

Supreme Court Grants *Cert.* in Public Employment Case

by Adam Kingsley

The Supreme Court has agreed to decide whether a city faces Title VII and Equal Protection liability when it declines to certify the results of an employment test that generated an adverse impact on minority candidates. The case is *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008), *cert. granted*, 2008 WL 4177275 (U.S. Jan. 09, 2009) (Nos. 07-1428, 08-328).

The Troubled History of Police and Fire Tests

Municipalities throughout the United States have spent decades litigating the results of hiring and promotional tests offered by their police and fire departments. During the 1960's and 1970's, minority and female candidates successful demonstrated that testing in this era often violated Title VII. In the following two decades, many cities engaged in a series of steps, including race-norming and out-of-rank promotions, designed to enhance minority representation in the departments. This led to claims of "reverse discrimination," but municipalities often justified adjustments that favored minority candidates on the ground that they were remedying their own prior discrimination. But, as the lasting effects of hiring and promotion discrimination of the 1960's and 1970's faded, this remedial rationale became increasingly unavailable.

Cities have turned to professional testing companies that promise to provide a battery of tests that are fair, valid and race-neutral in both administration and result. However, despite advances in the development and validation of tests, testing continues to generate disparities associated with race. When minority candidates underperform as compared to white candidates, municipalities face a Hobson's Choice: those that use the results of these disputed tests face lawsuits by minority candidates, while cities that adjust test results or discard the test face reverse discrimination litigation from disappointed white candidates.

For situations in which the public employer opts to use the results of the disputed test and minority candidates bring suit, a reasonably set body of case law has developed. First, the plaintiffs must prove that the test generated "adverse impact." This prima facie case is made with reference to the Equal Employment Opportunity Commission's (EEOC) standards for judging adverse impact, including the "four-fifths rule," which compares the relative success rate of candidates on the test. If the plaintiffs meet their burden, the employer must demonstrate that the test was valid – *i.e.*, that performance on the test is a meaningful predictor of how applicants will do on the job.

In proving validity, the municipality needs to demonstrate not only that the test was valid in general, but that the testing protocol that caused the adverse impact (*e.g.*, the use of a particular pass/fail point, or the decision to promote in rank order) is valid. If the employer meets this burden, the plaintiff can still prevail by proving that the employer could have chosen an "equally valid" means of hiring or promotion, one with less adverse impact.

Rarer are those cases in which the municipality recognizes adverse impact (and the possibility of a Title VII lawsuit by minority candidates) and, as a prophylactic, takes steps to reduce the adverse impact by changing the way in which the test results are used for hiring or promotion. As in *Ricci*, these types of changes can lead to charges of reverse discrimination under Title VII or the Equal Protection clause. The case law here is murkier, especially when the city's only rationale is to preemptively comply with Title VII.

Ricci v. DeStefano

In 2003, the City of New Haven administered written and oral tests for promotions to lieutenant and captain positions in the Fire Department. In accord with the City's Charter, applicants who passed the tests were listed in rank order, which guaranteed that higher-scoring applicants would be selected before lower-scoring test-takers. Based upon the anticipated number of promotions, the results of the tests produced an adverse impact on minority applicants. Specifically, of the seven captain vacancies, two would go to Hispanics and none to blacks, and none of the eight lieutenant vacancies was projected to go to blacks or Hispanics. Faced with these disappointing results and the possibility of a Title VII suit by minority officers if the results were used, the City declined to certify the results. White officers who were sure to be promoted based on the test results sued the City under Title VII and Equal Protection theories.

On summary judgment, the district court recognized the unusual position of the parties, but attempted to place the case within the typical *McDonnell Douglas* Title VII framework. Under this framework, the plaintiffs established their prima facie burden of demonstrating that the City's actions were race-based, and the burden shifted to the City to establish a legitimate, non-discriminatory reason for its actions. Pointing to prior Second Circuit decisions, the district court accepted the general idea that a desire to comply with Title VII could provide a legitimate non-discriminatory reason for the City's decision to scrap the test. However, the district court also recognized the inverted position of the parties: the City was arguing that its own tests were not sufficiently valid to survive

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that no alternative would serve the governmental interest with a less discriminatory effect).
17. *See* Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 573 (2d Cir. 2003).
18. *Id.*
19. *See* Mountan Side Mobile Estates P'ship, 56 F.3d at 1253.
20. 466 F.3d 1276, 1286 (11th Cir. 2006).
21. *Id.* at 1286-87.
22. As previously noted, the trial court declined the opportunity to indulge this argument, which was raised in the City's motion to dismiss, motion for summary judgment, and halftime motion for a directed verdict.
23. Dews v. Town of Sunnyvale, Tex., 109 F. Supp.2d 526 (N.D. Tex. 2000).
24. *Id.*
25. *Id.*
26. Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1288 (11th Cir. 2006).
27. *See* Doe v. City of Butler, 892 F.2d 315, 320 (3rd Cir. 1989) ("every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."); *see also*, Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996) ("the exercise of discretion, whether to require a minimum of 650 square feet for an apartment of four people, as opposed to a minimum of 500 square feet or 800 square feet, is a legislative, not a judicial function").
28. *See* Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (Seventh Circuit expressly rejects the argument that, once a racially discriminatory effect is shown, a violation of the FHA has necessarily been established); *see also*, Oti Kaga, Inc. v. South Dakota Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003); *compare* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988).
29. 272 U.S. 365 (1926); *see also*, Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (Supreme Court recognized a city's police power to protect its citizens from "the premature and unnecessary conversion of open-space land to urban uses" and the "ill effects of urbanization").
30. City of Kyle, Tex., Ordinance No. 438 (2003).
31. *See* Elliott v. City of Athens, Ga., 960 F.2d 975, 982 (11th Cir. 1992).
32. The City also challenged the plaintiffs' experts with *Daubert* motions. ML

Helping Development

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endnote, "In making this finding, the Zoning Administrator shall consider the building's past and current vacancy rate, existing and previous uses, and real estate market information." *Id.* at 30.
12. Los Angeles, Ca., Adaptive Reuse Incentive Areas Specific Plan, Ordinance No. 175,038, § 6 (2003).
13. Metropolitan Government of Nashville and Davidson County, Tenn., Ordinance No. BL2004-492 (Feb. 02, 2005), available at http://www.nashville.gov/mc/ordinances/term_2003_2007/bl2004_492.htm, or go to www.nashville.gov and search "BL2004-492."
14. Metropolitan Government of Nashville and Davidson Country, Tenn., Code, ch. 17.36, Overlay Districts (2008). The Code is available using the Online Library at www.municode.com.
15. Metropolitan Government of Nashville and Davidson County, Tenn., Ordinance No. BL2004-492 (Feb. 02, 2005).
16. *Id.* at § 2.
17. *Id.* at § 11.
18. *See* ftp://ftp.nashville.gov/web/mpc/Adaptive_Reuse_Ordinance.pdf. ML

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Feb. 27, 2008) (Explanatory Note on Evidence Rule 502).
9. *Id.*
10. For emphasis, this means that the terms of the court order would be enforceable in a subsequent proceeding against non-parties.
11. 145 Cong. Rec. S1318 (daily ed. Feb. 27, 2008) (Explanatory Note on Evidence Rule 502). ML

Supreme Court

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a traditional Title VII lawsuit, while the plaintiffs were stepping into what were usually the employer's shoes and defending the validity and use of the tests. In the end, the court found that the desire to comply with Title VII was a legitimate non-discriminatory reason, and that the City had leeway to decline to certify the tests, even when the ultimate validity of the tests, had they been used, remained uncertain.

On appeal, a three-judge panel of the Second Circuit summarily affirmed, essentially endorsing the district court's decision. The plaintiffs moved for rehearing *en banc*, which the Second Circuit denied by a 7-6 vote, with several dissenting opinions. Among their concerns, the dissenters questioned whether the district court used the correct framework, which gave a large degree of deference to the City, or whether something more akin to strict scrutiny was the appropriate standard for the City's admittedly race-conscious conduct. And assuming that compliance with Title VII could provide the basis for a compelling governmental interest, the dissenters also questioned whether the City could legally abandon its test for race-conscious reasons without a more detailed analysis of the validity of the test. What, the dissenters asked, prevented municipalities from adopting stealth quota systems based upon the mere presence of adverse impact?

A Grant of *Cert.* and a Plea for Clarity

In January, the plaintiffs' petition for certiorari was granted. Final briefs are due on March 18, and the case may be argued and decided this Term. As demonstrated by *Ricci*, hiring and promotional testing, especially in police and fire departments, continues to produce results that are legally perplexing and politically challenging. Cities continue to face the threat of litigation from either white or minority applicants (and sometimes both) each time they make a decision to test and to use (or not use) test results. Whatever the final outcome, municipalities must hope that the Supreme Court gives guidance as

to the risks that various options present, and provides municipalities with a roadmap for avoiding liability, if not litigation.

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Price of Competition

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14. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502-03 (1987).
15. *See, e.g.*, Texas Power & Light Co. v. City of Garland, 431 S.W.2d 511 (Tex. 1968); City of Tukwila v. City of Seattle, 414 P.2d 597 (Wash. 1966).
16. Southern Calif. Gas Co. v. City of Santa Ana, 336 F.3d 885, 896 (9th Cir. 2003).
17. AFSCME, Local 2957 v. City of Benton, 513 F.3d 874, 882 (8th Cir. 2008).
18. *Id.*
19. Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983).
20. Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987).
21. Baltimore Teachers Union v. Mayor and City of Council of Baltimore, 6 F.3d 1012, 1017 (4th Cir. 1993).
22. United States v. County of Muskegon, 298 F.3d 569, 585 (6th Cir. 2002).
23. *See, e.g.*, Contributors to Penn. Hosp. v. City of Philadelphia, 245 U.S. 20 (1917) (eminent domain power cannot be surrendered by contract); Pub. Serv. Co. of Colo. v. City of Loveland, 245 P. 493 (Colo. 1926) (city officials lacked the authority to execute a disclaimer upon behalf of themselves or future city councils that would deprive them of the exercise of their eminent domain power); and Bd. of County Com'rs of Calvert County v. East Prince Frederick Corp., 559 A.2d 822 (Md. App. 1989) (County's policy requiring reserved sewage and water capacity to be used within two years or payment of minimum user fees did not offend the doctrine, as the County lacked the power to create sewer rights in perpetuity and effectively prevent the enactment of future laws to fit changed circumstances).
24. *See, e.g.*, Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, LLC, 176 P.3d 737, 742-44 (Colo. 2007) (agreement to exercise eminent domain enforceable).
25. 478 P.2d 585 (Nev. 1970).
26. Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976).
27. Hudson v. City of Bossier City, 930 So.2d 881 (La. 2006).
28. City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (Iowa 1868) (Dillon's Rule states that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable).
29. The Seventh Circuit has made the interesting point that if a contract allows a party to pursue a claim for breach of contract, there is actually no impairment of the contract. Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1250-51 (7th Cir. 1996). Under this rule, one could argue that the Hampton provision renders any Contracts Clause claim moot, because Verizon would retain the ability to sue for breach of contract under the same standards that would apply to a Contracts Clause claim.
30. *See* City of Covington v. Covington Lodge No. 1, Fraternal Order of Police, 622 S.W.2d 221 (Ky. 1981). ML

Inside Canada

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plaintiff fell" at the time he broke his ankle. Nonetheless, the court held that the plaintiff failed to prove that the City was grossly negligent in the manner in which it handled the ploughing and/or sanding of the sidewalks. "All municipalities, especially large cities [,] have a monumental task to keep the public safe during all sorts of winter conditions," and the conditions at the time the plaintiff fell were a "unique situation."

The court dismissed the action, concluding with a request that the City not demand costs, as this "would only make the plaintiff's bad situation worse." ML

Ordinances

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4. Westport, CT, Retail Checkout Bags Ordinance (Sept. 5, 2008).
5. *Id.*
6. *Id.*
7. Maui County, HI., Ordinance Pertaining to Plastic Bag Reduction (July 14, 2008).
8. Austin, TX., Resolution No. 20070419-026 (Apr. 19, 2007).
9. *After a Year, Local Retailers Report Less Plastic Bag Usage*, Austin Business Journal, Nov. 18, 2008, at http://austin.bizjournals.com/austin/stories/2008/11/17/daily23.html.
10. Adam Lisberg, *Mayor Bloomberg Paints Grim Economic Picture for New York City 2009 Budget*, New York Daily News, Jan. 30, 2009, at http://www.nydailynews.com/ny_local/2009/01/30/2009-01-30_mayor_bloomberg_paints_grim_economic_pic.html.
11. Anne Thompson, *Paper or Plastic – What's the Greener Choice?* MSNBC.com, May 7, 2007, at http://www.msnbc.msn.com/id/18538484.
12. Joe Eskenazi, *The City's Politicos Made the Enviros Happy by Banning Plastic Bags, But Left Us With More Pollution and Cost*, SFWeekly.com, Jan. 07, 2009, at http://www.sfweekly.com/content/printVersion/1297386. See also, http://sfenvironment.org/downloads/library/2008_litter_audit.pdf.
13. Press Release, IKEA, *The Results are in ... over 92% of IKEA Customers Bagged the Plastic Bag!* (April 2, 2008) (on file with author).
14. Kathy Mulady, *$1280,625 to Fight 20-cent Bag Fee*, Seattle Post-Intellingencer, Sept. 11, 2008, at http://seattlepi.nwsource.com/local/378828_bags12.html. ML

Listserve

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