

September 2009

Employment Law Forum

The New Haven Firefighters' Decision – Impact on Personnel Selection

Background:

In 2003 the City of New Haven, Connecticut (City) administered written and oral examinations for individuals employed as firefighters in an effort to fill vacant lieutenant and captain positions in its Fire Department. The selection process for the promotional positions was set forth in a labor agreement negotiated between the City and the firefighters' union. Under the contract the written test counted for 60% of an applicant's score and the oral exam was weighted 40%.

The testing process resulted in disproportionately higher scores for white applicants than minority applicants. The City subsequently invalidated the test results because none of the black firefighters who passed had scored high enough to be considered for promotion. The City's reasoning for not certifying the test results was that doing so may have resulted in a law suit by black firefighters who were not promoted.

The plaintiffs (17 white and one Hispanic) were firefighters who would have received promotions but for the City's refusal to certify the test results. The plaintiffs claimed that the action by the City was a violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the United States Constitution. They argued that the City engaged in disparate treatment based on the plaintiffs' race and that the test results were not certified because blacks did not score high enough to be considered for promotion. The trial court granted summary judgment for the defendants.¹ A three judge panel of the Second Circuit Court of Appeals affirmed without analysis, relying on the lengthy District Court opinion.²

United States Supreme Court Decision:

Justice Anthony Kennedy, writing for a 5 – 4 majority, concluded that the City’s action in discarding the test results was a violation of Title VII, and avoided reaching the constitutional Equal Protection argument.³ Title VII prohibits both intentional acts of employment discrimination based on race, known as disparate treatment, and policies and/or practices which unintentionally result in adverse impact on minority groups, known as disparate impact. For example, in the instant case, even though the City made every attempt to provide a fair test for all candidates, the passing rate for black firefighters was less than half of that for white candidates. The Supreme Court concluded that these two provisions were in conflict. To resolve this conflict, the Court adopted the strong basis in evidence standard to which Kennedy concluded: “Even if respondents (the City) were motivated as a subjective matter by a desire to avoid committing disparate impact discrimination, there is no evidence – let alone the required strong basis in evidence – that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.”⁴

The promotional examinations were job-related and consistent with business necessity satisfying the standard set forth in the Court’s *Griggs v. Duke Power Company* decision.⁵ Furthermore, there was no equally valid, less discriminatory testing alternative available to the City. Therefore, there was no strong basis in evidence that a court would find the City liable for the disparate impact discrimination against black firefighters. The Court reasoned that although the City was faced with a prima facie case of disparate impact liability, this was “far from a strong-basis in evidence” that the City would be found liable.⁶

Consequently, the Court reversed the judgment of the District Court, and found that the white firefighters were entitled to summary judgment in their favor.

History – The Personnel Selection Process

The City of New Haven went to great lengths to provide a fair and valid testing process. The difficulty encountered that resulted in litigation was the fact that the written and oral examinations were weighted 60% and 40% respectively. The individual weights were negotiated at the bargaining table sometime in the past and directly impacted the outcome of the testing process. Several experts testified during the lower court proceeding that written examinations have historically had an adverse impact on minority individuals.⁷ (The determination of adverse impact was addressed in the Court’s *Griggs* decision citing the four-fifths standard [80% Rule] set forth in the Uniform Guidelines on Employee Selection Procedures.)⁸ However, consistent with the weights established by the labor agreement for the written and oral examinations, the City proceeded accordingly resulting in adverse impact on black candidates.

Testing procedures throughout the country changed following the *Griggs* decision. The Court held that an employment test with a substantial adverse impact was presumptively discriminatory.⁹ Use of such a test could only be permitted if justified by business necessity which in turn could be established through a determination as to whether the test was job related. Once adverse impact was established, the employer bore the burden of showing whether the test was job related. Under the *Griggs* standard, intent to discriminate became unimportant – the key factor in discrimination was an employment practice’s effect.¹⁰

Recognizing the disparate impact caused through the selection process, selection procedures including the application, job description, qualification standards, written, oral, physical, performance, background investigation, hiring interview, pre-employment physical examination, psychological, and related tests, were required to be job related and consistent with business necessity.¹¹ Employers, recognizing their vulnerability with established testing practices, began the process of validating the several components of the selection process.

Following *Griggs*, and recognizing the disparate impact caused by written tests, it was not unusual for employers to place greater emphasis on performance examinations, interview panels, and assessment centers. Testing experts emphasized that even with job related validated written examinations, it would not be unusual for disparate impact to be found with respect to minority individuals.¹²

Testing Alternatives

Irrespective of the testing process that is administered by private and public sector agencies, the most valid selection process is to place an individual on the job for a period of time. Work experience through job placement provides the employer the opportunity to evaluate an individual’s ability to perform the critical tasks required of the position - interpersonal skills, stress tolerance, recognition of and compliance with workplace regulations, time constraints, and other important factors related to job success. However, it is not practical for an employer to put numerous job applicants through a work performance process. Consequently, different types of tests are developed in an effort to bring out and evaluate the critical dimensions found in different kinds of jobs.

Considering the several decisions handed down by the United States Supreme Court concerning the employment testing process, beginning with *Griggs* to the recent *City of New Haven* decision, following are several suggestions that may be considered by employers regarding personnel selection.

1. Do not limit the employer’s method in determining the best qualified individual for a job through regulations, procedures, or agreements of any kind.

2. Ascertain that all components of the selection process, from the job description through the background investigation and hiring interview, are job related and consistent with business necessity.
3. Ascertain that the selection process satisfies the requirements of the Americans with Disabilities Act of 1990 (ADA), and subsequent amendments.¹³
4. Provide training on a continuing basis for hiring authorities addressing sensitivity issues involved in the hiring process including the ADA and affirmative action.

Finally, if there are employment selection issues that are in any way controversial, it is suggested that they be reviewed with counsel in light of the Court's recent decision.

¹ *Ricci et al v. DeStefano et al*, (2006) 554 F.Supp.2d 542.

² *Ricci et al v. DeStefano et al*, (2008) 530 F.3d 87.

³ *Ricci et al v. DeStefano et al*, (2009) 557 U.S. ____ .

⁴ *Id* at ____..

⁵ *Willie S. Griggs et al v. Duke Power Company*, 401 U.S. 424 (1971).

⁶ *Ricci*, *supra* 557 U.S. ____ .

⁷ *Ricci*, *supra* 530 F.Supp.2d ____ .

⁸ 41 CFR Part 60-3 (1978).

⁹ *Griggs*, *supra* at ____.

¹⁰ *Id* at ____.

¹¹ *Id* at ____.

¹² *Ricci*, *supra* 557 U.S. ____.

¹³ 42 USC §12101 *et seq.*