Ricci v. DeStefano: 3-alarm or false alarm?

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August, 2009 PTC-NC Luncheon

Overview

- The legal basics
- New Haven, CT: litigation central
- The City hires a consultant
- The results are in, and they're not good
- From frying pan into the fire
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- Now what?

The legal basics: Sources of lawsuits

1. Title VII of the Civil Rights Act of 1964
2. Sections 1981/1983/1985 (U.S. Code, Title 42)
3. Age Discrimination in Employment Act (ADEA)
4. Americans with Disabilities Act (ADA) and the Rehabilitation Act
5. USERRA and VEVRAA
6. Fair Credit Reporting Act
7. Immigration Reform and Control Act
8. Executive Order 11246
9. State and local laws
10. Employment torts (negligent hiring, invasion of privacy)

The legal basics

Two main types of discrimination claims:

1. Disparate treatment
   - Blatantly treating one group more favorably than another ("We're not sure a woman can do this job")
   - Mainly shows up at position hiring stage
2. Disparate (adverse) impact
   - Not blatant, but statistical results suggest illegal discrimination (typically but not always 4/5ths rule)
   - Mainly shows up at testing stage

The legal basics

Burden shifting* in disparate treatment cases:

1. Plaintiff successfully demonstrates they were qualified, were subject to an adverse employment decision, and circumstances give rise to inference of discrimination
2. Employer articulates a legitimate nondiscriminatory reason for the decision (e.g., job performance)
3. Plaintiff shows proffered reason given in #2 is pretext for discrimination (usually the only significant hurdle)

*The McDonnell-Douglas or McDonnell-Burdine burden-shifting scenario

The legal basics

4/5ths rule is common

Burden shifting in adverse impact cases*:

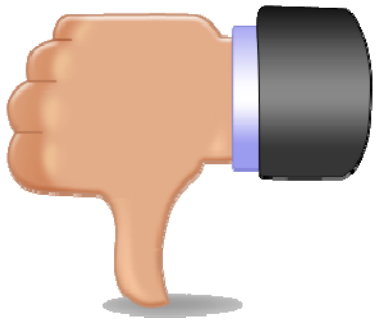
1. Plaintiff demonstrates that employer uses an employment practice that causes a disparate impact based on a protected group status
2. Employer demonstrates that challenged practice is job-related and consistent with business necessity (*this is where job analysis comes in*!)
3. Plaintiff demonstrates there is an alternative employment practice that is equally valid/job-related but with less adverse impact that could have been used

* Clearly described in CRA '91 (42 U.S.C. § 2000e-2)

The legal basics

A few other no-no's per Title VII:

1. Adjusting the scores of,
2. Using different cutoff scores for,
3. Or otherwise altering the results of employment-related tests on the basis of race, color, religion, sex, or national origin



New Haven, CT: litigation central

Exams in question: fire lieutenant and captain

City first sued in 1973 by black firefighters

Sued several times since (1989, 1998)

City charter specifies rule of three names

List good for 2 years

Union contract specifies 60% written exam, 40% oral exam; City relied on this

The city hires a consultant

- Firm specializes in fire and police exams
- Conducted standard job analysis: interviews, ride-alongs, JA questionnaire, oversampled minority firefighters
- Wrote 100-item written exams based on JA results; 3-month study period with study list
- Wrote oral exams that focused on hypothetical situations; rated by panel of three assessors

The results are in, and they're not good

- Lieutenant exam:
  - 79 candidates completed
  - Pass rates:
    - Whites: 58% (25/43)
    - Blacks: 32% (6/19)
    - Hispanics: 20% (3/15)

4/5ths: 46%

  - Due to rule of three and the eight current vacancies, ten were available for promotion. All were White.

The results are in, and they're not good

- Captain exam:
  - 41 candidates completed
  - Pass rates:
    - Whites: 64% (16/25)
    - Blacks: 37.5% (3/8)
    - Hispanics: 37.5% (3/8)

4/5ths: 51%

  - Due to rule of three and the seven current vacancies, nine were available for promotion—7 Whites and 2 Hispanics.

The results are in, and they're not good

Given these results—and after many meetings with City counsel, the consulting firm, HR, test-takers, the union, and other parties—the Civil Service Board decided* not to certify the results on March 18, 2004.

* Vote was 2-2 with one member recused

From frying pan into the fire

- Certain White and Hispanic fire-fighters who likely would have been promoted sued the City and some of its officials
- Suit alleged that by discarding the test results, the City & officials discriminated based on race (disparate treatment) in violation of Title VII of CRA '64 and violated the Equal Protection Clause of the 14th Amendment
- City argued in District Court that if they had certified the list, they would have violated disparate impact prohibition in Title VII.

From frying pan into the fire

- Two of the reasons why this case is weird:

  1. It's usually the racial minorities suing, not the White candidates (but it does happen). This is a good reminder that there is no "reverse discrimination."

  2. The City was put in the unusual position of arguing *against* its own test. Usually the employer is *defending* its test!

The City gets courted

- September, 2006: District Court grants summary judgment for the City.
- February, 2008: Court of Appeals affirms 7-6, with all six dissenters signing an opinion highlighting the issue for the Supreme Court.

- 6/29/09: Supreme Court of the United States (SCOTUS) rules in favor of plaintiffs

SCOTUS rules, cleans window with dirty rag

"All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race…Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decisions *because of race.*" (italics added)

SCOTUS rules, cleans window with dirty rag

"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."





SCOTUS rules, cleans window with dirty rag

"Applying the strong-basis-in-evidence standard to Title VII gives effect to both [adverse impact and disparate treatment] provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances."

SCOTUS rules, cleans window with dirty rag

"The racial adverse impact in this litigation was significant."

"The problem for respondents is that such a prima facie case—essentially a threshold showing of a significant statistical disparity, *Connecticut v. Teal*, 457 U.S. 440, 446, and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the test results."

SCOTUS rules, cleans window with dirty rag

"…the City could be liable for disparate-impact discrimination only if the exams at issue were not job related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative…"

"Based on the record…there is no substantial basis in evidence that the test was deficient in either respect."

SCOTUS rules, cleans window with dirty rag

"There is no genuine dispute that the examinations were job-related and consistent with business necessity…detailed steps [were taken by IOS] to develop and administer the examination…after painstaking analyses of the captain and lieutenant positions."

SCOTUS rules, cleans window with dirty rag

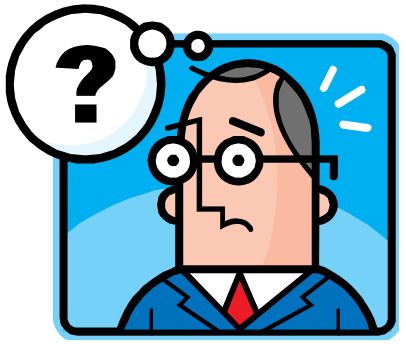
"[we do not] question an employer's affirmative efforts to ensure that all groups have a fair opportunity…But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race."

SCOTUS rules, cleans window with dirty rag

"We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The respondents, we further determine, cannot meet that threshold standard."

SCOTUS rules, cleans window with dirty rag

"If, after [the City] certifies the test results, the City faces a disparate-impact suit, then in light of today's holding the City can avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."



SCOTUS rules, cleans window with dirty rag

"This Court has repeatedly emphasized that [Title VII]"should not be read to thwart" efforts at voluntary compliance...The strong-basis-in-evidence standard, however, as barely described in general, and cavalierly applied in this case, makes voluntary compliance a hazardous venture."




SCOTUS rules, cleans window with dirty rag

- Some further points:
  - City failed to show that 60/40 weighting was arbitrary
  - Using banding after the fact would have violated Title VII
  - City did not make it clear that an alternative testing method (assessment centers) was genuinely available
  - Addition of Sotomayor (replacing Souter) will likely change nothing, but other replacements…? Constitutional issue could come back
  - Ginsburg predicts in her dissent "The Court's order and opinion, I anticipate, will not have staying power."

Now what?

- Continues SCOTUS trend toward race-blind decisions
- Continues SCOTUS tradition of fairly low validation burden
- Underlines (again) importance of the Uniform Guidelines
- Underlines importance of being able to live with your test results
- A reminder of how important individuals are

Conclusion

"The Court's decision may have generated many more questions than it answered. While some US Senators sought to use the case as a litmus test for the qualifications of the Supreme Court nominee, more than a few employers and their legal counsel were likely lamenting the lack of clarity – nothing resembling a litmus test – in the High Court's opinion as to how to meet the new standard announced for the lawful rejection of a selection procedure that has been determined to have a discriminatory impact on protected members of a workforce."

- CCH Workday Blog