

## What the *Ricci v. DeStefano* Case Means for Women's Rights

In *Ricci v. DeStefano* (07-1428), the Supreme Court held that where an employer seeks to set aside what it believes to be a discriminatory test or practice, the employer must have “a strong basis in evidence” – that is, that the employer will be subject to Title VII liability because the test adversely impacts individuals based on their sex, race, national origin or religion, and that the test is not job-related or consistent with business necessity,” or that there was “an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused to adopt.”

The Court’s ruling creates a new hurdle for employers that wish to voluntarily avoid the use of discriminatory tests. But the ruling recognized that consistent with this heightened standard employers are still obligated by Title VII to take steps to remove both intentional discrimination and unjustified discriminatory practices. It therefore is critical that employers identify effective ways to craft fair entry and promotional exams to ensure that Title VII remains an effective tool to open doors previously closed to employment to women and people of color.

Women’s entry into nontraditional occupations, such as firefighting, police work or construction, was made possible in large part by challenges to a variety of recruitment, hiring, and promotion practices that adversely affected women – challenges brought under the Title VII “disparate impact” theory of discrimination – that likely would have otherwise remained unchanged. Importantly, the Court’s decision preserves such challenges and requires on employers to continue to ensure that their tests and other selection criteria do not artificially exclude women or minorities.

### I. Background on *Ricci v. DeStefano*

In 2003, the City of New Haven administered written and oral promotional examinations for captain and lieutenant positions in its fire department. Based on the results, no Hispanic or African American applicants were eligible for the available lieutenant positions, and only two Hispanic and no African Americans were eligible for the captain positions. And no women of any race were eligible for promotion. Following hearings before the City’s Civil Service Board, the Board determined that it should not certify the exam results for promotions, believing that the City could be in violation of Title VII of the Civil Rights Act of 1964, which bars discrimination in employment based on race, color, sex, national origin and religion, if it made promotions based on the results of a flawed exam..

The City would not have been able to justify its use of the exam if it could not show that the exam was both job-related and consistent with its business needs. The City also considered testimony about alternative approaches to the exam. Testing experts offered evidence that other methods of testing candidates for promotion were available and

suggested that alternative tests might not have an adverse effect on minority candidates. Twenty white firefighters, including one Hispanic firefighter, filed suit, claiming that the decision by the City to not certify the results was reverse discrimination.

The district court rejected the firefighters' arguments that the City was required to certify the results of a test that it believed violated Title VII. A panel of the Court of Appeals for the Second Circuit affirmed the district court decision in a summary order, and the full Circuit denied rehearing of the panel's decision. The firefighters petitioned for certiorari, and the Supreme Court heard oral argument in the case in April, 2009.

The Supreme Court's decision that employers must have "a strong basis in evidence" before discarding a discriminatory test or practices represents a shift in the standard traditionally guiding employers confronting discriminatory practices and potentially undermines the decades of efforts to expand opportunities for women in nontraditional areas of employment.

## **II. Disparate Impact Cases Have Expanded Opportunities for Women**

Employment practices that impose a disparate impact, like the promotional test used in *Ricci*, have closed opportunities for women in nontraditional fields. In some cases, a practice disadvantages women without any relationship to job performance. Indeed, in such a case, a seemingly neutral practice may actually conceal an employer's intent to bar women from a job. For example, employers have historically implemented height, weight or strength requirements in police departments, fire departments, and in correctional facilities that are not at all related to job performance; in many cases, these practices were designed to maintain predominantly male working environments.

In addition, other employment practices covered by the bar against disparate impact discrimination reflect stereotypes about the skills required for a position but, upon examination, there are alternative practices that may both satisfy job performance demands and allow for a diverse workforce. Both forms of discrimination covered by the disparate impact standard serve as roadblocks to the advancement of women in nontraditional fields.

The examples below illustrate just a few of the employment practices, including tests and other seemingly neutral requirements, that courts have struck down under the Title VII disparate impact standard.

### ***Height and Weight Requirements:***

Title VII's ban on disparate impact discrimination allowed individuals to challenge – and as a result largely eliminated – the use of height and weight requirements that disproportionately excluded women from firefighting, construction and police work. For example:

- The Supreme Court first applied the disparate impact standard to remedy sex-based disparate impact discrimination when it struck down the Alabama State Penitentiary System's minimum height and weight requirements for correctional

counselors. The requirements had a significant disparate impact on women – 33 percent of women were ineligible for the positions because of the weight requirements and 22 percent of women were ineligible because of the height requirements. And only 1.28% and 2.35% of men were excluded by the respective height and weight requirements. The Supreme Court held that Alabama offered no evidence that either height or weight were necessary qualifications for correctional counselor positions. Although the state argued that height and weight were related to the strength needed for the position, there was no evidence correlating height and weight requirements to strength. (*Dothard v. Rawlinson*, 433 U.S. 321 (1977)).

- The Ninth Circuit struck down the height requirements utilized by the Los Angeles Police Department (LAPD) because they were not job related and had a disparate impact on women, who tend to be shorter than men. (*Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979)).

### ***Strength & Physical Tests:***

The disparate impact standard has led to changes to employer physical ability and strength tests. Although some positions are physically demanding, the tests have in some cases been designed in ways that are unrelated to the job and have served as part of a strategy to exclude women from nontraditional fields.

- The Eighth Circuit recently struck down a newly implemented strength test used for workers in a sausage factory. The test was not job related; in fact, it was more physically demanding than the actual job. And it had gross disparate impact on women – the percentage of women hired to work in the sausage factory fell from 47 percent to 15 percent after the employer implemented the strength test. Women who had worked in the factory along side men for years were unable to pass it. (*Equal Employment Opportunity Comm'n v. Dial*, 469 F.3d 735 (8th Cir. 2006)).
- A court struck down a physical agility test used by a fire department in Rhode Island. The test's designer admitted that the test favored men because it emphasized upper body strength, an area where men tend to outperform women. And the fire department was unable to show that the physical test was job-related. In fact, the plaintiff performed her job as a part-time firefighter without having passed the test and there was no evidence that part-time firefighters required different skills from fulltime firefighters. (*Legault v. aRusso*, 842 F.Supp. 1479 (D.N.H. 1994)).

### ***Oral and Written Examinations That Disadvantage Women:***

The disparate impact standard has also led courts to strike down discriminatory employer written and oral examinations. These tests have in some cases been designed in ways that are unrelated to job requirements and have served as part of a strategy to exclude women from nontraditional fields.

- The Sixth Circuit struck down the examination process used by the Toledo, Ohio Police Department in hiring and promotions. The exams consisted of a combination of written tests, physical ability tests, and a structured oral interview. The court struck down both the physical test portion and the structured interview, finding that neither was valid nor appropriately job-related. The court found that the grading of the interviews “was subject to a host of errors resulting from a lack of standardized conditions, rater bias, and the lack of criteria on which to judge the degree of correctness of answers.” The court concluded that “the structured interview was rife with the potential for discrimination.” (*Harless v. Duck*, 619 F.2d 611 (6th Cir. 1980)).
- The Ninth Circuit upheld a district court verdict striking down a written examination used by the City of Los Angeles Sheriff’s Department because it had a disparate impact on female applicants. Out of 79 women who applied for promotion for Sergeant, only 10 scored high enough for consideration, and only four were ultimately promoted. In comparison, of the 1312 men who took the exam, 127 were ultimately promoted. Similar results occurred in other years of testing. (*Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991)).

#### ***Other Standards That Disadvantage Women:***

- A court struck down a construction site policy prohibiting bathroom breaks. The employer told its female crane operators to follow the model set by their male colleagues and urinate off the back of the crane while working. This policy was not job-related and had a disparate impact on the ability of women to be employed as crane operators. (*Johnson v. AK Steel Corp*, 2008 WL 2184230 (S.D. Ohio May 23, 2008)).

Because of the disparate impact standard, courts have been able to root out discriminatory exams and other requirements and in their place implement standards that do not disproportionately exclude women and that more accurately screen for qualified employees.

#### **The Supreme Court’s Decision in Ricci Allows Employers to Continue to Prevent Discriminatory Standards**

Despite the Court’s departure from traditional interpretations of Title VII, employers must continue to take steps to eliminate practices that unfairly disadvantage women in the workplace. The Court rejected arguments made by the white firefighters that an employer must be found by a court to be in violation of the disparate impact provision of Title VII before it can discard the results of a discriminatory practice. This, the Court held, was “overly simplistic” and would undermine Congress’s intent that ‘voluntary compliance be ‘the preferred means of achieving the objectives of Title VII.’” Slip Op. at 21. Instead, employers must continue to evaluate their practices and, where practices serve as discriminatory barriers for employment or promotion, must address those barriers. Indeed, there are steps that employers can take during the design phase of a test to ensure their tests are fair. And even after administering a test, if there is a strong basis

in evidence that the test would violate Title VII's disparate impact standard, employers must take steps to remedy the discrimination.

NWLC filed an amicus brief in the case, which is available here: <http://nwlc.org/pdf/NWLC-Partnership%20Ricci%20Brief%20Final.pdf>.