



Employment Law Alert

Legal developments affecting human resource management

A publication of Nixon Peabody LLP

July 27, 2009

Pre-employment testing after *Ricci v. DeStefano*

By Philip M. Berkowitz and Kristen O'Connor

The Supreme Court decided *Ricci v. DeStefano* only a few weeks ago, and it has sparked debate about its impact on employment tests, disparate treatment and disparate impact discrimination, and the future of Title VII of the Civil Rights Act of 1964 (“Title VII”). Indeed, as discussed further below, *Ricci* has already been cited by a New York federal district court, in a similar firefighter disparate impact testing case.

In our previous Client Alert on *Ricci*, “Supreme Court Throws a Diversity Curveball in *Ricci v. DeStefano*,” our focus was on employer diversity initiatives, and how employers may be subject to disparate treatment liability by making decisions to avoid disparate impact liability. This follow-up Client Alert addresses additional questions raised by *Ricci*, provides an in-depth focus on employment testing, and discusses the recent New York firefighters’ case. We also consider President Obama’s Supreme Court nominee Sonia Sotomayor’s comments regarding *Ricci*.

I. Background

Title VII was implemented to prohibit employment discrimination on the basis of minority status. It was amended in 1991 to include the disparate impact remedy described in *Griggs v. Duke Power Co.* Title VII’s disparate treatment provisions prohibit outright (intentional) discrimination on the basis of protected status. Its disparate impact provisions prohibit discrimination as a result of facially neutral policies and exams. Thus, the law prohibits both intentional discrimination as well as potentially unintentional discrimination.

In *Ricci*, the top scorers on an employment test to determine eligibility for firefighter promotions were predominantly white, despite the employer having taken a number of steps, including retaining an outside consultant, to design a fair examination. The employer, the City of New Haven (“City”), decided not to certify the results of the examination because it feared a disparate impact discrimination lawsuit from the minority test takers.

The Supreme Court held this was illegal reverse discrimination because the City could not demonstrate a “strong basis in evidence that, had it not taken the action, it would have been liable” for disparate impact discrimination against the minority candidates. Thus, the City was held liable for disparate treatment discrimination against the non-minority firefighters for deciding not to certify the

test results because of its fear of a discrimination claim from the minority test-takers, who did not perform as well on the tests.

The Court attempted to harmonize the disparate impact and disparate treatment standards in *Ricci*, but offered little practical guidance for employers to determine what constitutes a “strong basis in evidence.” Thus, after *Ricci*, compensating for apparent disparate impact discrimination by changing employment decisions to favor minorities may expose employers to disparate treatment liability to non-minorities.

II. Validating employment exams

Cases challenging employer tests are usually brought as disparate impact claims. *Ricci* may alter the landscape of discrimination liability by making it harder for employers to show business justification for taking action to correct a disparate impact, and increasing the likelihood of both disparate impact and disparate treatment claims. It is therefore important that employers reexamine their employment testing procedures.

A. Uniform guidelines

The Equal Employment Opportunity Commission (“EEOC”) has issued guidelines on employment testing, including design, cutoff scores, processes for validation, types of validation, and reliance on experts. These guidelines are intended to aid employers in designing nondiscriminatory tests.

The emphasis for validity is on the methods used to create the test, rather than the validity of the final product. Courts and enforcement agencies consider whether the employer has conducted a thorough job analysis and whether the test was carefully developed in accordance with professional standards. Professional assistance and supervision in the development, use, and validation of selection procedures will help employers demonstrate an instrument’s validity. An expert’s testimony on how a test was designed can be invaluable to persuade a court a test is valid.

Title VII specifically prohibits employers from adjusting scores of, using different cutoff scores for, or otherwise altering the results of, employment-related tests on the basis of race, color, religion, sex, or national origin. Thus, Title VII explicitly prohibits employers from adopting unjustified cutoff scores, adjusting test scores or manipulating results in a way that has a disparate impact on minorities, or results in disparate treatment of non-minorities, absent a “strong basis in evidence” that the employer would be liable for disparate impact discrimination. Employers who rank test scorers must be able to demonstrate that a higher score correlates with better job performance.

B. Validation Studies

If a test is shown to have a disparate impact, an employer can defend using the test results by producing evidence there is a business justification for the selection method. *Ricci* may have changed the “business justification” standard in *Griggs v. Duke Power Co.* to a more stringent “strong basis in evidence” standard. But irrespective of the standard, employers still need to show the selection procedure was related to the job.

The showing is best accomplished through a “validation study.” Validation examines the relationship between a test and other behaviors. There are three validation techniques employers can use, depending on the results an employer is seeking by using a test.

1. Criterion validation

The most common validation method in predicting an individual's job performance is criterion validation. It is used to validate aptitude and intelligence tests, among others. In a criterion validation, the test results are compared with a reliable independent measure of what the test is supposed to predict. Statistical analysis is used to demonstrate that the test score is predictive of a particular element of job performance.

There are two types of criterion validation. In "predictive validation," the test is given to applicants but is not used in the decision whether to hire. Once a period of time has passed, the employer sees if the test score matches the job performance ratings the test was designed to measure. This comparison yields a validation coefficient, which tells whether the test is a good predictor of employees' job performance. In "concurrent validation," tests are given to current employees and their job performance is compared to their test scores, which yields the validation coefficient.

2. Content validation

Content validation is used for tests that measure skills and abilities. For this type of test to be found valid, courts look for employers or consultants to conduct a thorough job analysis. Content validation measures skills and abilities employees presently possess. Therefore, it is inappropriate to measure skills employees are expected to obtain or learn over time from their job experience.

3. Construct validation

Construct validation is more appropriate for tests measuring intangible qualities ("constructs") like, for example, the "it" factor. It is the most complex of the three validation methods, combining both criterion and content validation. Construct validation requires employers to conduct a job analysis to determine desirable work behaviors and the constructs of successful job performance. Employers should show empirical evidence that the selection procedure, constructs, and work behavior are related to successful job performance.

Employer testing, while a fair way to determine employment related decisions, can expose an employer to liability. Employers must be careful to identify which performance factors they want to measure, what type of test to administer, and how they want to score and validate a test. Consulting with counsel and experts and documenting the testing from start to finish are essential should the test or the results be questioned.

C. U.S. v. City of New York

On July 22, 2009, a New York federal district court found that the employment testing conducted by the Fire Department of New York ("FDNY") had a disparate impact on minority candidates. A class of would-be minority firefighters prevailed in showing the tests to become a firefighter resulted in an unlawful disparate impact on black and Hispanic applicants. The court held that the test, used to make hiring decisions from 1999–2007, was "poorly constructed" and "arbitrarily rank[ed]" the firefighter candidates.

In defending the claim of adverse impact discrimination, the City of New York was unable to prove a "business justification" for the test. The court pointed out that, unlike *Rivzi*, which involved reverse discrimination against non-minority firefighters, the FDNY case confronts whether the employment

tests “actually had a disparate impact upon black and Hispanic applicants for positions as entry-level firefighters.”

The court found the FDNY pre-employment tests did not actually test the abilities purported to be tested. The job analysis and test construction were deficient, and the record showed the FDNY did not use independent experts to write the tests, but instead relied on panels of firefighters to write the questions. The content of the tests was not directly related to the job requirements. An expert who performed statistical analyses showed the questions meant to measure a certain cognitive ability actually correlated more highly with questions meant to measure a different cognitive ability. The test was not representative of the content or the procedures required of the job. Finally, the court found the cutoff scores selected for the tests and method of rank-ordering test takers were inappropriately selected. The court carefully reviewed each step of the testing process, finding the FDNY failed to observe sound practices in its pre-employment testing.

III. Workforce reductions

Hiring and promoting are not the only employer decisions potentially affected by *Ricci*. After *Ricci*, employers who seek to eliminate an apparent disparate impact on minorities with respect to termination decisions and, therefore, modify those decisions, may be liable for disparate treatment discrimination against non-minorities.

The best approach for employers implementing a workforce reduction is to identify job-related criteria that are neutral and properly reflect legitimate business considerations. With the assistance of counsel, human resources should create guidelines to aid managers in selecting which employees to terminate. This way, the process of assuring nondiscriminatory decisions may be shielded from discovery by the attorney-client privilege.

IV. The Sotomayor connection

Ricci is more than just a controversial employment law decision raising questions about employer testing and validation. It is a 5–4 decision in a Supreme Court which will soon change its composition. Justice Souter’s retirement created a vacancy that likely will be filled by Judge Sonia Sotomayor of the U.S. Court of Appeals for the Second Circuit.

Notably, Judge Sotomayor was a member of the Second Circuit panel that upheld the City’s decision to refuse to certify the test results in *Ricci* on the basis of its disparate impact on minority firefighters. Justice Souter was one of four dissenting justices in the *Ricci* decision. Should Judge Sotomayor be affirmed to fill Justice Souter’s vacancy, it is likely the Court will remain split 5–4 on this issue.

As part of the Supreme Court confirmation hearing, Judge Sotomayor has answered many pointed questions about *Ricci* and the Second Circuit’s controversial per curiam decision in the case. On July 16, 2009, plaintiff Frank Ricci expressed his frustration over the ruling to the Senate Judiciary Confirmation, including the Second Circuit’s one-paragraph decision. Judge Sotomayor defended the Second Circuit’s decision to issue a per curiam decision based on the detailed analysis by the lower court. Although the Second Circuit’s decision was short, and did not provide much in the way of analysis, the end result makes clear that Judge Sotomayor feels strongly about providing equal opportunities to minorities in the workplace.

Conclusion

Employment testing will continue to be controversial and, undoubtedly, the subject of additional litigation. The New York court's order in the FDNY employment testing case shows that *Ricci* and its progeny will shape every step of employment testing.

Employers would be well advised to spend the extra time and resources necessary to ensure that any testing used to make hiring or promotion decisions, or criteria used in making termination decisions, identify legitimate job-related criteria and are applied in a neutral fashion, so as not to target minorities or non-minorities. Careful planning will help employers obtain test results measuring what is important to them, and decrease the chance of a discriminatory outcome. Similarly, workforce reductions that are thoroughly planned and completed with the advice of human resources personnel and counsel will be less likely to result in liability.

The Supreme Court will soon have a new Justice. And while *Ricci* is now the law of the land, it remains to be seen how this precedent will shape the landscape of discrimination law.

If you would like more information about the topics covered in this alert, please contact your regular Nixon Peabody attorney or :

- Philip M. Berkowitz at 212- 940-3128 or pberkowitz@nixonpeabody.com