

LEGAL UPDATE— REACHING BEYOND *RICCI*

2010 PTC-NC Conference

March 11, 2010

Your Presenter

2

Bryan Baldwin

Staff Services Manager II, Personnel Programs

California Department of Justice

(916) 322-5446

Bryan.Baldwin@doj.ca.gov

Introduction

3

- Legal basics
- *Ricci v DeStefano*
- *U.S. v. City of New York* (“Vulcan case”)
- The Bridgeport, CT case
- The future
- Lessons

Legal basics

4

Two main types of discrimination claims:

- 1. Disparate treatment (blatant) (DT)**
- 2. Disparate (adverse) impact (statistical) (AI)**

Issue in *Ricci*

5

May an employer legally engage
in DT discrimination
in order to avoid AI discrimination?

Facts in *Ricci*

6

- Fire lieutenant and captain exams in New Haven, CT
- City has history of being sued over these exams
- City charter and union contract constrained choices
- City hired consulting firm to develop exams
- AI found on both exams, Civil Service Board decided not to certify the results

Ricci lawsuit

7

- Certain White and Hispanic applicants sued for DT
- City argued if it had used the list, would have resulted in illegal AI
- Lower courts ruled for the City
- U.S. Supreme Court ruled 5-4 for plaintiffs and remanded
- District court ordered City to promote 14 plaintiffs

(One reason why) *Ricci* is weird

8

- City argued *against its own test*. But Supreme Court said they did several things right, including:
 - Hiring a reputable I/O consulting firm
 - Conducting a relatively thorough job analysis
 - Gave candidates sufficient time to prepare
 - Used objective development & scoring criteria

The “Strong Basis in Evidence” Standard

9

“Under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, [they] 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.”



Ricci distinguished: U.S. v. NYC

10

- Firefighter exams in New York City
- City has history of being sued over these exams; latest suit filed in 2007 over written tests
- In July '09, Dist. Ct. Judge ruled against City for illegal AI
- In Jan. '10, same judge ruled against City for DT pattern & practice related to exam

U.S. v. NYC (cont.)

11

- Some issues the judge had:
 1. Insufficient task-KSA linkages
 2. “Necessary at entry” standard violated for tasks/KSAs
 3. No pre-testing
 4. Insufficient evidence the exam measured what it claimed
 5. Insufficient number of KSAs measured
 6. Universe of testing methods not sufficiently considered
 7. Failure to measure and match reading level
 8. Cutoff scores based on operational need, not MQs

U.S. v. NYC cont.

12

- “I reference Ricci not because the Supreme Court’s ruling controls the outcome in this case; to the contrary, I mention Ricci precisely to point out that it does not. In Ricci...the Supreme Court confronted [a] narrow issue...In contrast, this case presents the entirely separate question of whether Plaintiffs have shown that the City’s use of [Exams] has actually had a disparate impact upon black and Hispanic applicants for positions as entry-level firefighters.”

-Judge Nicholas Garaufis, EDNY
(underlines added)

Ricci redux: Bridgeport, CT

13

- 12/06: promotional firefighter lieutenant exam
- 07/08: City changes weights
 - ▣ Old weighting: 50 written/45 oral/5 seniority
 - ▣ New weighting: 75 oral/ 25 written
- Causes change in ranks; in 04/09, 11 White and 1 Hispanic applicants sue
- 12/09: City settles by (un)adjusting the weighting of components; promos retro to 08/08 + \$75k fees
- Plaintiffs' attorneys said *Ricci* bolstered their case

Age discrimination

14

- *Gross v. FBL* (U.S. Supreme Court, 6/18/09)
 - ▣ In DT ADEA cases, plaintiff must show age was the “but for” factor and retains the burden
- 2/18/10: EEOC issues proposed RFOA regulations (AI cases). Examples of factors to consider:
 - Is it a common business practice?
 - Was practice applied fairly/accurately?
 - Why practice was chosen v. other options
 - Discretion given to supervisors

The future

15

- ❑ **Chicago PD** considering scrapping written police entrance exam
- ❑ Why? Decrease costs, increase minority hiring, avoid “costly legal battles”
- ❑ RFP for online exam cancelled last Fall; “no one said they could administer an online exam [and guarantee its integrity]” – HR spokesperson
- ❑ May impact academy success/fail rate
- ❑ Fraternal Order of Police President: “*sounds too stupid to be true*”

The future (cont.)

16

- **Lewis v. City of Chicago** (U.S. Supreme Court)
 - Firefighter applicants, written exam
 - Q: When does the 300 day EEOC filing requirement (for Title VII) begin—when the results of a test are announced, or when hires based on the results are made?
 - Decision expected late Spring/Summer
- Impact of *Ricci* on state anti-discrimination laws?
- Legislation?

The future (cont.)

17

- **NASA v. Nelson** (U.S. Supreme Court)
 - Q: Did NASA's background investigations violate federal *contract employee's* constitutional right to informational privacy?
 - Oral arguments expected Fall 2010

The future (cont.)

- Justice Scalia in his *Ricci* concurring opinion:
 - “[The] resolution of this dispute merely postpones *the evil day* on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection? The question is not an easy one.”

The future (cont.)

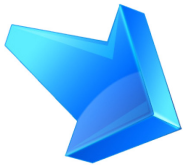
19

- Chief Justice Roberts in the *Lewis* oral argument:
 - *“You have just got to get as good legal advice as you can...[The question the city should ask is] “Are we going to be in more trouble if we follow the test or more trouble if we take it down?””*

Lessons

20

- Police/fire depts. should be on high alert
- Avoid race-based decisions at all costs (**esp. post-hoc**)
- Think broadly about test methods & alternatives
- Be prepared to live with your test results



And now...

21

An actual attorney.

