Promotional Testing: *Ricci* and Title VII Trends

by Lowell F. Denton and Clarissa Rodriguez



Ricci v. DeStefano[1] received a great deal of publicity, both in the legal and political context. The case requires careful analysis to have any significant lessons for those responsible for promotional testing and promotions in public safety departments, as there are many potential practical effects of this and other pending Title VII cases. *Ricci* involves a different perspective on the structure and balance of Title VII's provisions and protections, serving as a good study in the requirements of the law in a new application. It presents the opposite scenario of the usual challenge to an employment or promotional examination, as the plaintiffs attacked not the use of allegedly racially discriminatory exam results, but the defendants' reason for *refusing* to use the results.

Perhaps because *Ricci* is a reverse discrimination case, many unwarranted conclusions or assumptions surround the discussion of the case, and it has been hyped to further the agendas of various public safety groups.[2] This article uses *Ricci* as a roadmap in reviewing principles for promotional testing compliance, including the promotional examination standards established by the Equal Opportunity Employment Commission (EEOC) and the Supreme Court's ruling.

The Guidelines

As the key to the successful development of promotional exams, the EEOC established the Uniform Guidelines for Employee Selection in 1978 (Guidelines),[3] which require an employer to establish, by study and documentation, a correlation between the knowledge, skills, and abilities required for success in a position, and the outcome of the selection device used to make choices or rankings. The degree of correlation and accuracy must be evaluated and established, and this becomes more critical if the selection device is used to determine a rank order for hiring, as opposed to the creation of a pool or group of qualified applicants who are hired on more subjective criteria or by using additional exercises.

These Guidelines establish a process of developing, documenting, analyzing, administering, and evaluating post-administration, and of continuing to implement an employee selection process, which minimizes possible adverse impacts on protected minority groups. The Guidelines prescribe three different forms of validation: content validation, construct validation, and criterion validation.[4] Most employers use the content validation model, which evaluates the knowledge required to perform in a particular position.

The Guidelines provide a process for evaluating the job, customizing the examination process to develop a selection procedure that focuses effectively on what the job requires, and determining whether or not the test is truly predictive of success in the positions which are gained as a result of the selection process. They require a legitimate study, analysis, and documentation based on standards of the testing profession. The documentation requirements include

not just the work done, but an evaluation of the work in the context of the standards, resulting in conclusions and actions taken. An employer is required to determine if the selection devices have an adverse impact; if so, it has an affirmative duty to explore and evaluate alternative selection devices—ones that are equally capable of measuring the knowledge, skills, and abilities, but which have less adverse impact.

Once a test is administered, the EEOC's "four-fifths rule" provides that a selection tool that yields "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths ('4/5's') (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 4/5's rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact."[5]

Significantly, this standard refers to a "selection rate." This can be confusing, since *Ricci* is about pass rates and scores, and not about ultimate selection rates. It is only when a list is exhausted that there can be a "selection rate" available. Initial statistical analysis will indicate whether the test appears to have an adverse impact, but the four-fifths rule only applies to the true ultimate selection rate. Since the statistical significance of these calculations depends on one or two selections, more or less than that can be critical.

The law clearly imposes a duty on employers to minimize any adverse impact in the testing process. *Ricci* answers a very narrow decision about that responsibility. In most public safety testing scenarios, the reality is that the employer chooses to promote using the selection device even if an adverse impact is present, and addresses improvements, changes, or revisions to the testing process in future examinations. Further, while the EEOC Guidelines are not law but "rules of thumb," an employer has a duty to follow the Guidelines.

Ricci

In late 2003, 18 plaintiffs took the competitive examinations for promotions to the rank of lieutenant or captain in the City of New Haven Fire Department. (Seventeen of the plaintiffs were white; one was Hispanic.) The City had a merit-based civil service system established by the City Charter, which mandated a strictly competitive process for hiring and promotion, expressly prohibited the favoring or disfavoring of any candidate because of race or political affiliation, and restricted political patronage-based hiring and promotions. Promotions were to be made from a ranked eligibility list under the time-and court-honored mechanism known as the "Rule of Three."

The City's contract with the firefighters' union provided for written and oral examinations, with an applicant's score being based 60 percent on the written exam, and 40 percent on the oral exam. 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 in the department as a lieutenant, a high-school diploma, and certain vocational training courses.

The City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations. IOS conducted a test-design process with job analyses to identify the relevant tasks, knowledge, skills, and abilities. At every stage of the job analyses, IOS oversampled minority firefighters to ensure that the results would not unintentionally contain a racial bias. IOS also developed the written exam (to measure the candidates' job-related knowledge) and the oral exam (which concentrated on job skills and abilities). Finally, IOS assembled a pool of 30 assessors, superior in rank to the positions being tested, and trained them for several hours on how to score the candidates' responses consistently, using checklists of the desired criteria.

Seventy-seven candidates completed the lieutenant examination: 43 whites, 19 blacks, and 15 Hispanics. The 34 candidates who passed were 25 whites, six blacks, and three Hispanics. Because eight lieutenant positions were vacant at the time and based on the rule of three, the top ten candidates were eligible for an immediate promotion. All ten were white. (Subsequent vacancies would have

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allowed at least three black candidates to be considered for promotion to lieutenant.) On the captain examination, 41 candidates completed the exam—25 whites, eight blacks, and eight Hispanics. The 22 who passed were 16 whites, three blacks, and three Hispanics. As seven captain positions were vacant, under the rule of three, nine candidates were eligible for an immediate promotion: seven whites and two Hispanics.

The racial adverse impact was significant. On the captain exam, the pass rates were 64 percent for white candidates and 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 for minorities, which were approximately one-half the pass rates for white candidates, fell well below the 80% standard set by the EEOC to implement the disparate-impact provision of Title VII.[6] The City was clearly faced with a prima facie case of disparate-impact liability.

City officials met with IOS to express concern about the tests discriminating against minorities.[7] Specifically, the City's counsel raised the issue of disparate impact and indicated employer-initiated, even race-conscious, remedies could be employed.[8] Based on these concerns, the Civil Service Board held multiple hearings. It heard from other test experts as well as from firefighters, who testified both in favor of certifying the results and not certifying the results.[9] Ultimately, because the Civil Service Board deadlocked 2-2, the test results were not certified.[10] The plaintiffs then sued under Title VII for disparate treatment based on the failure to certify the results,[11] alleging that the City and its officials denied them opportunities for promotion on the basis of race.

The Ruling

The U.S. Supreme Court concluded that the action taken by the City was "impermissible under Title VII unless the employer [could] demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[12]

The Court began by stating that, absent a valid defense, the City's action in not certifying the examination results violated the disparate treatment provision of Title VII because it constituted a race-based decision.[13] The Court then addressed whether avoiding disparate-impact liability excused disparate treatment discrimination.[14] Turning to precedent under the Equal Protection Clause and the Fourteenth Amendment, the Court relied on a "strong basis in evidence" standard to justify remedial actions for past racial discrimination.[15] It reasoned that this would allow flexibility without requiring employers to "act only when there [was] a provable, actual violation."[16] The employer could ensure an equal opportunity for all applicants to apply for promotions but, once the process and the selection criteria had been established, it could not then reject the test results, absent a strong basis in evidence of an impermissible disparate impact.[17]

The City did not meet this"strong basis in evidence" standard.[18] Although the pass rates for minorities (approximately one-half the rate for whites) violated the 80% rule set by the EEOC to determine the existence of a disparate impact,[19] the Court found that a prima facie case of disparate-impact liability was "far from a strong basis in evidence that the City would have been liable under Title VII."[20] Because the City's evidence did not show that the test was not job-related or that there existed an equally valid, less discriminatory alternative that served the City's needs that the City refused to adopt, it did not meet its burden.[21] As a result, the Court determined the plaintiff firefighters were entitled to summary judgment on their Title VII claims.[22]

On the Court's finding that no "equally valid and less discriminatory tests were available,"[23] this outcome was mostly a failure of the evidence in the context of the record in this case, and should not be taken as a factual principle which transports to other cases. The Court noted that the exams' 40/60 formula was presumed to be for a rational reason; that "banding" scores, post-test administration, to make the minority test scores appear higher would violate the prohibition of adjusting test results on the basis of race; and that the evidence showed an assessment center was not available for the 2003 examinations.[24]

In reaching its decision, the Court indicated that, as enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment. The Civil Rights Act of 1964 did not include an express prohibition against policies or practices that produced a disparate impact. This changed with the ruling in *Griggs v. Duke Power Co.*,[25] where the Supreme Court interpreted the Act to prohibit, in some cases, an employer's facially neutral practices that were, in fact, "discriminatory in operation."[26] The *Griggs* Court stated that the "touchstone" for disparate-impact liability was the lack of "business necessity": if an employment practice operated to exclude minorities and could not be shown to be related to job performance, the practice was prohibited.[27] The employer's burden was to demonstrate that the practice had "a manifest relationship to the employment in question."[28] Under these precedents, 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.[29]

Under the disparate-impact statute, a plaintiff established a prima facie violation by showing that an employer used "a particular employment practice that cause[d] a disparate impact on the basis of race, color, religion, sex, or national origin."[30] An employer could defend against liability by demonstrating that the practice was "job related for the position in question and consistent with business necessity."[31] Even if the employer met that burden, however, a plaintiff could still succeed by showing that the employer refused to adopt an available, alternative employment practice that had less disparate impact and served the employer's legitimate needs.[32]

The evidence in *Ricci* showed that

the City failed to certify the examination results because of the statistical disparity based on race—how minority candidates performed compared to white candidates. Because the decision was based on race—the specific adverse impact standard created by the statute—the Court concluded that it violated the disparate-treatment prohibition of Title VII, absent some valid defense:

> 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. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.[33]

By codifying the disparate-impact provision in 1991, Congress expressly prohibited both types of discrimination—disparate treatment and disparate impact. The Court had to interpret the statute to give effect to both provisions, where possible. The Court rejected the argument that an actual *violation* of the disparate-impact provision had to exist before an employer could use its compliance as a defense in a disparate-treatment suit, finding that this was overly simplistic and too restrictive of Title VII's purpose. Such a rule "would run counter to what we have recognized as Congress's intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII.'"[34]

The Court also concluded that a "good faith" test was not enough. 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 a disparate impact. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even when there was little, if any, evidence of disparate-impact discrimination. This could amount to a "*de facto* quota system" in which a "focus on statistics ... could put undue pressure on employers to adopt inappropriate prophylactic measures."[35]

This operational principle could not be justified, as Title VII expressly disclaimed any interpretation of its requirements as calling for outright racial balancing.[36] The purpose of Title VII was "to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[37]

The U.S. Supreme Court concluded that the action taken by the City was "impermissible under Title VII unless the employer [could] demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."

The Court made clear that there was great flexibility at the "front end" of the process to assure racial fairness, as Title VII did 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. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end.[38]

Once that process had been established and the employer made clear the selection criteria, it could not invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.[39]

Practical Effects and Hiring Dilemmas

Ricci highlights the dilemma facing employers—to develop a selection device that minimizes adverse impact but remains truly predictive of success in public safety positions—and illustrates the expectations once a process is in place and a test has been conducted. Every employer should review the basic fundamentals of their selection device validation. Cut-off score determinations and test processes may comply with state law, but, without proof of validation, there is a risk the process may violate Title VII. The *Ricci* Court made clear that state law, or civil service and charter provisions, do not stand in the way of Title VII compliance: a "state court's prohibition of banding, as a matter of municipal law under the charter, may not eliminate banding as a valid alternative under Title VII."[40]

Changes necessary in test designs to avoid an adverse impact need to be addressed at the beginning of the process, rather than retrofitted to achieve a racial balance. Further, the EEOC Guidelines require specific and detailed compliance, and an evidentiary record of analysis and research.[41] These can only be of value in the hands of qualified and knowledgeable witnesses, as there is a great deal of mythology and misunderstanding in the day-to-day human resources discipline about test validation, at least in terms of what happens at the courthouse when a challenge occurs. Employers should evaluate their current practices and their outcomes to make sure that they are not vulnerable.

Recent Developments

In May, the U.S. Supreme Court held, in *Lewis v. Chicago*,[42] that a plaintiff who did not file a timely charge challenging the adoption of a practice could still assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice, as long as he or she alleged all of the elements of a disparate-impact claim. In *Lewis*, the City of Chicago required applicants for firefighter positions to complete a written exam and, based on the score, sorted the results into three categories. Starting in 1995, it used the list of applicants with a cut-off score of at least 89 out of 100 to fill vacancies.[43] Minority applicants who

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Penalties and Open Meetings

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551.143(a) (Vernon 2004) provides that an elected official commits an offense if he or she knowingly conspires, with less than a quorum of the public body, to circumvent the TOMA.
11. Harris County Emergency Serv. Dist. #1 v. Harris County Emergency Corps, 999 S.W.2d 163 (Tex. Ct. App. 1999).
12. Author's notes.
13. Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 07, 2006).
14. *Id.* at *5.
15. State ex rel. Murray v. Palmgren, 646 P.2d 1091, 1099 (Kan. 1982).
16. 547 U.S. 410 (2006).
17. 2006 WL 3327634 at *5.
18. *See* Pickering v. Bd. of Educ. of Tp. High School, Dist. 205, 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 147 (1983).
19. Rangra v. Brown, 566 F.3d 515 (5th Cir. 2009).
20. *Id.* at 521.
21. *Id.* at 522.
22. Jenevein v. Willing, 493 F.3d 551, 557-58 (5th Cir. 2007) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002)).
23. *Id.* at 556-58.
24. *Id.* at 559-60.
25. Rangra v. Brown, 576 F.3d 531 (5th Cir. 2009).
26. Rangra v. Brown, 584 F.3d 206 (5th Cir. 2009) (Dennis, J., dissenting).
27. *Id.* at 207.
28. Noting that "This court shirks its duty under the Constitution to afford Rangra a forum for his constitutional challenge and live controversy by dismissing his claim without full briefing, full oral argument, and full judicial consideration and attention." *Id.* at 210.
29. City of Alpine, et al. v. Gregg Abbot and the State of Texas, No. 4:09-CV-00059 (W.D. Tex. filed Dec. 14, 2009).
30. *See, e.g.*, Frank Sturzl, *Texas Newspapers Lash Out at City Officials*, Texas Municipal League Legislative Update (Dec. 10, 2009), available at http://www.tml.org/leg_updates/updatepdf/121009.pdf. ML

Quasi-Judicial Hearings

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11. Mathews v. Eldridge, 424 U.S. 319 (1976).
12. *Id.*
13. *See, e.g.,* Goss v. Lopez, 419 U.S. 565 (1975).
14. Neighbors for a Healthy Gold Fork v. Valley County, 176 P. 3d 126, 132 (Idaho 2007); *Mathews,* 424 U.S. at 333.
15. *Mathews*, 424 U.S. at 348.
16. Morrissey v. Brewer, 408 U.S. 471 (1972).
17. *Mathews*, 424 U.S. at 348.
18. *Id.* at 334, quoting *Cafeteria & Restaurant Workers Union, Local 473 AFL-CIO v. McElroy*, 367 U.S. 886 (1961).
19. *See, e.g.,* Dairy Prod. Serv., Inc. v City of Wellsville, 13 P. 3d 581, 593 (Utah 2000); Petersen v. Chicago Plan Comm'n of City of Chicago, 707 N.E.2d 150, 154 (Ill. Ct. App. 1998); Mohilef v. Janovici, 51 Cal. App. 4th 267, 286 (Cal. Ct. App. 1997).
20. West Bluff Neighborhood Ass'n v. City of Albuquerque, 50 P. 3d 182, 193 (N.M. Ct. App. 2002).
21. Barton Contracting Co. Inc. v. City of Afton, 268 N.W. 2d 712, 716 (Minn. 1978).
22. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).
23. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
24. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
25. *Mathews*, 424 U.S. at 335.
26. *Barton Contracting Co. Inc.*, 268 N.W. 2d at 715.
27. Petersen v. Chicago Plan Comm'n of City of Chicago, 707 N.E.2d 150, 154 (Ill. Ct. App. 1998), quoting *Telcser v. Holzman*, 201 N.E. 2d 370 (Ill. 1964).
28. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
29. *Id.*
30. Harris v. County of Riverside, 904 F.2d 497, 504 (9th Cir. 1990), quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983).
31. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
32. Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976).
33. Londoner v. City and County of Denver, 210 U.S. 373, 385 (1908).
34. *See, e.g.*, Idaho Historic Preservation Council, Inc. v. City Council of the City of Boise, 8 P.3d 646, 649 (Idaho 2000).
35. Dairy Prod. Serv., Inc. v. City of Wellsville, 13 P.3d 581, 593 (Utah 2000), citing *V-1 Oil Co. v. Dept. of Envtl. Quality*, 939 P.2d 1192, 1197 (Utah 1997).
36. West Bluff Neighborhood Ass'n v. City of Albuquerque, 50 P. 3d 182, 194 (N.M. Ct. App. 2002); McPherson Landfill, Inc. v. Bd. of County Comm'rs of Shawnee County, 49 P.3d 522, 531-32 (Kan. 2002).
37. *Id.*
38. *See West Bluff Neighborhood Ass'n*, 50 P.3d at 193; Medeiros v. Hawaii County Planning Comm'n, 797 P.2d 59, 67 (Haw. Ct. App. 1990).
39. *See, e.g.,* Mohilef v. Janovici, 51 Cal. App. 4th 267, 289-94 (Cal. Ct. App. 1997) and its discussion of cases.
40. *Id.* at 302.
41. *See, e.g.*, Kaelin v. City of Louisville, 643 S.W. 2d 590, 591 (Ky. 1982).
42. *See, e.g.*, Barton Contracting Co. Inc. v. City of Afton, 268 N.W. 2d 712, 715-16 (Minn. 1978).
43. *See Mohilef*, 51 Cal. App. 4th at 300-01.
44. People ex Rel. Klaeren v. Village of Lisle, 737 N.E.2d 1099, 1110-112 (Ill. Ct. App. 2000).
45. Chrobuck v. Snohomish County, 480 P.2d 489, 496 (Wash. 1971). ML

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were not hired filed suit in 1997, alleging that the City's selection practice had a disparate impact.[44] The City responded that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act, that of sorting the scores into eligibility categories.[45] The Court held that no limitation period applied for a disparate impact claim where the plaintiff could prove each element of a disparate impact claim and a discriminatory "employment practice."[46] The issue was not based on when a claimant's claim accrued, but whether the claim could accrue at all.[47] Although Title VII did not define "employment practice," the Court found that it encompassed excluding applicants on a "pass list" that exhibited a disparate

impact.[48] The City made use of the "practice" of excluding those who scored 88 or below each time it filled a new class of firefighters.[49] Unfortunately for the City, its "business necessity" defense under Title VII did not succeed; thus, each appointment from the list presented a disparate impact claim.[50]

Many employers may not be effectively following these minimum requirements, and some who are following them cannot, if pressed, prove it. The recent decisions in *Ricci* and *Lewis* illustrate a trend by the Supreme Court that suggests local government entities are required to re-focus on the requirements of Title VII to prevent discriminatory practices, especially with civil service and public safety positions. These events are a good reminder to revisit one's employment practices and keep a paper trail.

Notes

1. Ricci v. DeStefano, 129 S.Ct. 2658 (2009).
2. U.S. v. Vulcan Society, Inc., 637 F. Supp. 2d 77 (E.D.N.Y. 2009) (resisting an attempt to have *Ricci* govern all discrimination cases).
3. 29 C.F.R. § 1607.1 *et seq*. (1978).
4. *Id*. at § 1607.5 (general standards for validity studies).
5. *Id*. at § 1607.4 (D).
6. *Id*.
7. Ricci v. DeStefano, 129 S.Ct. 2658, 2666 (2009).
8. *Id*. at 2666-67.
9. *Id*. at 2667-71.
10. *Id*. at 2671.
11. *Id*.
12. *Id*. at 2664.
13. *Id*. at 2673.
14. *Id*. at 2674.
15. *Id*. at 2675.
16. *Id*. at 2676.
17. *Id*. at 2677.
18. *Id*. at 2676.
19. *Id*. at 2678.
20. *Id*.
21. *Id*.
22. *Id*. at 2681.
23. *Id*. at 2679-81.
24. *Id*.
25. 401 U.S. 424 (1971).
26. *Id*. at 431.
27. *Id*. at 431-32.
28. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).
29. *Id*. (allowing complaining party to show "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest").
30. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (West 2010).
31. *Id*.
32. 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii) and (C) (West 2010).
33. Ricci v. DeStefano, 129 S.Ct. 2658, 2674 (2009).
34. *Id*.
35. *Id*. at 2675.
36. 42 U.S.C. §2000e-2(j) (West 2010).
37. 129 S.Ct. at 2675.
38. *Id*. at 2677.
39. *Id*.
40. *Id*. at 2680. The Court added that it did not need to resolve the point, as banding was not a valid alternative in this case.
41. 29 C.F.R. § 1607.15 (documentation of impact and validity evidence).
42. 2010 WL 2025206 (U.S. May 24, 2010).
43. Applicants who scored between 65 and 88, designated as "qualified," were kept on the list but told it was unlikely they would be hired. *Id*. at *1.
44. Although African-Americans accounted for nearly half of all applicants, just over eleven percent of the "well-qualified" applicants were black.
45. 42 U.S.C. § 2000e-5(e)(1) required filing within 300 days "after the unlawful employment practice occurred."
46. 2010 WL 2025206 at *6.
47. *Id*. at *5.
48. *Id*. at *5.
49. *Id*.
50. The district court had rejected the City's business necessity argument; *see* Lewis v. City of Chicago, No. 98 C 5596, 2005 WL 693618 (N.D. Ill. Mar. 22, 2005). **M**

Licensing in Ontario

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8. S.O. 2006, c. 11, Sched. A.
9. Mascarin and Williams, *supra* note 4 at 6-7.
10. R.S.O. 1990, c. T.6.
11. R.S.O. 1990, c. R.30.
12. The *Savings and Restructuring Act, 1996*, S.O. 1996, c. 1, Sched. M, made significant changes to municipal legislative powers and administrative responsibilities. In addition to limiting the life span of future licensing by-laws, the Act also provided for retroactive control of licensing by-laws. Specifically s. 24(3), known as the "sunset provision," provided that: "A by-law of a local municipality, a regional municipality, The Municipality of Metropolitan Toronto and the Metropolitan Licensing Commission licensing a business under any Act passed before this section comes into force expires the earlier of five years after the day this section comes into force and the day it is repealed by the local municipality, the regional municipality, The Municipality of Metropolitan Toronto or the Metropolitan Licensing Commission, as the case may be."
13. S. Auerback and J. Mascarin, The *Annotated Municipal Act, Second Edition*, looseleaf (Toronto, Ontario: Carswell, 2010), Vol. 1 at MA4-1.
14. In *Municipal Parking Corp. v. Toronto (City)* (2007), 38 M.P.L.R. (4th) 1 (Ont. C.A.), the court noted that, when interpreting "consumer protection," it was to take into account the overall context of the enabling legislation, which, in this case, permitted municipalities to license, regulate, and govern business. Using this approach, the court determined that "consumer" would include those persons and entities with whom a licensee transacted, engaged, or dealt with directly as party of carrying on its licensed business activities.
15. In *Durham Rapid Taxi Inc. v. Ajax (Town)* (2006), 30 M.P.L.R. (4th) 1 (Ont. Div. Ct.), it was noted that, pursuant to s. 150(3) of the *Municipal Act*, 2001, any by-law licensing or imposing any condition on a business was to include an explanation as to the reason why the municipality was licensing or imposing the conditions, and how that reason related to the purpose of the licensing function set out in s. 150(2) of the statute. Furthermore, in *Municipal Parking Corp. v. Toronto* (City), *supra* note 14, the court noted that s. 150(3) of the *Municipal Act, 2001* imposed, on municipalities,