jackson lewis
Preventive Strategies and Positive Solutions for the Workplace®

International Municipal Lawyers Association
Advancing Excellence in the practice of Local Government Law

79th Annual Conference
Baltimore, Maryland

Diversity in the Ranks: Inclusion and Discrimination in Fire and Police Departments



Weldon H. Latham

Presented by:

Weldon H. Latham
John M. Bryson, II
Corporate Diversity Counseling Group



John M. Bryson II

September 11, 2014

©2014 Weldon H. Latham

©2014 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2014 Annual Conference, held September 10-14, 2014 in Baltimore, MD. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

Confidential and Privileged
Attorney-Client Communication

Overview

I. Current Environment

II. Risks of Poor D&I Performance

III. Municipalities' "Business Case" for Diversity

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

V. Key Discrimination Claims Pursued in Lawsuits, Investigations, Enforcement Actions

VI. Leading Case Law / Analysis of Disparate Impact Claims

VII. Affirmative Action and Related Cases

VIII. Exemplar Justice Department Consent Decrees

IX. Recommendations: Minimize Liability/Maximize D&I Benefits

X. Conclusion

I. Current Environment

A. Changing Demographics

1. Front-page headlines credited changed demographics for successive decisive victories of President Obama.

2. Growing numbers of / participation by African American, Hispanic, female, younger voters.

3. Census Bureau March 2014 projection: *Majority Minority nation by 2041*, two years earlier than December 2012 projection.

Confidential and Privileged
Attorney-Client Communication

I. Current Environment

B. Minority and Female Buying Power

1. Total Minority Buying Power: $2.6 trillion (*est.* $3.6 Trillion 2015).

2. African American and Hispanic Buying Power *each* exceeds GDP of all but 16 nations worldwide.

3. Female Buying Power: $4.3 trillion (*est.*).

Sources: Selig Center for Economic Growth, Terry College of Business, The University of Georgia (November 2013); World Bank; 2013 U.S. Census.; U.S. Bureau of Labor Statistics.

I. Current Environment

C. Corporate America Notices: "Best Companies" Competitions

1. ***Working Mother*, *Fortune*, *LatinaStyle*, *Black Enterprise***, other "Best Company" lists – increasingly important for branding, recruiting, and reputation.
2. Competition rising (*e.g.*, applications to ***DiversityInc*** "Top 50" up from 75 in 2001 to 893 in 2013).
3. *Customers are* demanding D&I information and major companies are requiring their vendors to respond to D&I Questionnaires.

I. Current Environment

D. Competition for "Best and Brightest" Talent

1. U.S. *Population* 2013: 317,000,000.
   - Minorities: 34% Women: 51%

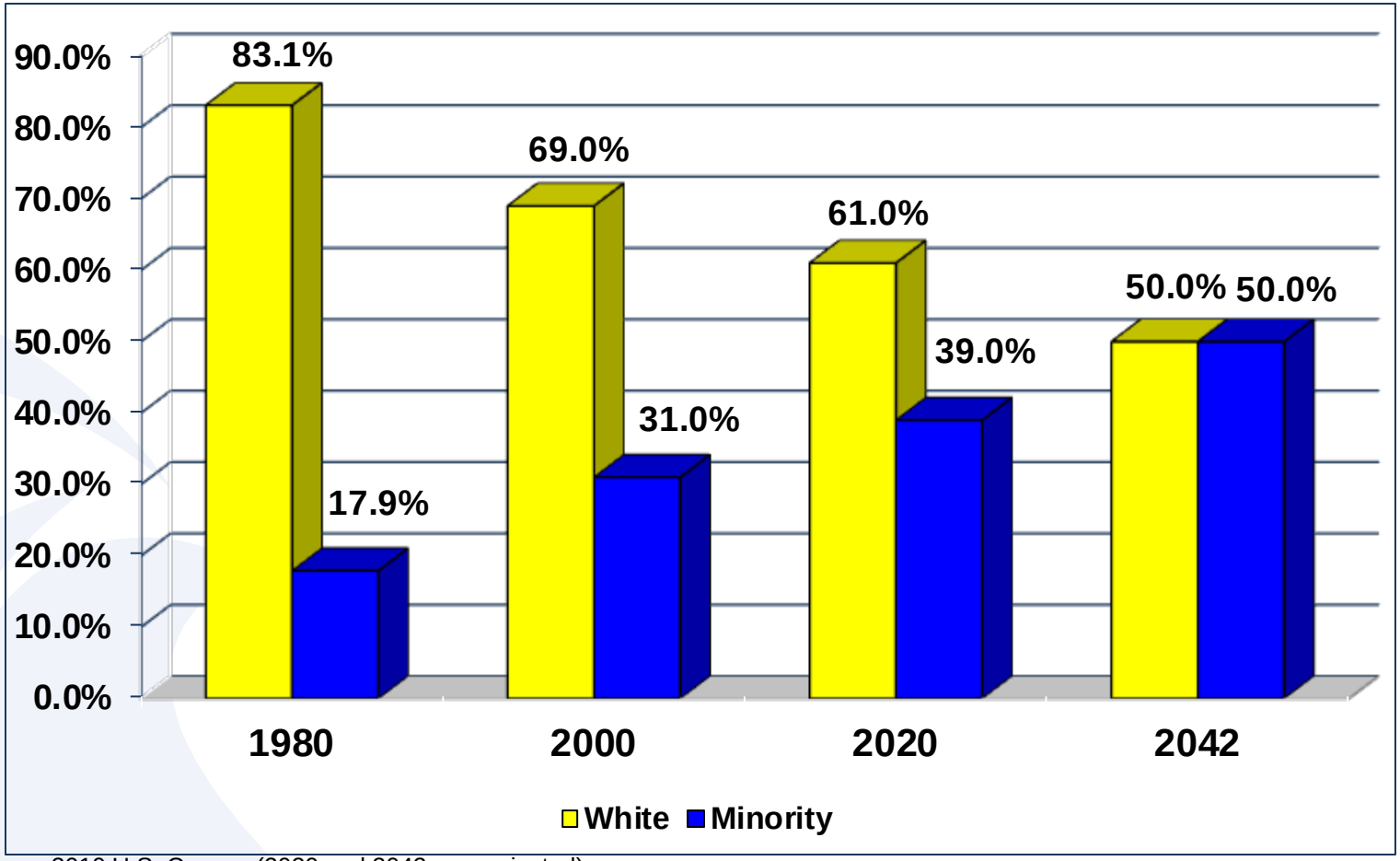
2. U.S. Population 2050: 439,000,000.
   - Minorities: 54% Women: 51%

3. New Hires 2013: 75% Minorities & Women.

Sources: 2010 U.S. Census (2020 and 2050 are projected); *Washington Post*, "Minorities Become a Majority in Washington Region," August 31, 2011; *Washington Post,* "U.S. To Grow Grayer, More Diverse," August 14, 2008.

I. Current Environment

E. Diversity of U.S. Workforce



Source: 2010 U.S. Census (2020 and 2042 are projected).

II. Risks of Poor D&I Performance

A. Perceptions of U.S. *Corporate* Executives

1. 81%: "witnessed discrimination."
2. 54%: "same as 10 years ago."
3. 77%: "discrimination top-down."

B. Take heed, Municipal Counsel: 63% surveyed *Fortune 500* General Counsel: employment suits are greatest risk*

Sources: *TheLadders.com*, "Workplace Discrimination Starts at the Top" (Feb. 28, 2007); "How Corporate America is Betraying Women," *Fortune* (Jan. 10, 2005). Additionally, "General Counsel fear [employment] discrimination suits will be their *greatest headache* in 2013," *Law360*, Feb. 26, 2013.

II. Risks of Poor D&I Performance

C. Major *Public Corporate* Discrimination Settlements

Amount	Basis	Year
$250 Million	Gender	2010
$192 Million	Race	2000
$176 Million	Race	1996
$160 Million	Race	2002
$104 Million	Gender	1997
$ 90 Million	Gender	2004
$ 80 Million	Race	2005
$ 54 Million	Race	2007
$ 54 Million	Gender	2004
$ 46 Million	Gender	2007

* Affected industries: Consumer products, energy, financial services, hospitality, insurance, manufacturing, pharmaceuticals, retail, *etc.*

Source: *DiversityInc.*

II. Risks of Poor D&I Performance

D. Adverse Impacts of Public Diversity Crises (*Beyond Legal Liability*)

1. Losing the War for Talent.
2. Damage to reputation.
3. Poor employee morale, productivity, retention.
4. Increased scrutiny: enforcement agencies / plaintiffs' attorneys.
5. Major distraction to management / workforce.
4. Supervisory paralysis / fear of discipline / claims of retaliation.

Confidential and Privileged
Attorney-Client Communication

II. Risks of Poor D&I Performance

E. Increased EEOC Enforcement

1. FY 2013 Budget: EEOC 10% increase.
2. 20% increase in EEOC charges filed FY 2007-12.
3. "Key for EEOC success is a strong … litigation program … [to] restore capacity to effectively investigate charges and litigate cases."*
4. Increased enforcement capability (*e.g.*, Ledbetter Fair Pay Act).
5. Strategic Plan emphasizes "systemic discrimination."**

* *Source*: EEOC 2013 Budget, eeoc.gov.

** "EEOC Aims to Boost Systemic Bias Cases in 4-year Plan," *Law 360*, Jan. 20, 2012 (EEOC "is planning to step up its legal assault on companies committing systemic discrimination in the workplace").

Confidential and Privileged
Attorney-Client Communication

III. Municipalities' "Business Case" for Diversity

- "Corporate America has learned over the years that having a diverse workforce increases the bottom line. The fire service has a different bottom line – that's our mission – and I firmly believe diversifying our workforce will strengthen our bottom line . . . [W]e are responding to more calls that interact with the public . . . [T]hese calls require more interpersonal skills and cultural competence."

  Quest, New Mexico Fire Chief Jona Olsson

- "Diversity in Chicago is our strength, not our weakness. It has helped Chicago become a leader in industries such as manufacturing, insurance, risk management, print and publishing."

  Chicago Mayor Rahm Emanuel

III. Municipalities' "Business Case" for Diversity

- Corporate America has aggressively, visibly led the D&I movement over the past 20 years:
  - Chief Diversity Officers.
  - Executive D&I Leadership Councils.
  - D&I Strategic Plans.
  - Progress in workforce diversity.
  - Awards and recognition.

- But the public expects its ***government***—*the* enforcer of civil rights and anti-discrimination laws—to lead in this area as well, and set an example. The Consumer Financial Protection Bureau is only the latest in a long line of government agencies hit by ugly discrimination headlines, hearings, investigations, lawsuits, and judgments.

The expectations are high and the penalties for failure are severe.

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

A. Increased Scrutiny of Workforces

1. U.S. Department of Justice ("DOJ")
2. Equal Employment Opportunity Commission ("EEOC")
3. Plaintiffs' attorneys
4. Civil rights groups
5. Associations of minority / female firefighters, police officers

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

B. Adverse Media Coverage

- "Justice Department Investigation of Newark Police Finds Routine Excessive Force, Unwarranted Stops, Theft, and Racism," *latinpost.com*, 7/24/14.

- "Austin Approves DOJ Settlement Over Firefighter Hiring [Austin, TX]," *Fire Engineering*, 5/17/14.

- "Black L.A. Firefighter Wins $1.1 Million Racial Discrimination Verdict [Los Angeles]," *losangelestimes.com*, 11/25/13.

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

B. Adverse Media Coverage

- "Feds: Austin Fire Dept. Discriminates Against Hispanics, African Americans [Austin, TX]," *Firehouse*, 9/27/13.

- "Chicago Tries to Douse Female Firefighters' Bias Suit [Chicago]," *Law360*, 11/2/12.

- "Syracuse Settles Reverse Discrimination Lawsuit Over Firefighter Jobs [Syracuse]," *syracuse.com*, 10/15/12.

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

B. Adverse Media Coverage

- "L.A. Fire Department Will Pay Nearly $500K to Settle EEOC Harassment and Discrimination Lawsuit [Los Angeles]," *howardlawpc.com*, 2/10/12.

- "Black Firefighters Group Alleges Discrimination: Vulcan Blazers Seek Justice Department Investigation [Baltimore]," *Baltimore Sun*, 10/24/11.

- "Black D.C. Firefighters Allege Widespread Discrimination in Federal Lawsuit [District of Columbia]," *Washington Post*, 10/15/10.

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

C. Scrutiny not Limited to Major Metro Departments

- "EEOC Sues Maui County Police Department for Age Discrimination," [Population 154, 834], *EEOC Press Release*, 12/18/13.
- "Justice Department Reaches Settlement to Resolve Claim of Citizenship Status Hiring Discrimination in Waterloo, Iowa [Fire Department]," [Population 68,653], *DOJ Press Release*, 1/30/14.
- "EEOC Sues Town of Clarence and Fire Companies for Age Discrimination," [Population 30,673], *EEOC Press Release*, 3/31/11.

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

C. Scrutiny not Limited to Major Metro Departments

- "Village of Mineola and Mineola Fire Department Settle EEOC Age Discrimination Suit," [Population 18,799], *EEOC Press Release*, 1/21/10.

- "Village of Amityville and Amityville Fire Department Settle EEOC Discrimination Suit," [Population 9,523], *EEOC Press Release,* 2/23/11.

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

D. Major Monetary Judgments / Verdicts / Settlements against Municipal FDs

- Approximately $235M reported in *past 10 years alone*.
- NYFD, $128M.
- Chicago, $80M.
- Los Angeles, $8.1M.
- Does not include burdens of injunctive relief, consent decree requirements.

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

E. Fire/Police Department Demographics*

A. Fire Departments

1. 295,000 firefighters nationwide
2. 89.5% White males vs. 62.6% U.S. population
3. 9.9% Hispanic /Latino vs. 17.1% U.S. population
4. 7.7% African American vs. 13.2% U.S. population
5. 1.1% Asian vs. 5.3% U.S. population
6. 3.4% women vs. 50% U.S. population

This is what gets the attention of enforcers, regulators, plaintiffs' attorneys, and civil rights groups.

* *Source*: Bureau of Labor Statistics, 2012. Estimates for the race groups (White, African American, and Asian) do not sum to 100% because data are not presented for all races. Also, individuals whose ethnicity are identified as Hispanic or Latino may be of any race. U.S. population from Census Bureau.

IV. Legal/Reputational Landscape: Increased Scrutiny of Municipalities

E. Fire/Police Department Demographics*

B. Police/Sheriffs' Departments

1. 657,000 police/sheriffs nationwide
2. 80.2% White vs. 62.6% U.S. population
3. 13.8% Hispanic/Latino vs. 17.1% U.S. population
4. 12.8% African American vs. 13.2% U.S. population
5. 3.1% Asian vs. 5.3% U.S. population
6. 12.6% Women vs. 50% U.S. population

* *Source*: Bureau of Labor Statistics, 2012. Estimates for the race groups (White, African American, and Asian) do not sum to 100% because data are not presented for all races. Also, individuals whose ethnicity are identified as Hispanic or Latino may be of any race. U.S. population from Census Bureau.

Confidential and Privileged
Attorney-Client Communication

V. Key Discrimination Claims Pursued in Lawsuits, Investigations, Enforcement Actions

A. Disparate Impact (selection processes)

B. Disparate Treatment: Discrimination, harassment, retaliation, hostile work environment

C. Both "traditional" and "reverse" discrimination claims

> "We're in a cycle: one year minority firefighters sue us for race discrimination, the next year white firefighters sue us for reverse discrimination, they both win, and the City and its taxpayers lose." ---*Metro Municipal General Counsel*

D. Most complex, recurring claims by DOJ are Disparate Impact

E. Suits often invoke EEOC *Uniform Guidelines on Employee Selection Procedures (1978)*

V. Key Discrimination Claims Pursued in Lawsuits, Investigations, Enforcement Actions

DISCRIMINATION	HARASSMENT	RETALIATION
• Refusing to hire, firing, or treating differently in compensation or work conditions based on a protected classification • Protected classifications: Race, Color, National, Origin, Gender, Disability, Age, Religion, *etc*. • Disparate Treatment and Disparate Impact	• Quid Pro Quo – Withholding of workplace benefit unless sexual favor is given; or threat of adverse action (*e.g*., termination) if employee refuses sexual proposition or advance • Hostile Environment: Words, actions, comments, jokes, behaviors and tangible things offensive to reasonable person and (in frequency or severity) interfere with ability of employees to perform duties – Covers claims based on: sex, race, disability, religion, national origin, *etc*.	• Employer takes an adverse action against covered individual because engaged in protected activity • Covered individual: Employees opposing unlawful practices, participating in proceeding, or requesting accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability

Confidential and Privileged
Attorney-Client Communication

V. Key Discrimination Claims Pursued in Lawsuits, Investigations, Enforcement Actions

DISPARATE TREATMENT	DISPARATE IMPACT
Treating similarly-situated employees differently under like circumstances – Intentional discrimination – Systemic disparate treatment: Company's standard operating procedure (*i.e.*, typical rather than exception) – Employer must justify each decision to show not intentional discrimination	Facially neutral policy or practice (*e.g.*, test, interview, residency requirement) with disproportionate adverse impact or effect on members of protected class in comparison to non-protected class – Unintentional discrimination – Can be justified via showing that selection process was job-related and business necessity ("validation")

Confidential and Privileged
Attorney-Client Communication

V. Key Discrimination Claims Pursued in Lawsuits, Investigations, Enforcement Actions

F. EEOC Uniform Guidelines on Selection Procedures (29 CFR 1607)

1. EEOC Guidelines 4/5^{ths} rule says selection rate of any group less than 80% of selection rate of highest group is evidence of adverse impact. If total selection process has adverse impact, each component of selection process must be analyzed for adverse impact, in a "validity study."

2. Three types of validity studies under the Guidelines: (1) Criterion-related-validity study (criteria predictive of job performance), (2) Content-validity study (knowledge, skills, and abilities related to the job), (3) Construct-validity study (general characteristics important to job performance).

3. **Criterion study** requires empirical data demonstrating selection procedure is *predictive* of significant elements of job performance. *E.g.*, IQ test.

V. Key Discrimination Claims Pursued in Lawsuits, Investigations, Enforcement Actions

F. EEOC Uniform Guidelines on Selection Processes

4. **Content study** requires information showing that content of selection procedure is *representative* of important aspects of job performance for which candidates will be evaluated. *E.g.*, typing test for secretaries.

5. **Construct study** requires data showing that procedure measures degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in job for which candidates will be evaluated.

6. Before conducting validity studies, employers must conduct "job analyses." Each type of validity study requires different type of job analysis.

7. If one or more validity studies warrants use of the procedure for the intended purpose under the Guidelines, the promotional procedure is properly validated. If no validity study produces sufficient evidence, "the employer must initiate affirmative steps to remedy the situation."

VI. Leading Case Law / Analysis of Disparate Impact Claims

A. Seminal Disparate Impact Case: *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)

1. *Facts*

- Duke Power had 5 departments – African Americans employed only in Labor Department where highest paying jobs paid less than lowest paying jobs in other 4 departments
- After enactment of Title VII, Duke Power added two requirements for employees to be placed outside Labor Department:
  - New Employees: High school education and satisfactory scores on two aptitude tests
  - Incumbent Employees: if lacking a high school education, required to pass two tests – general intelligence and comprehension

Confidential and Privileged
Attorney-Client Communication

VI. Leading Case Law / Analysis of Disparate Impact Claims

2. *Issue Presented*

   - Does Title VII prohibit an employer from requiring education or testing when (a) both are not significantly related to successful job performance, (b) both operate to disqualify African Americans at substantially higher rate than whites, and (c) jobs in question had previously been filled by only white employees pursuant to company policy?

VI. Leading Case Law / Analysis of Disparate Impact Claims

3. *Ruling*

- "Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."
- "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications . . . The touchstone is ***business necessity***. If an employment practice which operates to exclude African Americans cannot be shown to be related to job performance, the practice is prohibited."
- "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to testing job capability."

VI. Leading Case Law / Analysis of Disparate Impact Claims

B. Early Consent Decree Cases Brought by DOJ / Private Plaintiffs

E.g., Coffey v. City of Jacksonville and Braddy, 506 F.Supp. 528 (M.D. Fla. 1981): 2 African-American firefighters out of 700 in 1971 when suit filed; suit alleged disparate impact in testing; resulted in class certification and Consent Decree requiring hiring of 50% black/50% white applicants from eligible list until list exhausted. Case continued to be prosecuted; in 2009, plaintiffs challenged City's alleged compliance with Consent Decree (appointing as class counsel Thompson & Bishop, Akron, OH). Case still pending.

VI. Leading Case Law / Analysis of Disparate Impact Claims

C. Recent Comprehensive Opinion*: Bazile et al. v. City of Houston*, 858 F.Supp.2d 718 (S.D. Tex. 2012)

1. *Opinion*: 50 page opinion by U.S. District Court
2. *Lead Plaintiffs' Counsel*: Dennis Thompson, Akron, Ohio, same counsel as in multiple pending Jacksonville firefighter cases; $1.87M jury verdict for African-Americans in disparate impact promotional exam case, *Howe v. City of Akron* (2008); *Luke v. City of Cleveland*, jury verdict $650,000 and 15 promotions for black firefighters disparate impact/race discrimination
3. *Parties*: Firefighters, City, Union (Houston Professional Firefighters Association)

VI. Leading Case Law / Analysis of Disparate Impact Claims

C. *Bazile v. City of Houston*

4. *Claims*: Title VII/Section 1981 disparate impact and Fourteenth Amendment Equal Protection suit challenging system for promoting firefighters to captain and senior captain; Process based on (1) tenure (years of service) and (2) score on multiple choice exam, set out in Texas Local Government Code and CBA (test points added to length of service points; oral interviews prohibited); Rule of Three then used, presumption Chief selects highest first, otherwise must explain selection.

Confidential and Privileged
Attorney-Client Communication

VI. Leading Case Law / Analysis of Disparate Impact Claims

C. *Bazile v. City of Houston*

5. *Procedural Posture*: Mediation between Plaintiffs and City led to settlement in proposed consent decree between firefighter-plaintiffs and City requiring changes to captain and senior captain exams. Union intervened, objected on ground proposed exam changes violate Texas Code and CBA provisions—and on ground that neither party had demonstrated discrimination adequate to support a consent decree.

6. *Issues considered:*
   - Whether exams have disparate impact on African Americans;
   - Whether exams are reliable, valid measures of knowledge and qualities relevant to promotion decisions;
   - Whether exams are reliable, valid ways to compare candidates;
   - Whether proposed changes will provide reliable, valid exams and address disparate impact.

VI. Leading Case Law / Analysis of Disparate Impact Claims

C. *Bazile v. City of Houston*

7. *Analysis:* Experts' testimony/opinions left court with "sense of disquiet;" "all the witnesses' opinions amount to uncertain efforts to gauge how well different exam approaches measure, compare, and predict job performance. The combination of the lack of judicial expertise in this area and the limits of the expertise of those who do have training and experience support a cautious and careful judicial approach."

8. *Ruling:* Court ruled that the exams result in disparate impact and violate Title VII. **BUT:** some consent decree provisions altering the exams violate Texas Code and CBA and are not necessary to comply with Title VII. Use of situational-judgment questions and assessment center are justified by record and consistent with job-relatedness and business necessity. But "job-knowledge written test," "scenario-based computer-objective test," and certain aspects of assessment center (*e.g.*, no Rule of Three) are invalid.

Confidential and Privileged
Attorney-Client Communication

VI. Leading Case Law / Analysis of Disparate Impact Claims

D. *Ricci v. DeStefano,* 557 U.S. 557 (2009)

1. *Background*: After City of New Haven Fire Department discarded results of written exam, white firefighters sued City for *disparate treatment* discrimination, under Title VII
   - City argued it discarded results to avoid adverse impact discrimination against minorities
2. *Holding*: 5-4 decision, reversing Second Circuit, Court held City discriminated against white firefighters because decision to discard exams was made "because of race"
   - City did not show "strong basis in evidence" that test results would subject it to disparate impact liability

VI. Leading Case Law / Analysis of Disparate Impact Claims

D. *United States v. City of New York* (FDNY) (2010)

1. *Background*: FDNY used 2 written exams to rank entry-level firefighter applicants
2. *Plaintiffs*: United States, FDNY Vulcan Society, and individuals
3. *Issue*: Did continued racial disparities in exam results amount to *disparate impact and disparate treatment*?
4. *Ruling*:

   Yes – Court found FDNY engaged in systematic disparate treatment because exams were "part of a pattern, practice, and policy of intentional discrimination against black applicants that has deep historical antecedents and uniquely disabling effects."

   – Statistical, historical, anecdotal, and testimonial evidence supported Court's decision

VII. Affirmative Action & Related Cases

Date	Case	Holding
June 28, 1978	*Regents of University of California* v. *Bakke* State University Medical School Admissions	Quota system unconstitutional; race can be "plus" factor
June 27, 1979	*United Steel Workers of America* v. *Weber* Employer Training Program	Voluntary AAP OK if satisfies 3-part test ("quota" upheld)
May 19, 1986	*Wygant* v. *Jackson Board of Education* Public School System Lay-Offs	Layoffs based on race unconstitutional (not "narrowly tailored")
March 25, 1987	*Johnson v. Santa Clara County* State Agency Employment	AAP properly supported sex as decision-making factor
June 23, 2003	*Grutter* v. *Bollinger* *Gratz* v. *Bollinger* } The Michigan Cases State University Admissions	Diversity a "compelling state interest," individualized holistic approach OK; "points" system unconstitutional
December 15, 2003	*Petit v. City of Chicago* City Police Promotions	Seventh Circuit applied *Grutter* in employment context, upheld diversity as compelling state interest
June 28, 2006	*Parents* v. *Seattle School System* *Meredith v. Jefferson County* School Boards' Student Assignments	Solely race-based school assignments unconstitutional; not individualized
June 29, 2009	*Ricci* v. *DeStefano* City Firefighter Promotions	"Substantial basis in evidence" test for disparate treatment/impact
June 24, 2013	*Fisher v. UT Austin* State University Admissions [Issue: *Grutter* applied to Texas "Top 10 Percent" Rule]	Fifth Circuit decision vacated, remanded, again upholding *Grutter* plus 10% Rule
April 22, 2014	*Schuette v. Coalition to Defend Affirmative Action* Michigan law banning preferential consideration of race/sex in public college admissions	State Constitutional ban on race-sex based admissions in public university admissions upheld.

Confidential and Privileged
Attorney-Client Communication

VII. Affirmative Action & Related Cases

A. *Petit v. City of Chicago*, 352 F.2d 1111 (7th Cir. 2003).

1. *Facts*: Promotions to Sergeant based on written multiple choice test, written short answer test, oral examination, and performance evaluations, possible score 100. Results showed adverse impact on African Americans and Hispanics. Test had not been validated. City "standardized" the scores based on race and used the standardized scores to place candidates in rank order.

2. *Claim*: Non-minority Chicago Police officers sued City arguing that promotions of minorities ahead of them by "standardizing the scores" violated the Equal Protection Clause.

3. *Legal Standard Applied*: Strict scrutiny, compelling state interest, narrowly tailored.

VII. Affirmative Action & Related Cases

A. *Petit v. City of Chicago*

4. *Ruling*: Relying on *Grutter v. Bollinger*, 539 U.S. 306 (2003) (the Law School case): "[A]s did the University of Michigan, the Chicago Police Department had a compelling interest in diversity. Specifically, the CPD had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and earn the trust of the community, which in turn increases police effectiveness in protecting the city. . . . Faced with a very difficult situation, we find that the City formulated a plan which meets the standards enunciated in 2003 [Grutter]."

Confidential and Privileged
Attorney-Client Communication

VII. Affirmative Action & Related Cases

A. *Petit v. City of Chicago*

5. *Notable Quotes:*
   - "It seems to us that there is an even more compelling need [than in university admissions] for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago."
   - "[A]ll major studies conducted since the 1960's recognized the importance of minority representation. The reality of urban policing is that minorities are frequently mistrustful of police and are more willing than non-minorities to believe that the police engage in misconduct. . . [W]hen police officers are routinely supervised by minorities, the fears that the police department is hostile to the minority community will naturally abate."
6. *Significance*: First case post-*Grutter* to apply *Grutter* in the employment context, allowing diversity itself to be a compelling state interest (instead of remedying past discrimination).

VIII. Exemplar Justice Department Consent Decrees

1. **March 2014:** FDNY settled with DOJ and agreed to pay victims of discrimination $98 million – Justice Department originally sued the FDNY in 2007, alleging that its written examinations discriminated against African American and Hispanic entry-level firefighter applicants.

   Results:

   - Administration of $98M fund for claimants
   - New entry-level firefighter exam
   - Changes in recruiting, hiring procedures
   - Court monitor to oversee Consent Decree
   - Priority hiring of African Americans/Hispanics

VIII. Exemplar Justice Department Consent Decrees

2. **October 2012:** City of Selma, Texas entered into Consent Decree with DOJ to resolve lawsuit for engaging in retaliation against firefighter for filing complaint against superior for using ethnic slurs in workplace

   – City agreed to pay $28,500 to firefighter, implement specific process to investigate discrimination and retaliation complaints, and train all employees on the new EEO policy and Title VII prohibitions

3. **February 2009:** City of Dayton entered into Consent Decree with DOJ to resolve lawsuit alleging that City's "use of an internally created written examination for screening entry-level police officer applicants and its use of heightened minimum qualifications for entry-level applicants" resulted in disparate impact on African-Americans.

   – City agreed to pay $450,000 into settlement fund for harmed African-Americans and to develop new selection procedures complying with Title VII

VIII. Exemplar Justice Department Consent Decrees

4. **Sept. 2005:** D.C. Fire Department settled with DOJ and agreed to pay $101,000 to female applicants required to undergo pre-hiring pregnancy test and advised they could lose their jobs if they become pregnant within first year of employment

5. **June 2004:** Pattonville-Bridgeton (Missouri) Fire Department entered into Consent Decree with DOJ to resolve lawsuit alleging it created and condoned a "racially hostile work environment."
   - Fire department agreed to pay victim $55,000 and implement anti-discrimination policies, procedures, and training

VIII. Recommendations: Minimize Liability/Maximize D&I Benefits

Based on our experience advising municipalities, to minimize potential liability for discrimination and enhance diversity and inclusion, we recommend the following:

A. Identify the Department's diversity-related problems.

1. Conduct a statistical workforce analysis to identify any under-utilizations of minorities or women in all job categories; prepare appropriate Action Plans to remedy underutilizations.

2. Under attorney-client privilege, work-product protections where available, audit (adverse impact analyses) fairness of all processes that underlie most claims of discrimination, in areas including recruiting/hiring, pre- and post-employment testing, discipline, terminations, and promotions. Consult the EEOC Guidelines on Employee Selection Processes for guidance (not binding but important).

VIII. Recommendations: Minimize Liability/Maximize D&I Benefits

3. With expert guidance, validate and revise as necessary processes to address disparate impacts while continuing to assess necessary job skills and knowledge. Consider and document possible less-impactful alternatives.

4. Assess the effectiveness of current diversity programs and practices to institutionalize fair practices and increase credibility among those constituents most likely to raise concerns.

B. Develop a comprehensive Action Plan to enhance policies and procedures to ensure a fair, representative, and effective mission-oriented Department.

IX. Conclusion

- Scrutiny of fire and police departments will continue as long as disparate treatment and disparate impact claims are viable. Those departments that do not effectively address diversity issues will be subjected to investigations, enforcement actions, class action lawsuits, protests, and the adverse impacts of negative publicity. Prioritizing and enhancing diversity efforts before major allegations of discrimination arise can:
  - Significantly reduce claims;
  - Minimize intrusiveness of government investigations; and
  - Mitigate significant potential liability.

IX. Conclusion

- More importantly, a diverse and inclusive department will better serve its diverse community. A City with a reputation for fairness will more effectively attract new companies, taxpayers, and economic opportunities. A City with validated selection processes will attract and retain the best and the brightest into a highly-productive, diverse workforce.

Confidential and Privileged
Attorney-Client Communication

Thank You!



Workplace law. In four time zones and 55 major locations coast to coast.

jackson|lewis
Preventive Strategies and Positive Solutions for the Workplace®



Weldon H. Latham

Weldon H. Latham
John M. Bryson, II
Corporate Diversity Counseling Group



John M. Bryson II

Confidential and Privileged Attorney-Client Communication