he had spent a lot of money to prepare for the exam and had "studied 8 to 13 hours a day to prepare for the test." "I don't even know if I made it," Ricci told the CSB, "[b]ut the people who passed should be promoted. *When your life's on the line, second best may not be good enough."*

Ultimately, the New Haven CSB determined not to certify the exam results. This lawsuit followed. The plaintiffs included 17 white firefighters and 1 Hispanic firefighter who passed the examinations but were denied a chance at promotions when the CSB refused to certify the test results. The plaintiffs argued that the City, by voting against certifying the results, violated the Equal Protection Clause of the Fourteenth Amendment, along with the disparate-treatment prohibition contained in Title VII of the Civil Rights Act.

The Law

"Title VII of the Civil Rights Act of 1964, 42 *U.S.C.* § 2000e *et seq*., as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin." Title VII prohibits both intentional discrimination, which is known as "disparate treatment," as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities, which is known as "disparate impact."

"As enacted in 1964, Title VII's principal non-discrimination provision held employers liable only for disparate treatment. That section retains its original wording today. It makes it unlawful for an employer 'to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' 2000e-2(a)(1) * * *."

"The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact." In *Griggs v. Duke Power Co.,* 91 *S.Ct.* 849 (1971), however, the Court interpreted the Act "to prohibit, in some cases, employers' facially neutral practices that, in fact, are 'discriminatory in operation.' " According to the Court in *Griggs*, the "touchstone" for "disparate-impact liability is the lack of 'business necessity': 'If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited.' " Under the case law, "if an employer met its burden by showing that its practice was job-related, the plaintiff was required to show a legitimate alternative that would have resulted in less discrimination."

"Twenty years after *Griggs*, the Civil Rights Act of 1991, 105 Stat. 1071, was enacted. The Act included a provision codifying the prohibition on disparate-impact discrimination. That provision is now in force along with the disparate-treatment section already noted. Under the disparate-impact statute, a plaintiff establishes a *prima facie* violation by showing that an employer uses 'a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.' 42 *U.S.C.* §2000e-2(k)(1)(A)(i). An employer may defend against liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity.' Even if the employer meets that burden, however, a plaintiff may still

succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. 2000e-2(k)(1)(A)(ii) and (C)."

In this case, the plaintiffs alleged that "when the CSB refused to certify the captain and lieutenant exam results based on the race of the successful candidates, it discriminated against them in violation of Title VII's disparate-treatment provision." *The United States Supreme Court agreed.*

The Court's Approach

The Court's analysis began with this premise: "The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates." In short, "the City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.' " Without some other justification, "this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."

Said the Court:

> Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white.

So the main question is whether the City had a lawful justification for its race-based action. "Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination. That would amount to a *de facto* quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.' * * * Even worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance. That operational principle could not be justified, for Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing. §2000e-2(j). The purpose of Title VII 'is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.' "

In selecting a proper standard, the Court determined that, "certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary." Said the Court:

> Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. The standard leaves ample room for employers' voluntary compliance efforts * * *.

Resolving the statutory conflict in this way allows the disparate-impact prohibition to work in a manner that is consistent with other provisions of Title VII, including the prohibition on adjusting employment-related test scores on the basis of race. See 2000e-2(l). *Examinations like those administered by the City create legitimate expectations on the part of those who took the tests. As is the case with any promotion exam, some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests. 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. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.* (emphasis added).

If an employer cannot rescore a test based on the candidates' race, §2000e-2(l), then it follows [] that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates—absent a strong basis in evidence that the test was deficient and that discarding the results is necessary to avoid violating the disparate-impact provision. Restricting an employer's ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII's express protection of bona fide promotional examinations. *See* § 2000e-2(h)[.]

Because the City in this case could not meet its burden under "the strong-basis-in-evidence standard," the Court did not need to go on to decide the constitutional issue.

During the course of its decision, the Court emphasized that, once a promotional exam 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."

The Court concluded:

Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. * * * We hold only that, 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.

In this particular case, the racial adverse impact "was significant."

On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII. *See* 29 *C.F.R.* § 1607.4(D) (2008) (selection rate that is less than 80 percent "of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact")[.]

> Based on how the passing candidates ranked and an application of the "rule of three," certifying the examinations would have meant that the City could not have considered black candidates for any of the then-vacant lieutenant or captain positions.
>
> Based on the degree of adverse impact reflected in the results, [the City was] compelled to take a hard look at the examinations to determine whether certifying the results would have had an impermissible disparate impact.

The problem is that "a *prima facie* case of disparate-impact liability—essentially, a threshold showing of a significant statistical disparity, * * * and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results. That is because 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."

Speaking for the Court, Justice Kennedy concluded that there was "no strong basis in evidence to establish that the test was deficient in either of these respects.

According to the Court, "the examinations were job-related and consistent with business necessity. The City's assertions to the contrary are 'blatantly contradicted by the record.' " The evidence outlined "the detailed steps I.O. Solutions took to develop and administer the examinations. IOS devised the written examinations, which were the focus of the CSB's inquiry, after painstaking analyses of the captain and lieutenant positions—analyses in which I.O. Solutions made sure that minorities were over-represented. And I.O. Solutions drew the questions from source material approved by the Department." Clearly, the "questions were relevant for both exams."

The City also "lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative that the City, by certifying the examination results, would necessarily have refused to adopt.

Accordingly, the Court concluded that there was "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. In other words, 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 City's discarding the test results was impermissible under Title VII[.]"

The testing process in this case was open and fair. "The problem, of course, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe."

The Court's decision here in *Ricci* clarifies the issues in, and principles governing the DOJ's action against the New Jersey Civil Service police sergeant's exam. By certifying the present results and continuing its present form of testing, the Civil Service Commission is on sound footing. Indeed, given the strong language of the Court in *Ricci*, the New Jersey Civil Service Commission may be on thin ice if it fails to certify the results of the recent police sergeant's exam.