

Ricci Decision Charts New Course on Public Employment Testing

by Adam Kingsley

The United States Supreme Court has ruled that the City of New Haven's decision to abandon two promotional tests that had an adverse impact on black candidates was, itself, a violation of Title VII. *Ricci v. DeStefano*, 2009 WL 1835138 (U.S. June 29, 2009). Justice Kennedy, who possesses extraordinary sway on a highly divided court, drafted the 5-4 opinion and was joined by the typical "conservative" block – Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Ginsberg wrote a dissent and was joined by Justices Stevens, Breyer and Souter. The Court ruled in favor of the plaintiffs, 17 white candidates and one Hispanic candidate, who took promotional tests for the ranks of lieutenant and captain in the City of New Haven Fire Department. Under the promotional system mandated by City ordinances and the collective bargaining agreement between the City and the firefighters' union, the plaintiffs were in line to be promoted based upon their scores on promotional tests given in 2003.

Those tests had an adverse impact on black candidates: of the 27 black candidates who took the tests (including the nine black candidates who passed the tests), none were expected to be promoted based upon known vacancies in the two ranks. After heated debate in front of the City's Civil Service Board, the City determined that it was best to throw out the tests and avoid a potential Title VII lawsuit by black candidates under a disparate-impact theory. (Since 2003, the City has not re-tested anyone and filled the positions on a temporary, rotating, basis.) IMLA filed an *amicus* brief in favor of the City and argued that municipalities should have leeway in the way they respond to hiring and promotional tests that generate adverse impact.

Justice Kennedy's opinion acknowledged that, had the City used the tests and had black candidates sued the City, the minority plaintiffs would have easily established a prima facie case of disparate-impact employment discrimination under Title VII of the Civil Rights Act. But, continued the majority opinion, the possibility of a lawsuit and a prima facie case was not sufficient justification for the race-conscious act of discarding the test results. This was especially true because the tests in question were rigorously developed by an outside testing company to ensure content validity. Content-valid tests would have provided the City with a solid defense to any employment discrimination suit brought by disappointed minority officers.

The Court rejected the standard offered by the City – that a municipality was justified in declining to use test results if it had a "good-faith fear of disparate-impact liability." Justice Kennedy commented that this standard could "cause employers to discard the results of lawful and beneficial promotional examinations." Instead, the Court adopted the "strong basis in evidence" standard, which requires municipalities to show more than a good-faith concern about Title VII liability. Although the standard has yet to be fleshed out, the opinion suggests that a public employer need not conclusively show that it would have lost a lawsuit brought by minority candidates, but it must show that such an outcome was more likely than not.

This led the Court to a discussion of test construction and test validity. The majority highlighted the extensive efforts that the City's testing consultant took to ensure that the tests (a 60% written exam and a 40% oral exam, as required by the union's collective bargaining agreement) were content-valid and tested for the knowledge, skills, and abilities necessary for the positions of lieutenant and captain. The majority also noted that the City's testing consultant was willing to stand by the validity of its tests, but the City seemed to have minimal interest in hearing that testimony and "turned a blind eye to evidence that supported the exam's validity." In his concurrence, Justice Alito highlighted the hearings before the Civil Service Board and suggested that naked political consideration played just as much a role in the City's decision to scrap the tests as honest concerns about test validity and the threat of a Title VII lawsuit.

The dissent and some commentators criticized the majority's decision as a setback in the effort to eliminate workplace discrimination and ensure workplace diversity in managerial positions. Justice Ginsberg, who read her dissent from the bench, wrote that the presence of a gross disparate impact on a test should be enough to justify remedial measures, and also argued that tests with more focus on management and interpersonal skills (sometimes called "assessment center" tests) were equally valid, had less adverse impact on minority candidates, and could have been used by the City.

Justice Kennedy did not disagree with the idea that other testing procedures may well have less adverse impact than written tests and the rank-order use of test results. He added that municipalities are free to select tests or develop selection protocol based, in part, upon the premise that the chosen method will "provide a fair opportunity for all individuals regardless of race," but, once a test was administered, the employer "may not invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race."

Although the Court rejected the formula suggested by IMLA's brief and the dissent, it did offer some much-needed guidance to municipalities facing a testing dilemma, and provided a safe harbor of

continued on page 39

Traffic Enforcement Issues

cont. from page 38

2009); S. 211, 95th Leg., 1st Reg. Sess. (Mo. 2009).
74. H.R. 300, 81st Leg., Reg. Sess. (Tex. 2009).
75. S. 59, 2009 Leg., Reg. Sess. (Ala. 2009).
76. S. 389, 116th Leg., 1st Reg. Sess. (Ind. 2009); A.B. 504, 75th Leg., Reg. Sess. (Nev. 2009); S. 2004, 2009 Leg., Reg. Sess. (Fla. 2009); H.R. 439, 2009 Leg., Reg. Sess. (Fla. 2009).
77. S. 277, 2009 Leg., Reg. Sess. (Md. 2009).
78. *See* theNewspaper.com, *New York Legislature Approves Massive Traffic Camera Expansion* (Apr. 09, 2009) at http://www.thenewspaper.com/news/27/2742.asp.
79. NCUTLO, *Automated Traffic Law Enforcement Model Law*, at http://www.ncutlo.org/autoenforce622.htm. ML

Federal

cont. from page 18

ciliation Act of 2005 (May 17, 2006).
3. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.
4. National Association of Counties (NACo), *Toolkit on Repeal of New Non-Wage Withholding Requirement*, undated.
5. A letter sent to IRS Commissioner Douglas Shulman by a coalition of organizations, including IMLA, and urging the Commissioner to hold public hearings on Section 511, is available online at www.imla.org/irsletterimla.pdf.
6. GFOA Issue Brief, *Withholding Requirement on Government Payments and Other General Tax Issues* (Feb. 2009) states that "[i]n 2006, the Congressional Budget Office estimated the cost to state and local governments for administering this provision to be $62 million per year."
7. NACo Fact Sheet, *Repeal Three Percent Withholding Tax on County Purchases* (March 2007).
8. National Defense Industrial Association, *Little Known Legislation Takes Federal Contractors By Surprise* (March 2007).
9. Statement available at http:/www.acec.org/advocacy/committees09priorities /3percent.cfm. ML

Supreme Court

cont. from page 23

sorts. The Court placed great emphasis on test design and essentially held that a professionally prepared, content-valid test was a near impregnable defense to a Title VII disparate-impact lawsuit. Municipalities faced with adverse impact and the possibility of a lawsuit by minority candidates must now be prepared to stand by and defend their content-valid tests. At the same time, municipalities are free to explore selection procedures that have less adverse impact on minority candidates than traditional tests. The hope is that these alternative procedures will not only generate a more diverse promotion list, but will also do a better job of selecting candidates with intangible qualities, such as leadership, good judgment, and interpersonal skills. ML

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Inside Canada

cont. from page 28

the requester appealed. Section 6 (1)(b) provided that a record that revealed "the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public," was exempt from disclosure. To benefit from the exemption, the City was required to show that a statute – in this case, s. 239 of the *Municipal Act* – authorized the holding of the meeting in the absence of the public. That Act did so in the case of a meeting addressing "a proposed or pending acquisition or disposition of land by the municipality."

After reviewing the report at issue, the hearing officer concluded that the meeting (and consequently, the report) did not come within the "closed meeting" category because "most of the report" did not deal with "a proposed or pending acquisition or disposition of land" – "the bulk of the report contain[ed] background information and set[] out other options." There was, however, sufficient evidence to establish that council's actual deliberations at the meeting included the land disposition; thus, disclosing those limited portions of the report would have the effect of revealing the substance of city council's deliberations.

He concluded that only limited portions of the report qualified for exemption under s. 6(1)(b) of the MFIPPA (the portions addressing whether the City should dispose of the encroached-upon land to the requester and the position of staff on that issue), and that the remainder had to be disclosed. Second, he "also found that the City did not take all relevant factors into account when it exercised its discretion to withhold those portions of the report from the [requester]." These factors included whether the requester had "a sympathetic or compelling need to receive the information," and whether disclosure would "increase public confidence in the operation of the institution." Consequently, the City was ordered to re-exercise its discretion in this respect.

The CanLII website lists IPC decisions at http://www.canlii.org/en/on/onipc/index.html. The CanLII cites are, respectively, *Ottawa (City) (Re)*, 2009 CanLII 16569 (Ont. I.P.C.) and *St. Catharines (City) (Re)*, 2009 CanLII 29180 (Ont. I.P.C.). Both rulings are also available from the IPC website at http://www.ipc.on.ca. ML

Ordinances

cont. from page 29

nesses (other than restaurants) to conduct outdoor sales on their own property and adjoining streets or sidewalks, on a temporary basis, five times a year.
8. Christensen also claimed a violation of his rights under the Equal Protection Clause and the Fourth Amendment, but these claims were dismissed by the trial court and the dismissal was affirmed by the Tenth Circuit, so they are not discussed in this column.
9. 129 S. Ct. 808 (2009).
10. *See* Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996); ETW Corp v. Jireh Pub. Inc., 332 F.3d 915 (6th Cir. 2003); White v. City of Sparks, 500 F.3d 953 (9th Cir. 2007). ML