Ricci v. DeStefano: Balancing Title VII Disparate Treatment and Disparate Impact
Leveraging the Supreme Court's Guidance on Employment Testing and its Impact on Voluntary Compliance Actions

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Today's panel features:
Teresa R. Tracy, Partner, Berger Kahn, Los Angeles
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Thursday, July 30, 2009
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Ricci v. DeStefano: Balancing Title VII Disparate Treatment and Disparate Impact

Leveraging the Supreme Court’s Guidance on Employment Testing and its Impact on Voluntary Compliance Actions

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THE CLAIM

- THE RICCI FIREFIGHTERS CHALLENGED THE CITY'S DECISION TO THROW OUT THE RESULTS OF CERTAIN PROMOTIONAL EXAMINATIONS UNDER WHICH WHITE CANDIDATES HAD OUTPERFORMED AFRICAN-AMERICAN CANDIDATES.

- THE WHITE AND HISPANIC FIREFIGHTERS ASSERTED A DISPARATE TREATMENT CLAIM ALLEGING THAT THE CITY'S DECISION WAS MOTIVATED BY THEIR RACES.
RICCI V. DE Stefano, 129 S. Ct. 2658 (2009)

THE DEFENSE

• THE CITY ASSERTED THAT IT FEARED A DISPARATE-IMPACT LAWSUIT BY AFRICAN-AMERICAN FIREFIGHTERS IF IT USED THE TEST RESULTS TO MAKE THE PROMOTIONS.

The Facts

The Promotion Process

- Was governed by the city charter, which had established a merit system.

- Required the city to fill vacancies in its civil service ranks with the most-qualified individuals, as determined by job-related examinations.
THE CIVIL SERVICE BOARD

- CERTIFIED A RANKED LIST OF APPLICANTS WHO PASSED THE TEST AFTER EACH EXAMINATION.

- CERTIFIED PROMOTIONAL LISTS REMAINED VALID FOR TWO YEARS.
THE FACTS (cont.)

THE CITY / FIREFIGHTERS UNION CONTRACT

- SPECIFIED ADDITIONAL REQUIREMENTS OF THE PROMOTION PROCESS.

- APPLICANTS FOR LIEUTENANT AND CAPTAIN POSITIONS WERE TO BE SCREENED USING WRITTEN AND ORAL EXAMINATIONS, WITH THE WRITTEN EXAM ACCOUNTING FOR 60% OF AN APPLICANT'S TOTAL SCORE.
THE FACTS (cont.)

THE BID

• AFTER REVIEWING BIDS FROM VARIOUS CONSULTANTS, THE CITY HIRED INDUSTRIAL/ORGANIZATIONAL SOLUTIONS, INC. ("IOS") TO DEVELOP AND ADMINISTER THE EXAMINATIONS AT A COST OF $100,000.

• IOS SPECIALIZED IN DESIGNING ENTRY-LEVEL AND PROMOTIONAL EXAMINATIONS FOR FIRE AND POLICE DEPARTMENTS.
**RICCI V. DESTEPANO, 129 S. Ct. 2658 (2009)**

**THE FACTS (cont.)**

DEVELOPMENT OF THE EXAM / TESTING PROCESS

- IOS PERFORMED JOB ANALYSES TO IDENTIFY THE TASKS, KNOWLEDGE, SKILLS, AND ABILITIES ESSENTIAL TO THE LIEUTENANT AND CAPTAIN POSITIONS.

- INTERVIEWED INCUMBENT CAPTAINS AND LIEUTENANTS AND THEIR SUPERVISORS, AND RODE WITH AND OBSERVED OTHER ON-DUTY OFFICES.

- WROTE JOB-ANALYSIS QUESTIONNAIRES AND ADMINISTERED THEM TO MOST OF THE INCUMBENT BATTALION CHIEFS, CAPTAINS, AND LIEUTENANTS.
THE FACTS (cont.)

DEVELOPMENT OF THE EXAM / TESTING PROCESS (cont.)

- DEVELOPED MULTIPLE-CHOICE WRITTEN EXAMINATIONS, WHICH WERE WRITTEN BELOW A 10TH GRADE READING LEVEL.

- COMPILED A LIST OF TRAINING MANUALS, DEPARTMENT PROCEDURES, AND OTHER PROCEDURES TO USE AS SOURCES FOR THE TEST QUESTIONS.
THE FACTS (cont.)

DEVELOPMENT OF THE EXAM / TESTING PROCESS (cont.)

- IOS ALSO DEVELOPED THE ORAL EXAMINATIONS, CONCENTRATING ON JOB SKILLS AND ABILITIES.

  - ASSEMBLED A POOL OF 30 ASSESSORS WHO WERE SUPERIOR IN RANK TO THE POSITIONS BEING TESTED, AND TRAINED THEM ON HOW TO ADMINISTER THE ORAL EXAMINATIONS.

  - AT THE CITY'S INSISTENCE, ALL ASSESSORS CAME FROM OUTSIDE OF CONNECTICUT BECAUSE OF CONTROVERSY OVER PREVIOUS EXAMINATIONS.
THE FACTS (cont.)

DEVELOPMENT OF THE EXAM / TESTING PROCESS (cont.)

- THE ASSESSORS WERE BATALLION CHIEFS, ASSISTANT CHIEFS, AND CHIEFS FROM DEPARTMENT OF SIMILAR SIZES TO NEW HAVEN'S THROUGHOUT THE COUNTRY.

- 66% OF THE PANELISTS WERE MINORITIES, AND EACH OF THE NINE PANELS CONTAINED TWO MINORITY MEMBERS.
THE FACTS (cont.)

THE RESULTS

• WHITE CANDIDATES PERFORMED BETTER THAN AFRICAN-AMERICAN CANDIDATES ON THE EXAMS.

  – ALL 10 CANDIDATES ELIGIBLE FOR IMMEDIATE PROMOTION TO LIEUTENANT WERE WHITE (ALTHOUGH SUBSEQUENT VACANCIES WOULD HAVE ALLOWED AT LEAST 3 BLACK CANDIDATES TO BE CONSIDERED FOR PROMOTION TO LIEUTENANT).

  – 9 CANDIDATES — 7 WHITES AND 2 HISPANICS, BUT NO AFRICAN-AMERICANS — WERE ELIGIBLE FOR AN IMMEDIATE PROMOTION TO CAPTAIN.
THE FACTS (cont.)

THE AFTERMATH

- THE CITY'S CONTRACT WITH IOS CONTEMPLATED THAT, AFTER THE EXAMINATIONS, IOS WOULD PREPARE A TECHNICAL REPORT THAT ANALYZED THE RESULTS.

- CITY OFFICIALS REQUESTED A MEETING WITH IOS'S VICE PRESIDENT INSTEAD

- CITY OFFICIALS EXPRESSED CONCERNS THAT THE TESTS HAD DISCRIMINATED AGAINST MINORITY CANDIDATES, BUT IOS'S VICE PRESIDENT DEFENDED THE VALIDITY OF THE EXAMS.
RICCI V. DESTEFANO, 129 S. Ct. 2658 (2009)

THE FACTS (cont.)

POLITICS

• LOTS AND LOTS OF POLITICS — 7-1/2 PAGES OF THE COURT’S OPINION.
THE CITY’S DECISION

• THE CIVIL SERVICE BOARD VOTED NOT TO CERTIFY THE RESULTS OF THE EXAMINATIONS.

• THE CITY ARGUED THAT THE DECISION WAS BASED ON A GOOD-FAITH BELIEF THAT IT FEARED BEING SUED BY AFRICAN-AMERICAN EMPLOYEES ON A DISPARATE IMPACT CLAIM UNDER TITLE VII.
THE FACTS (cont.)

THE LAWSUIT

• THE CITY ARGUED THAT IT COULD NOT BE HELD LIABLE UNDER TITLE VII'S DISPARATE-TREATMENT PROVISION FOR ATTEMPTING TO COMPLY WITH TITLE VII'S DISPARATE-IMPACT PROVISION

• THE RICCI FIREFIGHTERS COUNTERED THAT THE CITY'S GOOD-FAITH BELIEF WAS NOT A VALID DEFENSE TO ALLEGATIONS OF DISPARATE TREATMENT.

• FOLLOWING DISCOVERY, THE PARTIES FILED CROSS-MOTIONS FOR SUMMARY JUDGMENT.
THE FACTS (cont.)

• THE DISTRICT COURT GRANTED SUMMARY JUDGMENT FOR THE CITY, FINDING THAT THE CITY'S ACTION WERE NOT "BASED ON RACE" BECAUSE THE TEST RESULTS WERE DISCARDED AND NO ONE WAS PROMOTED.

• THE DISTRICT COURT CONCLUDED THAT THE CITY'S MOTIVATION TO AVOID MAKING PROMOTIONS BASED ON A TEST WITH A RACIALLY DISPARATE IMPACT DID NOT, AS A MATTER OF LAW, CONSTITUTE DISCRIMINATORY INTENT UNDER TITLE VII.

• THE DISTRICT COURT'S HOLDING WAS AFFIRMED BY THE SECOND CIRCUIT WITHOUT ANALYSIS
RICCI V. DESTEFANO, 129 S. Ct. 2658 (2009)

THE ISSUE BEFORE THE SUPREME COURT

• WHETHER THE CITY'S STATED PURPOSE OF AVOIDING DISPARATE-IMPACT LIABILITY EXCUSES WHAT OTHERWISE WOULD CONSTITUTE PROHIBITED DISPARATE-TREATMENT DISCRIMINATION.
**THE HOLDING**

THE SUPREME COURT HELD

- THAT THE CITY'S ACTION IN DISCARDING THE RESULTS OF THE PROMOTIONAL EXAMS WERE BASED ON RACE

- THEREFORE, THE COURT HELD, THE CITY'S ACTION WOULD VIOLATE TITLE VII'S DISPARATE-TREATMENT PROHIBITION ABSENT SOME VALID DEFENSE

THE HOLDING (cont.)

THE SUPREME COURT HELD

• FEAR OF LITIGATION – BY ITSELF – COULD NOT JUSTIFY
  THE CITY'S RELIANCE ON RACE TO THE DETRIMENT OF
  THOSE FIREFIGHTERS WHO HAD PASSED THE EXAMS
  AND QUALIFIED FOR PROMOTIONS.

  – THE COURT SPECIFICALLY REJECTED THE CITY'S
    ARGUMENT THAT AN EMPLOYER'S GOOD-FAITH BELIEF
    THAT ITS ACTION WERE NECESSARY TO COMPLY WITH
    TITLE VII'S DISPARATE IMPACT PROVISION – WITHOUT
    MORE – SHOULD BE ENOUGH TO JUSTIFY RACE-
    CONSCIOUS CONDUCT
THE HOLDING (cont.)

THE SUPREME COURT HELD THAT

• **UNDER TITLE VII, AN EMPLOYER CAN ENGAGE IN INTENTIONAL DISCRIMINATION FOR THE ASSERTED PURPOSE OF AVOIDING (OR REMEDYING) AN UNINTENTIONAL DISPARATE IMPACT ONLY IF THE EMPLOYER HAS AN OBJECTIVE, STRONG BASIS IN EVIDENCE TO BELIEVE IT WOULD BE SUBJECT TO DISPARATE IMPACT LIABILITY IF IT FAILED TO TAKE THE RACE-CONSCIOUS, DISCRIMINATORY ACTION.**
THE HOLDING (cont.)

- THE COURT SPECIFICALLY **REJECTED** THE PLAINTIFFS' ARGUMENT THAT THE CITY COULD NOT TAKE ANY RACE-BASED ADVERSE EMPLOYMENT ACTION IN ORDER TO AVOID DISPARATE-IMPACT LIABILITY – EVEN IF THE EMPLOYER KNOWS ITS PRACTICE VIOLATES THE DISPARATE-IMPACT PROVISION.

- THE COURT ALSO **REJECTED** THE PLAINTIFFS' ARGUMENT THAT AN EMPLOYER MUST, IN FACT, BE IN VIOLATION OF THE DISPARATE-IMPACT PROVISION BEFORE IT COULD USE COMPLIANCE AS A DEFENSE IN A DISPARATE-TREATMENT SUIT.
THE HOLDING (cont.)

THE SUPREME COURT HELD

• THE CITY OF NEW HAVEN'S RACE-BASED REJECTION OF THE PROMOTION TEST RESULTS COULD NOT SATISFY THE STRONG-BASIS-IN-EVIDENCE STANDARD.

• REVERSED THE LOWER COURT'S HOLDING

• ENTERED SUMMARY JUDGMENT FOR THE PLAINTIFFS IN A DISPARATE TREATMENT CASE.
THE HOLDING (cont.)

THE SUPREME COURT ACKNOWLEDGED

• THE CITY HAD STATED A PRIMA FACIE CASE OF DISPARATE-IMPACT LIABILITY (i.e., HAD MADE A THRESHOLD SHOWING OF A SIGNIFICANT STATISTICAL DISPARITY)

– THE PASS RATE OF MINORITIES FELL WELL BELOW THE 80% (OR 4/5'S) STANDARD SET BY THE EEOC TO IMPLEMENT THE DISPARATE IMPACT PROVISION OF TITLE VII.
**RICCI V. DE STEFANO,** 129 S. Ct. 2658 (2009)

**THE HOLDING (cont.)**

- HOWEVER, THE COURT HELD THAT A THRESHOLD SHOWING OF SIGNIFICANT STATISTICAL DISPARITY -- WITH 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.
RICCI V. DESTEFAANO, 129 S. Ct. 2658 (2009)

THE HOLDING (cont.)

THE SUPREME COURT HELD THAT THE CITY HAD TO FURTHER SHOW A STRONG BASIS IS IN EVIDENCE FOR BELIEVING

• THAT THE EXAMS AT ISSUE WERE NOT JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY; OR

• THAT THERE EXISTED AN EQUALLY VALID, LESS-DISCRIMINATORY ALTERNATIVE THAT SERVED THE CITY’S NEEDS BUT THAT THE CITY REFUSED TO ADOPT.

THE COURT, HOWEVER, FOUND THAT THERE WAS NO "SUBSTANTIAL BASIS IN EVIDENCE" THAT THE TEST WAS DEFICIENT IN EITHER RESPECT.
THE HOLDING (cont.)

THE COURT HELD THAT THERE WAS NO SUBSTANTIAL BASIS IN EVIDENCE THAT THE TEST WAS NOT JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY BECAUSE

• OF THE STEPS TAKEN BY IOS TO DEVELOP AND ADMINISTER THE TESTS AND THE "PAINSTAKING ANALYSES" OF THE QUESTIONS ASKED TO ASSURE THEIR RELEVANCE TO THE PROMOTIONAL POSITION; AND

• THE CITY'S TURNING "A BLIND EYE" TO EVIDENCE SUPPORTING THE VALIDITY OF THE EXAMS.
THE COURT ALSO HELD THAT THERE WAS NO STRONG BASIS IN EVIDENCE SHOWING AN EQUALLY-VALID, LESS-DISCRIMINATORY TESTING ALTERNATIVE THAT THE CITY, BY CERTIFYING THE TEST RESULTS, WOULD HAVE REFUSED TO ADOPT.

- THE CITY PRODUCE NO EVIDENCE THAT THE WRITTEN / ORAL WEIGHTING ACTUALLY USED WAS INDEED ARBITRARY, OR THAT A DIFFERENT WEIGHTING WOULD BE AN EQUALLY-VALID WAY TO DETERMINE CANDIDATES ARE QUALIFIED FOR PROMOTION
THE HOLDING (cont.)

• A DIFFERENT INTERPRETATION OF THE CHARTER PROVISION LIMITING PROMOTIONS TO THE HIGHEST-SCORING APPLICANTS WOULD HAVE PRODUCED LESS-DISCRIMINATORY RESULTS WOULD HAVE VIOLATED TITLE VII'S PROHIBITION OF RACE-BASED ADJUSTMENT OF TEST RESULTS

• AN ASSESSMENT CENTER WAS NOT AN OPTION BASED ON THE STATEMENTS IN EVIDENCE.
RICCI V. DESTEFANO, 129 S. Ct. 2658 (2009)

CONSTITUTIONAL IMPLICATIONS

THE COURT HELD THAT BECAUSE THE CITY HAD NOT MET ITS BURDEN UNDER TITLE VII, THE COURT DID NOT NEED TO DECIDE WHETHER A LEGITIMATE FEAR OF DISPARATE IMPACT IS EVER SUFFICIENT TO JUSTIFY DISCRIMINATORY TREATMENT UNDER THE CONSTITUTION.

• THE RICCI FIREFIGHTERS ALSO HAD ASSERTED A CLAIM OF RACE DISCRIMINATION UNDER THE EQUAL-PROTECTION CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION

EMPLOYMENT TESTS AND OTHER EMPLOYMENT STANDARDS

EMPLOYEE SELECTION PROCEDURES INCLUDE

- PEN-AND-PAPER TESTS
- PERFORMANCE TESTS
- INFORMAL OR CASUAL INTERVIEWS
- UNSCORED APPLICATION FORMS
- TRAINING PROGRAMS
- PROBATIONARY PERIODS
- PHYSICAL, EDUCATIONAL, AND EXPERIENCE REQUIREMENTS
EMPLOYMENT TESTS AND OTHER EMPLOYMENT STANDARDS

EMPLOYMENT DECISIONS INCLUDE

- HIRING
- MEMBERSHIP (e.g., Unions)
- RECRUITING AND REFERRALS
- SELECTION FOR TRAINING
- TRANSFER
- PROMOTION
- RETENTION
DISPARATE IMPACT CLAIMS

• ATTACK FACIALLY-NEUTRAL EMPLOYMENT PRACTICES THAT NEVERTHELESS OPERATE TO EXCLUDE DISPROPORTIONATE NUMBERS OF STATUTORILY-PROTECTED PERSONS.

• DO NOT REQUIRE PROOF OF INTENT TO DISCRIMINATE
CLAIMS OF DISPARATE IMPACT UNDER TITLE VII ARE GOVERNED BY THE STATUTE — 42 U.S.C. § 2000e-2(k)

AN UNLAWFUL EMPLOYMENT PRACTICE BASED ON DISPARATE IMPACT IS ESTABLISHED IF

• THE PLAINIFF DEMONSTRATES THAT AN EMPLOYER USES A PARTICULAR EMPLOYMENT PRACTICE THAT CAUSES A DISPARATE IMPACT ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN; AND

• THE DEFENDANT FAILS TO DEMONSTRATE THAT THE CHALLENGED EMPLOYMENT PRACTICE IS JOB RELATED FOR THE POSITION IN QUESTION AND CONSISTENT WITH BUSINESS NECESSITY.
CLAIMS OF DISPARATE IMPACT UNDER TITLE VII ARE GOVERNED BY THE STATUTE — 42 U.S.C. S § 2000e-2(k)

• THE PLAINTIFF MUST DEMONSTRATE THAT EACH PARTICULAR CHALLENGED EMPLOYMENT PRACTICE CAUSES A DISPARATE IMPACT

  ○ EXCEPTION: IF THE PLAINTIFF CAN DEMONSTRATE THAT THE ELEMENTS OF A DEFENDANT'S DECISIONMAKING PROCESS ARE NOT CAPABLE OF SEPARATION FOR ANALYSIS, THE DECISIONMAKING PROCESS MAY BE ANALYZED AS ONE EMPLOYMENT PRACTICE.

• IF THE EMPLOYER DEMONSTRATES THAT A SPECIFIC EMPLOYMENT PRACTICE DOES NOT CAUSE THE DISPARATE IMPACT, THE EMPLOYER IS NOT REQUIRED TO DEMONSTRATE THAT SUCH PRACTICE IS REQUIRED BY BUSINESS NECESSITY.
CLAIMS OF DISPARATE IMPACT UNDER TITLE VII ARE GOVERNED BY THE STATUTE — 42 U.S.C. S § 2000e-2(k)

ALTERNATIVELY, AN UNLAWFUL EMPLOYMENT PRACTICE BASED ON DISPARATE IMPACT IS ESTABLISHED IF

• THE PLAINTIFF DEMONSTRATES THAT THERE IS AN ALTERNATIVE EMPLOYMENT PRACTICE AVAILABLE THAT ACHIEVES THE SAME BUSINESS GOALS WITH LESS DISCRIMINATORY IMPACT; AND

• THE PLAINTIFF DEMONSTRATES THAT THE EMPLOYER REFUSES TO ADOPT SUCH ALTERNATIVE EMPLOYMENT PRACTICE.

THE PLAINTIFF'S DEMONSTRATION WITH RESPECT TO THE CONCEPT OF AN "ALTERNATIVE EMPLOYMENT PRACTICE" SHALL BE IN ACCORDANCE WITH THE LAW AS IT EXISTED ON JUNE 4, 1989 (i.e., PRIOR TO WARDS COVE)
CLAIMS OF DISPARATE IMPACT UNDER THE ADEA ARE GOVERNED BY CASE LAW

AN UNLAWFUL EMPLOYMENT PRACTICE BASED ON DISPARATE IMPACT IS ESTABLISHED IF

• THE PLAINTIFF DEMONSTRATES THAT AN EMPLOYER USES A PARTICULAR EMPLOYMENT PRACTICE THAT CAUSES A DISPARATE IMPACT ON THE BASIS OF AGE; AND

• THE EMPLOYER FAILS DEMONSTRATE THAT THE ADVERSE IMPACT IS BASED ON OR OTHERWISE ATTRIBUTABLE TO A REASONABLE FACTOR(S) OTHER THAN AGE DISCRIMINATION.
CLAIMS OF DISPARATE IMPACT UNDER THE ADEA ARE GOVERNED BY CASE LAW

LIKE TITLE VII,

- THE PLAINTIFF MUST ISOLATE AND IDENTIFY A SPECIFIC EMPLOYMENT PRACTICE THAT IS ALLEGEDLY RESPONSIBLE FOR ANY STATISTICAL DISPARITY RISING TO THE LEVEL OF AN ADVERSE IMPACT.

UNLIKE TITLE VII, HOWEVER,

- THE BUSINESS-NECESSITY TEST HAS NO PLACE IN AN ADEA DISPARATE-IMPACT ANALYSIS

- SO LONG AS THE EMPLOYER’S ONE SELECTED WAY WAS NOT UNREASONABLE, WHETHER THERE ARE OTHER REASONABLE WAYS FOR THE EMPLOYER TO ACHIEVE ITS GOAL IS IRRELEVANT
DISPARATE IMPACT CLAIMS — TITLE VII vs. ADEA

• ADEA — JURY TRIAL

• ADEA — LIQUIDATED DAMAGES AWARD ARE NOT SPECIFICALLY EXCLUDED BUT, THEORETICALLY, THE "WILLFUL" STANDARD OF PROOF SEEMINGLY WOULD MAKE RECOVERY DIFFICULT

• TITLE VII — NO JURY TRIAL

• TITLE VII — NO COMPENSATORY OR PUNITIVE DAMAGES AVAILABLE

• TITLE VII — SUPREME COURT TO ADDRESS TIMELINESS ISSUE NEXT TERM
IMPACT OF *RICCI*
ON REDUCTIONS-IN-FORCE

EMPLOYERS ALSO CONDUCT DISPARATE-IMPACT ANALYSES IN PREPARING FOR REDUCTIONS IN FORCE

• RACE / ETHNICITY

• AGE

• SEX
IMPACT OF *RICCI*
ON REDUCTIONS-IN-FORCE

TITLE VII APPLIES EQUALLY TO ALL PROTECTED GROUPS:

• ALL RACES / ETHNIC GROUPS

• BOTH SEXES

• A CLAIM OF DISCRIMINATION BASED ON A RIF MAY BE ASSERTED BY ANY PERSON BASED ON ONE OR MORE PROTECTED CHARACTERISTICS UNDER TITLE VII -- PROVIDED THE EMPLOYER IS SUBJECT TO THE STATUTE
IMPACT OF RICCI ON REDUCTIONS-IN-FORCE

RICCI IS A DISPARATE-TREATMENT CASE

• INTENT IS KEY

• SUPREME COURT IN RICCI EMPHASIZED EMPLOYEE'S EXPECTATIONS BASED ON TIME, MONEY AND EFFORT DEDICATED TO STUDYING FOR EXAMS

• GOOD FAITH WILL BE REWARDED (HOPEFULLY)
IMPACT OF \textit{RICCI} ON REDUCTIONS-IN-FORCE

\textit{RICCI} SPECIFICALLY LIMITS ITS HOLDING TO CLAIMS UNDER TITLE VII

- TITLE VII HAS A DISPARATE-IMPACT PROVISION

- SUPREME COURT IN \textit{RICCI} WAS REQUIRED TO GIVE FULL EFFECT TO BOTH THE DISPARATE-TREATMENT AND DISPARATE-IMPACT PROVISIONS OF THE STATUTE
IMPACT OF RICCI ON REDUCTIONS-IN-FORCE

Employers obviously should seek to avoid taking employment actions that would violate either the disparate-treatment provision or the disparate-impact provision of Title VII.

Lessons from RICCI

- Title VII protects all employees
- Title VII does not permit favoring one protected group of employees over another
IMPACT OF RICCI ON REDUCTIONS-IN-FORCE

IN TAXMAN v. BOARD OF EDUCATION OF TOWNSHIP OF PISCATAWAY, THE THIRD CIRCUIT HELD THAT THE EMPLOYER'S DESIRE TO MAINTAIN RACIAL DIVERSITY WAS AN IMPERMISSIBLE FACTOR WHEN IT WAS NOT INTENDED TO EITHER REMEDY DISCRIMINATION OR THE EFFECT OF PAST DISCRIMINATION.

• BOARD LAID OFF WHITE TEACHER AND RETAINED AFRICAN-AMERICAN TEACHER

• UNITED STATES FILED AMICUS BRIEF ARGUING THAT TITLE VII PERMITS RACIAL PREFERENCES IN LAYOFFS

• THE SUPREME COURT GRANTED THE BOARD'S PETITION FOR CERT, BUT THE PARTIES SETTLED

• RICCI WOULD APPEAR TO SUPPORT TAXMAN'S HOLDING
IMPACT OF RICCI ON REDUCTIONS-IN-FORCE

RISK ASSESSMENT

RICCI TITLE VII DISPARATE-TREATMENT CLAIM:

• COMPENSATORY DAMAGES
• PUNITIVE DAMAGES
• JURY TRIAL

TITLE VII DISPARATE-IMPACT CLAIM:

• NO COMPENSATORY DAMAGES
• NO PUNITIVE DAMAGES
• NO JURY TRIAL
IMPACT OF RICCI ON REDUCTIONS-IN-FORCE

*RICCI* ARGUABLY SHOULD HAVE A MORE LIMITED IMPACT UNDER THE ADEA

- UNLIKE TITLE VII, ADEA EFFECTIVELY CREATES AN UNPROTECTED CATEGORY OF EMPLOYEES

- MAY BE MORE PROBLEMATIC FOR STATE AGE-DISCRIMINATION STATUTES THAT COVER EMPLOYEES OF ALL AGES
IMPACT OF RICCI ON REDUCTIONS-IN-FORCE

WHAT HAPPENS IF EMPLOYER DETERMINES THAT ITS RIF SELECTION PROCEDURE HAS RESULTED IN A DISPARATE IMPACT UNDER TITLE VII?

• EMPLOYER TYPICALLY DOES NOT HAVE THE OPTION OF SIMPLY NOT PROCEEDING WITH A REDUCTION-IN-FORCE AS THE CITY OF NEW HAVEN CHOSE TO DO WITH ITS PROMOTIONS.

• CAN YOU ADDRESS DISPARATE-IMPACT WITHOUT CREATING A R/CCI CLAIM?
IMPACT OF RICCI ON REDUCTIONS-IN-FORCE

IF THERE IS A DISPARATE IMPACT:

• RETRIEVE ALL MATERIALS PREVIOUSLY USED BY MANAGERS OR SUPERVISORS IN MAKING RIF SELECTIONS

• DETERMINE WHAT PROCEDURES NEED TO BE CHANGED

• APPLY NEW PROCEDURES AS MODIFIED

• CONDUCT DISPARATE-IMPACT ANALYSIS AGAIN
Ricci v. DeStefano:
Balancing Title VII Disparate Treatment and Disparate Impact Testing and Its Impact on Voluntary Compliance Actions

Strafford Publications
July 30, 2009

Presented by Teresa R. Tracy
II. Impact of Ruling on Employment Standards and Voluntary Compliance Programs

A. Use of Employment Tests

- Tests remain permissible but must be carefully constructed and validated
- Disparate impact remains an important issue

B. Other Employment Standards

- Evaluated against the same standards as an employment test
- Some have more tendency to result in disparate impact than others
- *Uniform Guidelines on Employee Selection Procedures*
II. Impact of Ruling on Employment Standards and Voluntary Compliance Programs (cont.)

D. Affirmative Action Plans

- Controversial Issue
- Focus: Outreach and Barrier Removal
- Basis: Facts and Information
- OFCCP stepping up its enforcement

E. Diversity Plans

- Voluntary diversity plans remain subject to challenge
III. Impact of Decision on Future Litigation

- Advocates on both sides are likely to find helpful language
- Actual impact on litigation may be minimal
- Open issue for government employers: equal protection under U.S. Constitution

B. Standards for Motion for Summary Judgment

Steps in evaluating disparate impact case remain largely unchanged:

- Demonstrate disparate impact
- Employer must show practice or policy was job-related and consistent with business necessity
III. Impact of Decision on Future Litigation (cont.)

- Show that the employer refused to adopt alternative that would have less disparate impact and serve the employer’s legitimate needs
- If employer makes discriminatory decision to avoid potential disparate impact, must be able to show “strong basis in evidence”

Subsequent Cases:

*Baron v. New York City Department of Education*

*United States v. City of New York*

*United States v. City of New York (firefighter case)*
III. Impact of Decision on Future Litigation (cont.)

C. Privilege Issues

- Planning can be critical
- “Advice of Counsel” defense is dangerous but tempting
- Assume that information provided to the government will be disclosed
- Deliberative process privilege
- Work product doctrine
- Attorney-client privilege
Teresa R. Tracy

Teresa Tracy is chair of Berger Kahn’s Labor & Employment Group. She has practiced exclusively in labor and employment law for 28 years and has extensive experience representing employers in wrongful termination, discrimination, harassment, wage and hour matters, class actions and traditional labor law. She also advises clients on compliance with the myriad of state and federal regulations governing employers. Ms. Tracy is the author of numerous articles. She has been selected six times by her peers as a Southern California Super Lawyer in the area of Labor and Employment. In 2005, she was named one of the “Top 75 Women Litigators” by the Los Angeles Daily Journal.

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RICCI v. DeSTEFANO:
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July 30, 2009

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II. IMPACT OF RULING ON EMPLOYMENT STANDARDS AND VOLUNTARY COMPLIANCE PROGRAMS

A. Use of Employment Tests

According to the OFCCP, professionally-developed tests can be used to make employment decisions, so long as the tests are fair and non-discriminatory. However, there are tough legal requirements that apply when tests and other assessment instruments are used to select employees. There is a guide developed by O*Net titled “Testing and Assessment: an Employer’s Guide to Good Practices” that is available on the DOL website. In addition, for all but the most basic job-related skills tests, an employer should consult knowledgeable legal counsel or a Human Resources professional before instituting any employment tests.

Most Human Resources professionals would agree that a good assessment tool or procedure maximizes the chances for getting the right fit between a job and an applicant. However, it is dangerous and usually counterproductive to place too much emphasis on only one assessment tool, e.g., making a hiring decision solely on the results of a written examination. For example, a person may state in an interview that he or she almost never arrives on time but scores the highest on a mechanical ability test. If the person is going to work on an assembly line, does the employer want to jeopardize the entire line by hiring someone who, although skilled, is likely to have a high incidence of tardiness?

B. Other Employment Assessment Tools

Any test or procedure used to measure an individual’s employment or career-related qualifications and interests can be termed a personnel assessment tool. Thus, it goes far beyond tests in the traditional sense and can include any instrument or procedure that measures samples of knowledge, skills, behavior or performance. Thus, interviews, work samples, aptitude tests, work history, minimum work qualifications (e.g., education), are all assessment tools.

Personnel assessment tools differ in purpose (hiring, promotion, training), what they are designed to measure (abilities, skills, work styles, work values, or vocational interests), what they are designed to predict (job performance, managerial potential, career success, job satisfaction, tenure), format (paper-and-pencil, work sample, computer simulation), and level of standardization, objectivity, and quantifiability (subjective evaluations, structured achievement tests, interviews, personality inventories).

All assessment tools used to make employment decisions, regardless of format, level of standardization, or objectivity, are subject to legal standards.
(Career counseling assessments used for advice and guidance are usually not subject to the same legal standards as employer decisionmaking assessment tools.)

In 1978, the EEOC, the Civil Service Commission (predecessor of the Office of Personnel Management), and the Labor and Justice Departments, jointly issued the *Uniform Guidelines on Employee Selection Procedures*. The *Guidelines* remain in effect today. They cover all employers employing 15 or more employees, labor organizations, and employment agencies, as well as contractors and subcontractors to the federal government and organizations receiving federal assistance. They apply to all tests and other procedures used to make employment decisions, including hiring, promotion, disciplinary action, and training if it leads to any of these actions. The *Guidelines* can be found at www.acd.ccac.edu/hr/DOL/60_3_toc.htm.

One of the basic principles of the *Guidelines* is that it is unlawful to use a test or selection procedure that creates adverse impact, unless justified. Adverse impact occurs when there is a substantially different selection rate among racial, gender, or ethnic groups in the decisionmaking.

The *Guidelines* can be complicated, particularly when it comes to “validation” of a test. Two qualities that are important in a test are (a) reliability (i.e., how dependably or consistently does the test measure a particular characteristic), and (b) validity (i.e., what characteristic the test measures and how well the test measures that characteristic). Any given assessment tool can be reliable but not valid, or valid but not reliable. Test developers have the responsibility of developing a test that meets both of these criteria, as well as describing what groups any test is valid, and the interpretation of scores.

However, as a general guideline, adverse impact is normally suggested when the selection rate for one group is less than 80% that of another. However, variations in sample size can affect the interpretation of the calculation, particularly where there are very large or very small groups at issue.

An assessment procedure that causes adverse impact can continue to be used only if there is evidence that (a) it is job-related for the position in question; and (b) its continued use is justified by business necessity. Business necessity is harder to satisfy than a “business purpose” test that may have been used in the past.

Another important provision under Title I of the Civil Rights Act of 1991 (Title VII is another part of this same law), relates to the use of group-based test score adjustments to maintain a representative work force. The Civil Rights Act of 1991 prohibits score adjustments, the use of different cut-off scores for different
groups of test takers, or alteration of employment-related test results based on the demographics of the test takers. These practices, sometimes called race-norming or within-group norming, had been used by some employers and government agencies in the past to avoid adverse impact.

Of course, any test must be administered, scored, and used in an even-handed and fair manner. Thus, for example, the same orientation to the test should be given to everyone, and any pre-test materials (sample questions, study materials) should be equally accessible.

In interpreting test results, there are two general methods. A "norm-referenced" test method compares the score that an applicant receives with the scores of a particular reference group (the "norm" group). The norm group generally consists of a large representative sample of individuals from specific groups, e.g., entry-level clerical employees. Thus, this method should use a test that is normed on a closely-related occupation to the one for which the test is being used.

In a criterion-referenced test, the test score indicates the amount of skill or knowledge the person taking the test has regarding a particular subject or content area. It is not used to indicate how well the person does compared to others, but rather relates solely to the test taker’s degree of competence in the specific area assessed. A particular test score is often chosen as the minimum acceptable level of competence.

Determining how to process the test results to make employment decisions is an area open to challenge. In a "rank-ordering" system, the candidates are arranged on a list from highest to lowest score based on the test results and candidates are chosen on a top-down basis. A “cut-off score” system establishes a minimum score that the candidate must have to qualify for a position; candidates who score below this cut-off generally are not considered for selection.

If the employer determines that it is necessary to use a test that may result in adverse impact, it is generally recommended that it only be used as one part of a comprehensive assessment process, to allow the employer to improve the assessment of the individual and reduce the effect of differences in average scores between groups on a single test.

D. Affirmative Action Plans

As amply shown by the amount of discussion both before and after the Supreme Court handed down its decision in Ricci, the issue of affirmative action remains highly controversial and also extremely misunderstood.
Although some earlier court decisions justifiably led many to believe that affirmative action meant “quotas” with a requirement that certain percentages of women and minorities got hired and promoted, and the workforce mirror the population (regardless of what population parameter was used), this is not the true nature of current affirmative actions.

The Office of Federal Contract Compliance Programs (OFCCP), part of the United States Department of Labor, has long been tasked with the enforcement of Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act. Taken together, these laws prohibit discrimination and require federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran. The OFCCP's website, at www.dol.gov/esa/OFCPP, contains much helpful information.

In July 2009, OFCCP announced plans to conduct 450 compliance evaluations of federal contractors in receipt of American Recovery and Reinvestment Act Funds. Although it will audit approximately 90 supply and service contractors receiving federal contracts through the Funding, it will place particular emphasis on the construction industry, due to the high percentage of Funds going to these projects.

An OFCCP audit generally includes a review of differentials in applicant flow, hiring, transfers, promotions, and terminations, as well as compensation differentials and immigration compliance. The auditor also reviews the contractor's outreach program.

Affirmative obligations for those covered by OFCCP's affirmative action obligations have three major obligations, i.e., to ensure an equal opportunity to apply and compete for jobs, to prove reasonable accommodations for disabilities unless it would cause undue hardship, and to periodically audit and evaluate personnel processes.

The basic requirements for non-construction contractors who are covered by the OFCCP are:

- don't discriminate
- post EEO posters
- include the EEO tag line in employment advertising
- maintain records
- permit OFCCP access to books and records in connection with an investigation or compliance evaluation
- file an annual EEO-1 report
By far the most misunderstood of the above requirements is the maintenance and evaluation of records, the so-called “written affirmative action plan” with its “goals.” Goals are simply not quotas.

The focus of the periodic audits is to help identify processes or areas of the employer’s procedures that may suggest the existence of disparate treatment or disparate impact impeding the hiring and promotion of women and minorities, as well as to serve as a vehicle for identifying additional outreach actions that the employer can take.

1. **Focus: Outreach and Barrier Removal**

Many employers recognize there is a real business advantage to having a diverse workforce. Customers and members of the public often like to see that an employer has employees that share the characteristics of the customer and/or member of the public, and communities can share pride in providing and supporting a diverse workforce.

Again, this does not mean quotas. Rather, it means engaging in outreach efforts to recruit applicants who may not regularly have access to employment opportunities for some reason. For example, if an employer has traditionally relied on word-of-mouth or employee referrals for new hires, it is likely that the applicants will share the characteristics of the employer’s current workforce. A rather simple outreach effort would be to post and publish employment opportunities in places where non-traditional applicants have access to the information.

Similarly, an employer can take steps to identify and address more subtle barriers. Does promotion depend heavily on who an employee knows inside or outside the organization? Are the same characteristics judged differently depending on the person being judged? If so, such barriers can be addressed. For example, “golf outings” are often viewed by women as being disadvantageous to them, since it is more likely that a male will be invited and it is perceived that important information, introductions, and bonding occurs during the golf game. Making sure that females have access to the same kind of opportunity in a setting that may be more conducive to their social, physical and/or time issues can be an example of barrier removal.

2. **Basis: Facts and Information**

Affirmative action plans, as envisioned under the OFCCP’s regulations, are based on facts and information, not speculation. They are guided by informed decisions about what the appropriate comparators are.
For example, it is not realistic to compare the percentage of managers in an organization to the percentage composition of the general population (which, after all, includes infants and other under-age persons as well as those who have retired and have no interest in working, and those who simply do not have the legitimate skills for the job). On the other hand, it is more realistic to compare the percentage of managers to the recruitment sources for those positions, both inside and outside the organization. This is a primary point that pundits on both sides of the affirmative action debate often lose sight of.

E. Diversity Plans

The author believes it would be a mistake to interpret *Ricci* as a litmus test or referendum on legitimate affirmative action efforts and other actions to create a more diverse workforce. Rather, it is a decision based on a unique set of facts presented to the Supreme Court.

The author believes that the case is equally applicable to all characteristics protected by Title VII, i.e., color, religion, sex, and national origin. It is also applicable to all analogous situations, e.g., screening criteria for new hires, or termination standards.

Because the majority in *Ricci* was careful to point out that Title VII does not prohibit an employer from considering, before administering a test of practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race”, the decision is probably not going to be applied by lower courts in a way that affects the status of most diversity groups, awareness programs, anti-discrimination training programs, and other personnel actions designed to promote the inclusion and fair treatment of under-represented groups generally.

In this case, the Supreme Court was not persuaded that the test itself was not legitimate, although it resulted in a prima facie case of disparate impact. On the captain exam, the pass rate for Caucasian candidates was 64%, and 37.5% for both African American and Hispanic candidates. On the lieutenant exam, the pass rate was 58.1% for Caucasian candidates, 31.6% for African American candidates, and 20% for Hispanic candidates. The majority opinion, however, believed there were mitigating factors, i.e., first, that the tests were job-related and consistent with business necessity, and second, that there was no viable alternative.

Justice Kennedy, who wrote for the majority, concluded that a race-based action such as the City’s action to disregard the results of the test, was 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.

Missing from the majority opinion is a meaningful consideration of facts that Justice Ginsberg's dissent pointed out, i.e., the fact that the overwhelming majority of minority applicants were "first generation firefighters" who had to rely on obtaining back-ordered textbooks to prepare for the examination, while Caucasian firefighters from generations of firefighters could more quickly obtain the texts from family members who had access to them, as well as the fact that a neighboring fire department used a different testing system that generated more standard, less racially correlated, results. She also pointed out the historical problems that non-Caucasians had experienced in trying to become firefighters and rise within the firefighter ranks.

Many commentators believe that the 5-4 decision will be addressed again in the relatively near future by a Supreme Court that has a changed composition. The currently-sitting Supreme Court Justices are perceived by many to have a decidedly "conservative" bent. Clarence Thomas has been critical of affirmative action. Anthony Kennedy has been a vocal critic of affirmative action, criticizing in a 2003 decision how race factored into university admissions. John Roberts, when he worked for the Reagan administration, advised the administration to exercise caution when showing support for "perceived" problems of gender discrimination. Antonin Scalia is 73; it is quite possible that he will leave the bench during the Obama administration. In his concurrence Justice Scalia argued that disparate impact may not even be sufficient grounds for a Title VII case, and that it may be necessary to specifically prove conscious intent rather than documenting discriminatory patterns. He also suggested last year that the intent should be the basis of Voting Rights Act rulings. Samuel Alito, 59, is likely to say on the Court for the foreseeable future.

It is also quite possible that Congress will take swift action to address the implications of the Ricci decision.

III. IMPACT OF DECISION ON FUTURE LITIGATION

In Ricci, the City was tied to a union contract that gave multiple-choice exam results a weight of 60% in deciding promotions. The fact that a union contract required this testing method and weighting does not provide a defense to a claim of race discrimination under Title VII.¹

¹ The union also sued the City, but the case was dismissed. The federal judge ruled that the union could not take sides because it had an inherent conflict of
There are certainly legitimate questions about the use of written tests in some circumstances. For example, here a test might be used to measure a supervisor’s knowledge of clear-cut decisions, or even an assessment of the “least dangerous of the bad option” situations. However, probably no one would disagree with the proposition that leadership and sound decision-making under tense and dangerous conditions are far more difficult to assess in a multiple-choice format.

The majority decision in *Ricci* dodged the issue of whether the City violated the equal protection guarantee of the United States Constitution. Narrowly read, the decision addresses the question of how serious the prospect of litigation over an employment practice has to be before an employer is allowed to take action (even discriminatory action) to avoid liability. Under the majority’s opinion, a “good faith” fear of liability is not enough. On the other hand, it also rejected the firefighters’ contention that reverse discrimination could be justified only to avoid an outright collision between the two legal requirements. Instead, the majority seemed to pick a middle ground: to discriminate against majority applicants, employers will need a “strong basis in evidence” that they otherwise would have been liable under a disparate impact theory.

Thus, the decision raises the bar for disparate impact lawsuits, and employees will have a tougher time convincing the court not to throw out cases that aren’t backed by solid evidence (a “strong basis in evidence”) that an employer had some practical way to avoid the discrimination. However, it also means that employers will have to pay more attention – in advance – to the procedures used to select employees, and will be hard-pressed to simply disregard the results of those procedures when the results suggest a disparate impact and expose the employer to the real possibility of a discrimination lawsuit.

The primary impact of *Ricci* may be limited to those instances in which an employer is considering abandoning an assessment tool after it has been used. However, critics of diversity efforts will find much ammunition in the majority’s language for years to come.

This author does not believe that the law has ever required “equal results” or the selection of applicants who do not meet legitimate, job-related criteria. Rather, it requires equal opportunity with the recognition that there are systemic factors that may result in unintentional, disparate results from facially-neutral processes.

interest - all of its members paid dues, but the lawsuit would expressly serve the interests of a select few over the objections of many.
It also given fuel to the continued discussion about how to address societal conditions that may serve to hold economically-disadvantaged children (who are disproportionately minority), e.g., educational opportunities and encouragement, role models, good nutrition, and safe streets.

In the case of the New Haven firefighters, it may well be that in order to better equip the applicants to take a test on a level playing field, the test materials need to be equally available to all applicants at the same time. This could be accomplished, for example, by using a test that did not have previously wide use (thereby at least reducing the advantage to those with connections and earlier access to study materials).

B. Standards for Motion for Summary Judgment

The Ricci decision did not erase the recognition of disparate impact. Nor did it broadly change the basic analytical framework of a disparate impact case, which calls for a three-part test.

The first step is to demonstrate a disparate impact. While there is controversy about the standard for doing so (is it the 80% rule, or one that is more or less stringent), this is usually the least controversial of the steps. In some cases, however, the plaintiff is hard-pressed to identify the “practice” or “policy” that is alleged to have created the disparate impact.

The second test is to shift the burden to the employer to show that its practice or policy was “job related for the position in question” and “consistent with business necessity.”

If the employer can do so, the plaintiff may still succeed by showing that the employer refused to adopt an available alternative practice that has less disparate impact and serves the employer’s legitimate needs.

According to the Ricci decision, an employer is not allowed to engage in intentional discrimination to avoid disparate impact liability. Thus, it is clear that (a) an employer cannot avoid disparate impact liability by engaging in disparate treatment discrimination; (b) an employer need not show that it is in fact guilty of disparate impact discrimination in order to take steps that attempt to avoid that violation as a defense against disparate treatment liability; and (c) a good faith belief that it might violate the disparate impact prohibition is not going to suffice to justify race-based employment decisions.

Instead, the majority opinion borrowed a standard from Equal Protection cases and adopted the “strong basis in evidence” standard. Under this standard, actions based on race are 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. Thus, the second prong of the test, under circumstances like those involved in *Ricci*, would allow an employer to take otherwise discriminatory action if the record demonstrated that there was a strong basis in the evidence to show that its originally-intended action would have led to disparate impact liability.

The majority opinion simply found the evidence before it lacking in an evidentiary “strong basis.” It reasoned that the examinations were clearly job-related and consistent with business necessity. Furthermore, there was not a strong evidentiary record that there was an equally-valid, less-discriminatory testing alternative that the could would necessarily have refused to adopt had it certified the test results. In reaching this conclusion, the Court rejected the argument that the City could have adopted a different composite-score calculation (i.e., giving a different weight to the test results in the overall selection process) or a different interpretation of the “rule of three.”2 According to the Court, the mere suggestion of alternative test methods did not raise a genuine issue of whether these alternatives were available to the City and that they would have produced a less adverse impact.

Based on the lack of a genuine dispute of a material fact regarding whether the City had a sufficiently strong basis in evidence to believe that it would face disparate impact liability if it certified and used the test results, the Court held that Title VII did not permit the City to disregard the test results.

The Court went one step further and explained that, notwithstanding the prima facie case against it, the City could defend against a disparate impact claim on the basis that the failure to certify the test results would result in liability for disparate treatment. Presumably, the standard would be the same as for the reverse situation, i.e., the City would have to show a “strong basis in evidence” for its defense on this ground.

The Court declined to consider the issue of whether the City’s actions may have violated the Equal Protection Clause.

The Court also provided a very broad guideline for employers faced with the City’s dilemma: While a purely statistical disparity (even a very significant one) would not alone suffice to justify race-based remedial action, it is enough to trigger an investigation into what actions created the statistical disparity and the

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2 Under this rule, once the test results were certified, the department had to make promotions from the applicants with the top three scores.
likelihood that they would give rise to disparate impact liability.\textsuperscript{3} An employer can only implement a race-based solution if the investigation revealed the strong basis in evidence that the cause of the disparity was not job related and consistent with business necessity, or that there existed an equally-valid, less-discriminatory alternative that serves the employer’s needs but which the employer refused to adopt.

Several federal courts have already applied \textit{Ricci} in the context of a motion for summary judgment.

In \textit{Baron v. New York City Department of Education}, 2009 U.S. Dist. LEXIS 57515 (E.D.N.Y., 7/7/09), the court stated in dicta that \textit{Ricci} made it clear that a statistical disparity is only the “threshold showing” in a disparate impact case, and that an employer could be liable for disparate impact only if the employment examination was not job related and consistent with business necessity, or if there existed a valid, less-discriminatory alternative that served the employer’s needs but that the employer refused to adopt.

In \textit{United States v. City of New York}, 2009 U.S. Dist. LEXIS 60268 (S.D.N.Y., 7/2/09), the court made a passing reference to \textit{Ricci} but based its decision in a disparate treatment case on a factor that may be telling in future cases: the employer never filled the provisional position for which the plaintiff applied, and indeed had never filled such a position since August 2000. Furthermore, while the employer circulated a job posting for the position in June 2002, it never scheduled any interviews. Thus, the plaintiff’s disparate treatment claim failed to survive the employer’s motion for summary judgment.

Most recently, in \textit{United States v. City of New York}, E.D.N.Y. Case No. CV 07 2067, a district court in Brooklyn ruled on July 23, 2009, that New York City had \textit{discriminated} against African American and Hispanic applicants to the fire department. According to the court, the two entrance exams, used in 1999 and 2002, adversely affected minorities and had little relation to firefighting. Each of

\textsuperscript{3} In \textit{Ricci}, the City held five public hearings to obtain feedback regarding job-relatedness and alternative practices. The firm that developed the oral and written tests provided detailed information about its processes and the numerous steps taken to minimize the potential for bias. There was discussion of the lack or access to the study materials, the use of information not relevant to the work done by the City’s firefighters, and alternatives that other fire departments used that resulted in less disparate impact (e.g., a different allocation in weighting, and/or the use of test centers where the candidates’ decision-making and performance of job-related tasks could be observed). At the conclusion of the hearings, the City acted to discard the test results.
the exams contained 85 multiple-choice questions about firefighting practices: the order in which a firefighter should don gear in an alarm, what the rear of a building would look like based on its façade, the right situations in which to say “mayday” rather than “urgent” over the walkie-talkie. However, the exams also required applicants to read and understand long passages, often containing technical terms, and then answer questions about them. One question, for instance, followed a 250-word description of the use and maintenance of portable power saws and asks which type of blade must be put out of service. The choices: a) a carbide tip blade missing nine tips, b) a carbide tip blade with three broken tips; c) an aluminum blade measuring 12 inches; d) a yellow silicon carbide blade measuring 9 inches. (the correct answer was a).

The judge found that the City did not establish that the skills that the test measured were not necessary for the job. The judge wrote that in creating the test, the city convened a panel of firefighters who identified 21 “task clusters” to be tested, like evaluating a fire scene or searching for victims, and 18 “abilities” such as memorization, deductive reasoning and spatial orientation. The panel determined that only half of the abilities could be tested in a multiple choice format, and two abilities that the panel ranked as most important – oral comprehension and oral expression – were omitted because it was not feasible to conduct interviews with thousands of applicants. According to court documents, an employee in the City’s Department of Citywide Administrative Services interviewed 6 firefighters about what might make a good employee, then had 10 more add ideas. These were then converted into exam questions – but there was no objective, research-based inquiry into whether the final questions screened for or predicted actual job performance. In later depositions, the panel members showed a considerable degree of confusion about the process and definitions of abilities the members were supposed to evaluate. For example, one panel member said he “probably didn’t know” what inductive reasoning meant when he rated its importance to the job. Others were unsure of the meaning of “problem sensitivity,” “visualization,” “time sharing,” and other skills the test was supposed to measure. According to the judge, the city had demonstrated “only a minimal relationship between the content of its examinations and the content of the job of firefighter.” These serious failings culminated in the city’s decision to use the problem-riddled examinations to impossibly fail and arbitrarily rank firefighter candidates. He noted that the city took “significantly fewer steps” to develop the test than New Haven did in the Ricci case. He went on to say that the case before him proved that “when an employment test is not adequately related to the job for which it tests – and when the test adversely affects minority groups – we may not fall back on the notion that better test takers make better employees.”

The district court took pains to reference Ricci early in its 93-page decision “not because the Supreme Court’s ruling controls the outcome in this case,” but
"precisely to point out that it does not." The court stated that the Ricci decision confronted the "narrow issue" of whether the City could defend its disparate treatment of white firefighters by asserting that it did so in a good faith effort to voluntarily comply with Title VII's ban on disparate impact against a protected group. In contrast, the case before him asked the separate question of whether the plaintiffs showed the two entry-level exams "actually had" a disparate impact on minority candidates.

Thus, as a practical matter, the Ricci decision may not have much application to a broad range of other employment decisions or employment litigation. Employers remain well advised to use carefully and well-thought out practices and procedures to make employment decisions designed to avoid both disparate treatment and disparate impact, i.e., that give a fair opportunity for all individuals regardless of race.

The decision will most likely have a major impact on the developers of standardized tests who, in order to sell their tests, will have to persuade employers that the use of a particular test in a given situation will not expose the employer to adverse impact exposure (and employers will have to carefully consider if and what test to use). This may drive the cost of tests up. Developers of written tests should pay particular attention to the Ricci discussion of whether the test was job-related and consistent with business necessity, particularly the emphasis that was placed on the detailed steps the City had taken to develop and administer the test after extensive analyses of the positions involved. The City had hired a consulting firm to perform the test. The firm had designed numerous promotion tests for firefighters across the country. The firm's test wasn't canned; it was based on the firm's on-site evaluation of what the City's firefighters and their officers actually did on a daily basis. After observing the inner workings of the City's firefighters over time, the firm's consultants designed the promotion tests in question. The contract between the City and the consulting firm required the firm to prepare a technical report consistent with EEOC test validation guidelines. Minority firefighters placed a significant role in the development of the procedures. The source material from which the questions were drawn was deemed appropriate, and the City had entertained challenges to the validity of particular questions (none of which were identified in any of the Court's opinions). Furthermore, the City's outside consultants had detailed information available to establish the validity of the questions, if challenged.4

4 Once the City saw the results, it told the firm not to prepare the technical report, although the firm maintained that its procedures were racially neutral and its report found that a legitimate, nondiscriminatory test had been used.
It also obviously has a significant impact on the kind of evidence that an employer will need to develop if it feels the need to throw out the results of a test that it previously decided to use.

As long as the employer can show that the test is job-related and consistent with business necessity – both standards that have long been the law – the employer should use the test results. Thus, the case emphasizes the need for solid decisionmaking in advance of testing. However, if for any reason the employer does not like the ramifications of the test results, it better have a “solid basis in evidence” for not using those results.

At the same time, in those cases in which an employer decides to use race-based selection criteria, it will be up against a standard that is not really specific or well-defined. Thus, future cases will have to sort out what these requirements mean in concrete situations.

Furthermore, one of the unanswered questions that remains is whether government employers, even if they have a “strong basis in evidence” that they think will justify making a race-based job selection, can escape liability under the Constitution. The Court said explicitly that it was not ruling on the question of whether compliance with that standard would satisfy the Constitution’s command of racial equality.5

D. Privilege Issues

One of the first decisions in any internal investigation is whether and how to conduct the investigation with respect to protections offered by the attorney-client privilege and work product doctrine.

Counsel (both inside and outside) should be consulted on this important issue. Assuming that the decision is made to take advantage of all possible protections, the investigation must be carefully structured to avoid losing the protections through inadvertent discussions and disclosures. This will generally mean that counsel and their staff (whether inside or outside the company) will be involved in developing, analyzing, discussing, and presenting the information.

It is likely that at some point in the administrative stage or later litigation, some or all of the information developed will be disclosed to a governmental agency and perhaps even the other side. While this may require at least a partial waiver of the protections afforded by the attorney-client privilege, attorney work

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5 The Constitutional issue only affects governments. Private employers are not bound by this Constitutional requirement.
product should be carefully protected. Thus, it is important to include the person identified as the person who will ultimately testify about the information in the development of the information.

The most likely participants in the investigation include:

1. Internal company resources with critical expertise who will make good witnesses, if necessary (e.g., Human Resources, Payroll, IT)

2. Consultants and testifying experts

3. Subject matter experts

Discussions with and among these individuals must be conducted so as to protect against losing the privileged status of the discussion.

Furthermore, while the “advice of counsel” defense may serve to blunt the effect of the agency’s (or later, an employee/plaintiff’s) attack on the reasons for the employer’s decisions and perhaps serve as the basis for arguing that punitive damages should not be awarded, the use of this defense may waive the attorney-client privilege even as to trial counsel. Thus, this issue should be carefully considered in deciding who as counsel should be involved in the investigation and advice, the jurisdiction in which any action may be litigated, and the likelihood that the “advice of counsel” defense will be used.

Cases that have considered the “advice of counsel” defense include:

» In re Seagate Technology, LLC, 2007 U.S. App. LEXIS 19768 (Fed. Cir. 2007) (as a general proposition, asserting the advice of counsel defense and disclosing opinions of opinion counsel do not constitute waiver of the attorney-client privilege for communications with trial counsel)


159 F.R.D. 361 (D. Mass. 1995) (waiver extended to trial counsel only for communications contradicting or casting doubt on the opinions asserted)

» Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999) (employer contended that it consulted with its attorneys regarding the obligations imposed upon it by the FLSA, but it had not asserted and would not assert reliance on advice of counsel as a predicate for its good faith beliefs; court found that privilege had been waived and ordered limited depositions of both the trial counsel and in-house counsel based on the employer's failure to object to questions designed to elicit privileged information and failure to halt executive/deponents' responses to all such questions, and one executive indicated that the employer had solicited advice equally from these attorneys)

» Scholtis v. Eldre Corp., 441 F.Supp.2d 459 (W.D.N.Y. 2006) (employer's in limine motion to preclude the use of any testimony concerning certain conversations between its former human resources manager and its former executive vice president was denied where the statements were made in response to the human resources manager's inquiry concerning certain wage matters on behalf of a particular employee; former vice president had responded that she was told that the handbook had been gone over by the company's attorneys and everything in it was legal)

» Newman v. Countrywide Home Loans, Inc., 144 Lab. Cas. (CCH) P34, 368; (N.D.Tex. 2001) (employer denied that its conduct was willful and asserted a defense of good faith based on the advice of counsel; both its assertion of this defense and its disclosure of its attorney's opinion letters constituted waiver of the attorney-client privilege insofar as it related to communications to or from counsel seeking and giving advice with respect to the exempt or non-exempt status of account executives and the employer was thus ordered to produce documents relating to the methodology or formulae used to classify the employer's employees and documents used or relied upon in determining that the plaintiff's position as an account executive was an exempt position)

» Dawson v. New York Life Ins. Co., 901 F.Supp. 1362 (assertion of advice of counsel defense to claim to violation of FLSA resulted in waiver of privilege as to certain discovery)
Tips for Establishing and Maintaining Privileged Status

- Appropriately mark privileged documents
- Maintain privileged documents in a confidential manner
- Include counsel in interviews and discussions
- Be careful of non-privileged discussions
- Have preliminary database construction and manipulation performed by non-testifying personnel at direction of counsel
- Identify who will make and receive reports, and what type of report will be made

Discrimination laws include non-retaliation provisions. Therefore, make sure that everyone involved in the investigation is familiar with these provisions. In particular, when involved in government investigations, do not attempt to identify the employee(s) who were the basis for initiating the complaint.

Plan the scope of the investigation. Most often, the investigation will first focus on the allegations of any complaint. However, if concerns arise during the scope of the initial investigation that there may be additional violations, decide whether and to what extent to expand the investigation. Be careful that any expanded investigation is appropriately insulated from the original investigation and that it, too, is conducted in a way so as to maximize the availability of the attorney-client privilege and the work product doctrine. Do not assume that a "self-critical analysis" privilege will apply; many courts have not recognized such a privilege, and those that have recognized it have done so in limited contexts.

The investigation will almost certainly include the review of documents (e.g., personnel files, medical records), training given, and systems. If an area is lacking, consider what other information is available to "fill in the gaps."

Prepare a witness interview outline for use at the various levels and types of employees who will be interviewed. Include non-retaliation language. Make sure that the interview focuses the questions on the facts that will be important for the defense of the case.

Counsel should be involved in making reports so as to maximize available protections. It is more important in class actions to keep upper management advised due to the larger potential damages and implications for the company's manner of conducting its business. The person(s) designated to receive the reports should be cautioned about ways to avoid waiving any privilege protections.
The way in which reports are delivered can also be important. For example, where there is the likelihood of liability and high damages, it may be better to make informal, oral reports particularly if the problem is not likely to be remedied so as to minimize the possibility of a willful violation being found. Reports should be carefully worded to avoid conclusory language that will bury the company if it turns out that the report must be – or is inadvertently – disclosed.

Sample cases in which privilege issues have arisen:

» United States v. BDO Seidman, LLP, 492 F.3d 806 (7th Cir. 2007) (In the context of an IRS attempt to enforce administrative summonses against an accounting firm that allegedly failed to disclose potentially abusive tax shelters that it promoted, the court reviewed whether the attorney-client privilege was maintained through the common interest doctrine. The common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person and, in effect, extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances, i.e., where the parties undertake a joint effort with respect to a common legal interest, and the communication is made to further an ongoing enterprise. Here, the memo in question was originally addressed to the company’s outside counsel from a company employee and requested advice on a legal question. The memo was subsequently forwarded to a different law firm. The company successfully argued that it was forwarded as part of the company’s effort to coordinate with the second firm regarding a common legal position that the company and the second firm would later communicate to their joint clients and that the document remained privileged despite the fact that the second firm voluntarily disclosed the memo in response to an IRS subpoena.)

The First, Federal, Fourth, Second, Ninth and Seventh Circuits have held that litigation need not be actual or imminent for communications to be within the common interest doctrine; the Fifth Circuit has held otherwise.

» Herrman v. Gutterguard, Inc., 199 Fed. Appx. 745 (11th Cir.2006) (defendant in FLSA collective action successfully disqualified the plaintiffs’ lead counsel and his firm on the ground that a conflict of interest existed because he had previously worked at an employment defense firm which had performed a compliance audit for the parent company and affiliated companies which were now
the defendants in the case)

» *In re Qwest Communications International, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (court declined to adopt a “selective waiver rule” which would have continued the attorney-client privilege and work product protection to certain documents, despite the company’s voluntary disclosure to the SEC and DOJ).

The First, Second, Third, Fourth, and D.C. Circuits have also rejected the “selective waiver rule.”

» *Pichler v. UNITE*, 446 F.Supp.2d 353 (E.D.Pa. 2006) (The Driver’s Privacy Protection Act of 1994, 81 U.S.C.S. §§ 2721-2725 does not allow a person to acquire personal information from the motor vehicle records for the purpose of finding and soliciting clients for a lawsuit. In order for the litigation exception to apply, there must be an actual investigation, litigation must appear likely at the time of the investigation, and the protected information acquired during the investigation must be of “use” in the litigation, meaning that there is “a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding.”)

» *Colindres v. Quietflex Mfg.*, 228 F.R.D. 567 (S.D.Tex. 2005) (In this discrimination class action, the defense expert sent defense counsel an unsolicited email discussing two specific questions which the court had asked. The expert subsequently submitted his supplemental report that addressed one of the two questions he discussed in the email. The email addressed the expert’s understanding of the payroll data and the ability to use that data to calculate back pay, while taking into consideration individual variations caused by the piece rate wage. Defendants offered his expert testimony on the issue of calculating back pay. The court held that the email was not privileged and ordered that it be disclosed.)

The EEOC has taken the position that information and documents that are provided to it can be disclosed to the charging party, and at least under Title VII, has prevailed on this issue. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981) (EEOC can disclose information from a charging party’s file to that party, but not information from the files of other charging parties who had brought claims against employer, because limited disclosure enhanced EEOC’s ability to resolving charges through informal conciliation and negotiation, but Court noted
that issues concerning the Trade Secrets Act and the FOIA were not before the Court.

The courts have grappled with the issue of what information an employer can withhold from providing to the EEOC on confidentiality grounds. In general, unless the employer can prove a compelling reason, e.g., trade secret status, the courts will require production. However, an employer should, if the information is sufficiently sensitive, request a confidentiality agreement with the EEOC. Although the EEOC itself is reluctant to enter into such agreements, it is a good first step to requesting protection from the courts. The courts have demonstrated their willingness to review confidentiality issues on specific items of information, and when they believe it to be appropriate, to require the EEOC to enter into such confidentiality agreement on specified items of information.

Cases in which the courts have considered confidentiality arguments include:

» University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) (employer in Title VII case required to disclose peer review materials from an EEOC subpoena where statutory language was broad, precedent for the privilege was nonexistent, and disclosure did not infringe the right of “academic freedom” because the subpoena was content neutral).

» Adkins v. Christie, 488 F.3d 1324 (11th Cir. 2007) (medical peer review privilege did not apply in § 1983, 1981, 1985 racial discrimination case; by arguing that the physician fell below its standards, the hospital put other peer reviews at issue)

» EEOC v. HWCC-TUNICA, Inc., 2008 U.S. Dist. LEXIS 85830 (N.D. Miss. 2008) (EEOC filed motion to compel production pursuant to a demand for production of records; request sought “any and all documents used to respond to the Complaint filed in this action” as well as documents from non-party personnel files. The court found that the former was not overbroad nor did it impinge on the attorney-client privilege or attorney work product to the extent that the company internally investigated claims of discrimination as much to resolve them as to prepare for anticipated litigation but excluded from production confidential communications between defense counsel and client and documents prepared in anticipation of litigation subject to preparation of privilege log as to the latter, the court declined to require production of the entire personnel files of the employer’s former human resources personnel on the ground that it was highly unlikely that they would contain relevant
information and the EEOC had contact information for these individuals)

» **EEOC v. CRST Van Expedited, Inc.,** 2008 U.S. Dist LEXIS 28113 (N.D. Iowa 2008) (in pattern and practice litigation, the employer successfully argued that the EEOC was not entitled to the name of an employee and the name of the alleged harasser unless and until the employee indicated an intent to be included in the litigation)

» **EEOC v. Sheffield Financial LLC,** 2007 U.S. Dist. LEXIS 43070 (M.D.N.C. 2007) (in this national origin discrimination case, the employer sought discovery of medical information relating to the employee’s health care, mental health treatment, counseling, and similar medical information; the EEOC resisted, claiming that the request was overbroad, irrelevant, and that the employee’s mental state and medical history were not at issue because the EEOC was only seeking “garden-variety” compensatory damages; the court had little difficulty finding the requested discovery to be relevant to the issue of damages because the employee was seeking damages for “past and future emotional distress, humiliation, anxiety, inconvenience, and loss of enjoyment of life;” that there was no privilege that applied, and that any privacy concerns were adequately addressed through a consent protective order)

» **Martinez v. EEOC,** 2004 U.S. Dist. LEXISS 23182 (W.D. Tex. 2004) (employee sought the EEOC’s entire investigative file of his administrative charge against his former employer; EEOC produced “public information” but withheld 17 pages on the ground that it was privileged on the ground of personal privacy and confidential source (because the investigator had promised two witnesses confidentiality); court upheld withholding everything but two envelopes)

» **Venetian Casino Resort, L.L.C. v. EEOC,** 530 F.3d 925 (D.C.C. 2008) (in response to subpoena from EEOC in an ADEA case, employer submitted commercial information that it deemed and identified as confidential. The EEOC subsequently subpoenaed more documents. When the EEOC later denied the employer’s petition to revoke the subpoena, this case ensued. After finding that the details of the EEOC’s disclosure policy were unclear on the record before it, the court nevertheless concluded that the record left no doubt that the EEOC had the policy of disclosing confidential information without notice to the submitter. The court remanded the
case to the district court to enjoin the EEOC from disclosing the employer’s confidential information without adhering to the notice and other requirements of the EEOC’s regulations implementing the FOIA. The EEOC ran into trouble in this case because it had two irreconcilable policies, one of which – the Compliance Manual (Section 82) relating to the Privacy Act – apparently enabled the EEOC or, for that matter, any person asking for information, to circumvent the other regulation (29 CFR § 1610.19, et seq.) that implemented the FOIA and required pre-release notification for confidential commercial information.)

» **EEOC v. Bessemer Group, Inc.,** 105 Fed. Appx. 411 (3rd Cir. 2004) (employer lost argument that it should not have to comply with EEOC subpoena because it asserted that its practices were legal and thus the absence of a statutory violation rendered the purpose of the investigation illegitimate; court agreed with EEOC that more information was necessary before a dispositive legal determination could be made as to whether the employer was in compliance with law)

» **EEOC v. Ocean City Police Department,** 820 F.2d 1378 (4th Cir. 1987) (en banc)(quashing subpoena relating to Title VII charge because the charge was untimely)

» **EEOC v. Group Health Plan,** 212 F.Supp.2d 1094 (E.D. Mo. 2002) (quashing subpoena because the charge against the employer did not involve practices covered by the ADA)

» **EEOC v. WinCo Foods, Inc.,** 2006 U.S. Dist. LEXIS 64521 (E.D. Cal. 2006) (court rejected EEOC’s argument that employer failed to exhaust its administrative remedies by failing to object to subpoena and therefore waived objections; court held that compliance with 29 CFR sec. 1601.16(b) – which provides that any person served with subpoena who intends not to comply shall petition the issuing director – was not jurisdictional and inconsistent with 29 USC 161 which made such a petition discretionary)

This does not mean that an employer cannot take action where an employee violates the privacy rights of others. **See, e.g., Vaughn v. Epworth Villa,** 537 F.3d 1147 (10th Cir. 2008)(plaintiff filed EEOC charge alleging she was discriminatorily disciplined for errors; she later submitted the copy of the redacted medical record to prove her point. When the employer later found out about this disclosure, it terminated her. The Tenth Circuit held that the plaintiff engaged in a
“protected activity” when she submitted the unredacted medical records to the EEOC. However, because she was unable to show that others who had violated the employer’s policy – and possibly federal law protecting the confidentiality of medical records – had not been terminated, she failed to prove that her termination was unlawful retaliation.)

E. Deliberative Process Privilege

This privilege protects certain predecisional, internal agency information, such as recommendations and analysis, from disclosure during litigation. The government may withhold evidence in litigation in any of the following circumstances: (1) where a statute makes certain documents or information confidential; (2) where a privilege or objection is available to any other litigant under the Federal Rules of Civil Procedure (for example, relevance, undue burden, or attorney-client privilege); or (3) where a special privilege exists unique to the government – such as the deliberative process privilege.

The EEOC typically asserts this privilege in litigation in order to protect the confidentiality of internal, deliberative material, such as documents containing the analyses, opinions, or recommendations of enforcement unit staff, and attorney memoranda containing analysis or recommendations.

There are few cases that extensively address this privilege.

- **EEOC v. American International Group, Inc., 1994 U.S. Dist. LEXIS 9815 (S.D.N.Y. 1994)** (the court noted that the privilege only protects information which is predecisional and deliberative. It does not protect factual findings or factual material which may be severed from the deliberative portion of a report)

- **EEOC v. Fina Oil and Chemical Co., 14 F.R.D. 74 (E.D. Tex. 1992)** (court noted that since the purpose of the privilege is to protect the full and free exchange of information in the agency, the test is whether disclosure would serve only to reveal the evaluative process by which a member of the decision-making chain arrived at his/her conclusion)

- **EEOC v. Albertson’s LLC., 2007 U.S. Dist. LEXIS 32003 (D. Col. 2007)** (EEOC’s assertion of this privilege in response to a Rule 30(b)(6) deposition notice was found to be premature where not a single question had yet been asked)

- **EEOC v. Continental Airlines, 395 F.Supp.2d 738 (N.D. Ill. 2005)** (example of case in which the employer argued that even where
Although EEOC attorneys can assert this privilege in litigation on their own authority (for example, in responses to discovery requests or when defending depositions), the privilege must be formally asserted by the head of the EEOC whenever the applicability of the privilege becomes an issue before a court (for example, in connection with motions to compel, for protective orders, or to quash subpoenas.

F. Work-Product Doctrine

In EEOC v. Carrols Corp., 215 F.R.D. 46 (N.D.N.Y. 2003), the court ruled that questionnaires which the EEOC had sent to the employer's employees using a database supplied by the employer constituted the EEOC's work product, even though the questionnaires were completely filled out by the individuals and simply returned to the EEOC. Furthermore, the EEOC had offered to supply the employer with witness summaries that would serve to identify the witness and provide at least some insight into the witnesses' likely testimony. Thus, although the EEOC was ordered to provide the summaries that it had offered, but was not ordered to produce the actual questionnaires. Since the court made a ruling based on this doctrine, it did not address the EEOC's argument that the claimant communications were protected by the attorney-client privilege; however, it commented that it "is not at all clear that the EEOC has satisfied its obligation to factually demonstrate each of the recited elements" to successfully invoke that privilege.

On another matter in dispute, the Carrols court ordered the EEOC to ascertain whether it had developed statistical data relating to the incidence of sexual harassment or retaliation complaints in workforces comparable in size, turnover rate, dispersion or working conditions similar to that of the employer, rejecting the EEOC's work product doctrine argument.

G. Attorney-Client Privilege

The EEOC can also assert an attorney-client privilege.

Numerous cases have held that the EEOC bears the burden of establishing which allegedly aggrieved parties it represents and the bases upon which the EEOC claims to have an attorney-client relationship with the party. This can involve an evaluation of the "client's" indication of any desire for such a relationship, as well as when such a relationship was actually established.
Some cases that have reviewed this question include:

» **EEOC v. Int'l Profit Assocs.,** 206 F.R.D. 215 (N.D. Ill. 2002) (the court found that certain allegedly aggrieved employees had established an attorney-client relationship with the EEOC. In doing so, however, the court did not rely merely on the fact that the EEOC claimed that the particular employees were among the allegedly aggrieved parties; instead, the court noted that the women had "contacted the EEOC via returned questionnaires or telephone calls" and that "each woman identified as a class member was asked if she wished the EEOC to act on her behalf in this lawsuit and each class member replied in the affirmative.")

» **EEOC v. Johnson & Higgins, Inc.,** 1998 U.S. Dist. LEXIS 17612, (S.D.N.Y. 1998) (holding that in connection with an EEOC enforcement action '[w]hether a privileged attorney-client relationship exists rests upon the client's intent to seek legal advice and the client's belief that he is consulting an attorney... The burden of sustaining the privilege is on the proponent - here, the EEOC")

» **EEOC v. Chemtech Int'l Corp.,** 1995 U.S. Dist. LEXIS 21877 (S.D. Tex. 1995) (finding that an attorney-client relationship existed between an aggrieved party and the EEOC based on an affidavit from the client stating that he believed that an attorney-client relationship existed)

» **EEOC v. Georgia-Pacific Corp.,** 1975 U.S. Dist. LEXIS 15377 (D. Ore. 1975) (finding an attorney-client relationship based on the contents of the client's letters clearly indicating that she was contacting the EEOC litigation center for expert legal advice and that she expected her communications to remain confidential). See also, **EEOC v. HBE Corp.,** 64 Fair Empl. Prac. Cas. (BNA) 1518 (E.D. Mo. 1994), rev'd in part on other grounds, 135 F.3d 543 (8th Cir. 1998); **EEOC v. Collegeville/Imagineering Ent.,** 2007 U.S. Dist. LEXIS 3764 (D. Ariz. 2007)

» **Equal Employment Opportunity Comm'n v. Morgan Stanley & Co., Inc.,** 206 F.Supp.2d 559, 561 (S.D.N.Y 2002) ("[t]he case law is not definite regarding the moment when the EEOC enters into an attorney-client relationship with the members of the class it seeks to represent." The United States Supreme Court has made clear that any order limiting communications between parties and potential class members should be based on "a clear record and specific
findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981))

» *EEOC v. Albertson's Inc.*, 2006 U.S. Dist. LEXIS 73278 (D. Col. 2006) (the court considered a motion by the EEOC to prohibit defense counsel from contacting allegedly aggrieved parties outside of the presence of the EEOC’s lawyers. It denied the EEOC’s request. The EEOC’s actions merely in filing an enforcement case and identifying a group of people as being among the allegedly aggrieved parties, without more, is insufficient to create an attorney-client relationship between the allegedly aggrieved parties and the EEOC. The case cites numerous prior cases which will be helpful to defense counsel on this issue)

» *EEOC v. TIC*, 90 Fair Empl. Prac. Cas. (BNA) 737 (E.D. La. 2002) (considered the EEOC’s motion for protective order in which it asked that the employer be precluded from engaging in ex parte communications with all potential claimants in the action. The EEOC argued that although it did not have an attorney-client relationship with all potential claimants, it was entitled to invoke the attorney-client privilege and the American Bar Association’s Model Rule of Professional Conduct 4.2 to prevent the employer from talking with potential claimants because the EEOC represents all claimants’ interests in this action. After reviewing prior judicial decisions on this issue, the court concluded that the EEOC had simply not provided evidence to support its position. In addition, since the EEOC was suing with respect to applicants who had not been hired, the fear of retaliation was minimal)
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