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Ricci v. DeStefano: What It Means for Public Employers

By Ronald Kramer

I. Introduction

While the public perhaps knows more about *Ricci v. DeStefano*[1] for Justice Sotomayor's involvement, public employers understand *Ricci* has a far greater impact than fodder for the 24-hour news cycle. In *Ricci*, the Supreme Court addressed and decided an issue that many public employers are forced to address: What does an employer do with an employment testing process where, despite its best efforts to make it non-discriminatory, the test results demonstrate it had a disparate impact on minorities? Can the employer throw out the test and try again? Does the employer violate Title VII of the Civil Rights Act of 1964 (the "Act") if it does? Will it violate the Act if it does not?

The Court has attempted to balance the Act's prohibitions on intentional and disparate impact discrimination by permitting an employer to take actions that otherwise would be considered intentionally discriminatory where it has a "strong basis in evidence" to believe that it would face disparate impact liability if it did not do so. For New Haven, Connecticut (the "City"), that meant its decision not to certify tests violated the Act because the City lacked a strong basis in evidence to believe it would face disparate impact liability.

Public employers now have a standard they can rely upon when faced with this situation. Whether any employer can apply the standard with any confidence that it will not be sued and, if sued, that it will be successful, is another question. Yet public employers must learn the lessons of *Ricci*, for its effects extend far beyond promotions and its full impact has yet to be seen.

II. The Facts

The City of New Haven is the lead player in what could be considered a modern Greek tragedy.[2] It wanted to do the right thing, to run objective fire lieutenant and captain promotional tests that would be completely non-discriminatory and also comply with: (i) civil service rules setting forth a rule of three for promotions; and (ii) a union collective bargaining agreement requiring that sixty percent of the exam be the results of a written test and the remaining forty percent be an oral exam.[3] The City hired an experienced outside consulting firm, Industrial/Organizational Solutions (IOS), to develop and administer the examinations.[4]

IOS performed job analyses, interviewed employees, did questionnaires, and even engaged in ride-alongs in developing the test. At every stage, IOS *over sampled* minority firefighters to ensure that the results would not unintentionally favor white applicants.[5] For the written exam, all of the questions came from City-approved training manuals and applicants were told the chapters from which questions were drawn and given ample time to study.[6]

From the job analyses, IOS drafted hypothetical firefighting situations to test applicants in the oral exam. To staff the nine three-member assessor panels, IOS retained experienced higher ranking fire officers from similar, out-of-state departments. IOS trained them on how to administer the exam, and each panel consisted of a Caucasian, Hispanic, and an African-American.[7]

Despite the City's efforts, the test results showed the process had a disparate impact on minorities. For the lieutenant's exam, forty-three whites, nineteen blacks and fifteen Hispanics completed the exam, yet twenty-five whites (58.1 percent), sixteen blacks (31.6 percent) and thirteen Hispanics (20 percent) passed. For the captain's exam, twenty-five whites, eight blacks and eight Hispanics completed the exam, yet sixteen whites (64 percent), three blacks (37.5 percent) and three Hispanics (37.5 percent) passed.[8] The disparities fell well below the eighty percent standard set by the EEOC to implement the Act's disparate impact provisions.[9] Moreover, given the civil service rule requiring that promotions be made from the top three candidates, if the promotion lists were certified, all

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eight vacant lieutenant positions would be filled by whites, and of the seven captain vacancies, at best two Hispanics and no blacks could be promoted.[10]

City officials were concerned, and the City's Civil Service Board (CSB) held five meetings/hearings over whether to certify the results.[11] City officials presented evidence, as did firefighters (for and against), representatives of the local union and the International Association of Black Firefighters.[12] The CSB further invited three other witnesses to provide additional opinions. The first, an IOS competitor, claimed that the results showed a very high disparate impact, but admitted the disparity was generally within the range of what he sees professionally. He made several suggestions to improve the process, including changing the weights given to the portions of the exam, and possibly in the future running an assessment center instead.[13] The second witness, an African American federal fire program specialist who also was a retired Michigan fire captain, opined that the applicants should have known the materials upon which they were questioned. He concluded any disparate impact was likely due to whites outperforming some minorities on testing or because more whites took the exam.[14] The final witness, a college professor whose primary field of expertise was not firefighting, but race and culture as they influence performance on tests, opined that no matter what test the City used it would have revealed a disparity.[15]

After hearing the evidence, the CSB did not certify the test results.[16] Plaintiffs, seventeen white firefighters and one Hispanic, brought suit, alleging among other claims violations of the Act and the 14th Amendment's Equal Protection Clause.[17] The district court ruled for the City on summary judgment, finding that the City's "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent under Title VII."[18] The court determined that the City's actions were not "based on race" since all applicants took the same test, and thus the result was the same for all when the results were discarded.[19] The Second Circuit affirmed the decision in a now famous one-paragraph opinion,[20] and a petition for rehearing en banc was narrowly denied.[21]

III. The Decision

In a 5-4 decision, the Supreme Court reversed,[22] finding that the City had violated Title VII by failing to certify the test results.[23] The Court believed that the City's actions violated Title VII's disparate-treatment prohibitions "absent some valid defense."[24] The Court rejected the lower court's finding of no discriminatory action, declaring that the decision not to certify the examination results because of the statistical disparity based on race was violative race-based decision-making:

> Whatever the City's ultimate aim – however well intentioned or benevolent it might have seemed – the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.[25]

The Court then considered when an employer can take a race-based action to avoid possibly engaging in unlawful disparate treatment. The Court rejected claims that it would never be appropriate to take action to avoid a disparate treatment violation, because the Act prohibits both types of conduct and must therefore be interpreted to give effect to both provisions.[26] Nor did it accept claims that such a defense should only work if the employer was "in fact" in violation of the Act's disparate treatment prohibition, for that would run counter with Congress's intent to encourage employers to voluntarily comply with the Act.[27]

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Similarly, the Court rejected claims that an employer's "good faith belief" should be sufficient to justify race-conscious conduct.[28] The majority felt this approach would go too far, especially since Congress when it codified disparate impact prohibitions in the 1991 Civil Rights Act made no exception for disparate treatment actions taken in good faith to avoid disparate impact violations. The Court feared such a minimal standard would encourage race-based action at the slightest hint of disparate impact, give rise to a de facto quota system where results were tossed based solely on statistics, and could give license to employers to toss results where they did not comport with their preferred racial balance.[29]

Instead, the Court looked to precedent under the Equal Protection Clause of the 14th Amendment for a standard that "strikes a more appropriate balance" when reconciling competing obligations.[30] There, "certain governmental actions to remedy past racial discrimination – actions that themselves are based on race – are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary."[31] This standard met the Court's goals of giving effect to and reconciling both the Act's disparate treatment and disparate impact provisions while encouraging employers to voluntarily comply with the law without giving them license to make race-based decisions at will:

> Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances.The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination. . . . And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.
>
> Resolving the statutory conflict in this way allows the disparate-impact prohibition to work in a manner that is consistent with other provisions of Title VII, including the prohibition on adjusting employment-related test scores on the basis of race. *See [42 U.S.C.] § 2000e-2(l).*][32]

Under that standard, the Court found that the City had violated the Act, for the record "makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate impact liability in violation of Title VII."[33] While admittedly the significant adverse impact here constituted a prima facie case of disparate impact liability, that and nothing more "is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results."[34] The City could only have been liable for disparate impact discrimination if, in addition, the exams were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt.[35]

Here the examinations were job-related and consistent with business necessity.[36] With regard to valid less-discriminatory alternatives, the Court rejected, among others: (i) utilizing a different composite score (scores were contractual, no basis to conclude this was an equally valid alternative that could have been adopted), (ii) reinterpreting the "rule of three" to provide for banding (if done after knowing the results the City would have violated Title VII's prohibition on adjusting test results based on race); and (iii) the use of assessment centers (the record reference of this possibility did not raise a factual question as to whether the option was available or if it would have had a less adverse impact).[37] Discarding the tests was violative, and "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."[38]

The dissent challenged the majority's attempt to place the core directives ("twin pillars") of Title VII – disparate impact and disparate treatment – at odds with each other.[39] The dissent rejected the idea that an employer that changes an employment practice in an effort to comply with the Act's disparate impact provision acts "because of race." Instead, the dissent would hold that an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate the disparate treatment bar automatically or at all, provided the "employer must have *good cause* to believe the device would not withstand examination for business necessity."[40]

The dissent also attacked the strong-basis-in-evidence standard. The dissent questioned the utility of the standard, given that the Equal Protection Clause lacks a similar disparate impact component, and the distinguishable cases upon which the majority relied involved constitutional challenges to absolute racial preferences where race was the decisive factor.[41] The dissent took issue with the standard itself, the lack of elaboration on how it was to be applied, and how the lack of certainty may discourage voluntary compliance.[42] The dissent warned that any employer attempting to meet this standard could expect costly disparate treatment litigation where its chances for

success would be "highly problematic." Indeed, the dissent questioned how this standard was any different from requiring the employer to establish a provable, *actual* violation against itself, something justices have frowned upon in the past.[43]

The dissent believed the City had ample "good cause" to believe its selection process was flawed and thus did not violate Title VII.[44] In particular, the dissent attacked the City's blind use of the contractually mandated testing requirements and weighting, when apparently no consideration was given to determining whether either the tests or their weighting were likely to identify the most qualified candidates. The dissent cited evidence that assessment centers were commonplace and better able to identify the qualified candidates, as well as precedent demonstrating that written exams were not probative of a firefighter's leadership and fire skills.[45] The dissent also took issue with the City's constraints on the exams' creation, which deprived the City of possible alternatives such as an assessment center, and prevented the consultant from its usual practice of showing the written test to actual City fire officials to insure the questions were truly appropriate for the City.[46] In light of these and other factors the dissent believed City had good cause to believe its testing process would not withstand a disparate impact claim.[47]

IV. Decisions Since Ricci

Cases since *Ricci* have yet to apply the new defense in a disparate treatment, disparate impact case. Two early cases, however, are of note. First, *in United States v. City of New York*,[48] a district court found on summary judgment that the New York City's written firefighter examinations violated the Act's disparate impact provision. The court made a point of emphasizing that *Ricci* was not controlling as to whether a testing process "*actually had*" a disparate impact on minority candidates, and that the City of New York had taken significantly fewer steps than New Haven to validate its exam.[49] No doubt, however, employers facing disparate impact claims will try to analogize their hiring processes to New Haven's.

Second, *Ricci* already has been utilized as support for ending a consent decree to correct prior discrimination. In *Cleveland Fire Fighters for Fair Hiring Practices v. City of Cleveland*,[50] the court was asked to extend the City's time to comply with a consent decree dating back to 1977 (and amended thereafter) to increase the ratio of minority firefighters. Over the years the city had increased its minority firefighter percentage from four percent to twenty-six percent, but due to economically caused layoffs and state pension changes that encouraged firefighters not to retire, the City was not able to meet the hiring and diversity goals of the latest amended decree.[51] The City and other interested parties sought an extension of the decree, and others argued the decree should expire. The parties actually agreed to extend the decree to 2014,[52] but the court at a status on the very day *Ricci* issued[53] advised the parties that the proposed stipulation was unacceptable, and that if a new proposal was not submitted it would rule on the competing motions.

When the parties could not reach agreement, the court terminated the case. The court considered its case similar to *Ricci*, in that "what is integral here is the administration of an examination, as part of an overall hiring process, that is fair to all people – regardless of race.[54] The court saw Ricci as a reminder of how far the nation has come from the origination of affirmative action in the 1960s, how much progress has been made in places like Cleveland, and how courts struggle to find the proper balance to ensure equal opportunity between minorities and non-minorities alike.[55] Here, the court found that the City had made a good faith effort to comply with the remedy designed to correct past discrimination, circumstances beyond its control caused it to fall short of the consent decree's goal, the City had in place a nondiscriminatory hiring procedure that will be fair to all and that will lead to increased minority hiring, and, therefore, judicial monitoring was no longer necessary.[56] The court also recognized that, had it accepted the parties' agreed extension, the decree would have been in place for 41 years since the case had first been filed – i.e., "no one that would be affected by the intervention of this Court would even have been born at the time the case was filed."[57]

V. Lessons From Ricci

How long *Ricci* will remain the law is anyone's guess given it is yet another 5-4 decision, and Congress has become active in changing decisions it does not like. Public employers, however, must assume that *Ricci* will remain the law, and recognize and learn from the decision.

Lesson 1:

The time to develop and evaluate an examination process to insure it is non-discriminatory, has no disparate impact, and is job-related and consistent with business necessity is *before* the exam is implemented.

Above all, *Ricci* reminds employers that the time to develop, evaluate and validate a test to insure it is job related, non-discriminatory, and does not disadvantage minorities is *before* a test is administered. As the Court recognized: "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race."[58]

To the extent New Haven erred, it was by trying to throw out the test after it had already been given.[59] Modifying the scoring or results after the fact similarly would have been found violative.

Employers should take steps to avoid disparities in test results before a test is implemented. Among many options: (1) establish a pilot program to assess whether the early returns suggest an adverse impact; (2) engage a testing expert who can provide background on which types of test tend to produce disparate impacts; (3) build more flexibility into the process, such as by limiting the weight given to written exams or establishing bands for test results to give the employer more leeway and discretion. Employers should work with testing professionals to insure whatever process ultimately adopted is validated.

Granted, it may not always be possible to accurately assess whether a test will statistically disadvantage a protected group before implementation. Extra precautions taken on the front end, however, will at least help defend against a disparate impact claim. To this end, employers also should closely examine which test would best reflect on the skills needed for the job. Employers should not assume that a test is legitimate simply because another community uses the same test for a similar position, or because a union contract dictates the process. Each test must be narrowly crafted to fit the job requirements.

Lesson 2:

The defense goes both ways

At the end of its opinion, the majority provided New Haven a "silver lining" in its decision:

> Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today *it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability*.[60]

Thus, an employer facing disparate impact claims apparently also may raise a defense that it promoted or hired people based on the tests because it had a strong basis in evidence that, had it not done so, it would have been liable for disparate treatment.

Assuming that the majority is correct, and that one need not actually *prove* a violation to meet the strong basis in evidence test, does this give an employer in close cases the license to decide what it wants to do, as opposed to what may actually be the right decision legally? After all, in a close case wouldn't there be a strong basis in evidence that a violation occurred under either a disparate impact or a disparate treatment theory? Courts will have to address this.

Lesson 3:

The dissent has a point. What will it take to demonstrate a strong basis in evidence?

The *Ricci* Court held that an employer could throw out test results based on race only if it had a "strong basis in evidence" that (1) its test was "deficient" and (2) "discarding the results [was] necessary to avoid violating the disparate impact clause."[61] Even though the test results reflected a significant racial imbalance, and the City held multiple meetings wherein it received feedback that the test potentially could be improved, the Court still found no genuine issue of material fact that there was no "strong basis in evidence" to justify discarding the test. While the majority expressly rejected finding an employer can avoid liability only if it can prove disparate impact discrimination would have occurred, the dissent argues that that may ultimately be what it takes to meet the strong basis in evidence standard.

Given the lack of explanation as to what may be required, lower courts eventually will have to decide how much an employer will need to reach the "strong basis in evidence" standard. In the meantime, a public employer facing test results demonstrating a *prima facie* case of disparate impact discrimination is, after *Ricci*, in not much better shape than New Haven in terms of its options. Any action taken likely will lead to litigation, and the employer will be forced to decide whether to defend the test or defend the decision to ignore the test. In either case, apparently, the employer can raise this new defense – but that again begs the question of proof.

If an employer fears litigation, it should develop a portfolio of evidence reflecting that it has a "strong basis" to believe that it would be liable if it did not take the action it did. The employer will likely want to retain a recognized testing expert to carefully review the test program and test results, analyze testing alternatives, and issue a full report. The employer also may wish to hire an experienced labor and employment attorney (or even a retired judge) to obtain a legal opinion as to whether it likely would be liable, and be prepared to waive the privilege and rely on that report if sued. The goal is to develop a solid evidentiary case that the employer had no choice but to take the action it did or else be liable for discrimination.

Lesson 4:

***Ricci* extends beyond promotions**

Ricci's analysis extends beyond promotions to any situation where disparate impact applies. Hiring processes clearly are covered, and as in *Cleveland Fire Fighters*, the rationale even may be of use in evaluating ongoing consent decrees regarding discriminatory practices.

One particular concern for public employers given the current economic recession is reductions-in-force. Often, reductions-in-force proceed as follows: (1) the employer asks managers to evaluate candidates for reduction in several categories such as experience and skill, (2) the employer creates a preliminary list of those to be laid off, (3) the employer runs statistical analyses to detect whether the tentative reduction plan would disparately impact those in protected classes, and (4) the employer "subtly" encourages managers to reconsider their earlier ratings in the event that the numbers suggest a disparate impact. The reason is simple: the threat of class action disparate impact lawsuits far outweigh the risk that a non-minority might sue. Given *Ricci*, such post-hoc manipulation of the numbers carries much more risk. Public employers need to be very careful about how they structure reductions.

VI. Conclusion

The fall-out from *Ricci* is not over. Public employers continue to face disparate impact claims over testing processes. They now have a defense to taking controversial actions to avoid feared discrimination claims, but as the dissent notes it may be very hard to prove. Someone is going to have to litigate the parameters of the defense – and eventually the courts will have to set some clear guidelines for employers to follow. ♦

Notes

1. 129 S. Ct. 2658 (June 29, 2009).
2. At least if one reads the majority opinion. The dissent claims the City's test had "multiple flaws," that "[f]irefighting is a profession in which the legacy of racial discrimination casts a long shadow,"the City "pervasively discriminated against minorities," and that it had been the subject of a discrimination lawsuit and resulting settlement agreement in 1975. *Id*. at 2690-91. Justice Alito, in his concurring opinion, claims the record allegedly contained evidence that could lead a jury to find that the City's disparate impact concern was pretextual: The City really scrapped the test to please a politically important racial constituency. *Id*. at 2684.
3. *Id*. at 2665.
4. *Id*.
5. *Id*.
6. *Id*. at 2665-66.
7. *Id*. at 2666.
8. *Id*. at 2666, 2678.
9. *Id*. at 2678; 29 C.F.R. § 1607.4(D) (2008) (selection rate that is less than 80 percent "of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of ad-verse impact").
10. 129 S. Ct. at 2666.
11. *Id*. at 2667-2670.
12. *Id*.
13. *Id*. at 2668-69.
14. *Id*. at 2669.
15. *Id.*
16. *Id.* at 2664.
17. *Id.* at 2670-71.
18. *Ricci v. Destefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006) *aff'd* per curiam, 530 F.3d 87 (2d Cir. 2008), *Reh'g en banc denied*, 530 F.3d 88 (2d Cir. 2008), rev'd, 129 S. Ct. 2658 (2009).
19. *Id.* at 161.
20. 530 F.3d at 87.
21. 530 F.3d at 88 (7-6 decision denying rehearing en banc).
22. Justice Kennedy wrote the opinion, with Roberts, Scalia, Thomas and Alito joining. 129 S. Ct at 2664-2681. Scalia wrote a concurring opinion, as did Alito, which Scalia and Thomas joined. *Id* at 2681-2683. Ginsburg filed the dissent, which Stevens, Souter and Breyer joined. *Id*. at 2689-2710.
23. In so doing, the Court declined to rule on the Equal Protection claims. *Id*. at 2681.
24. *Id*. at 2673.
25. *Id*. at 2674.
26. *Id*.
27. *Id*.
28. *Id*. at 2674-75.
29. *Id*. at 2675; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).
30. *Id*. at 2675.
31. *Id*. at 2675 (*citing Richmond v. J.A. Croson Co*., 488 U.S. 469, 500 (1989) (*quoting Wygant v. Jackson Bd. of Ed*., 476 U.S. 267, 277 (1986) (*plurality opinion*).
32. 129 S. Ct. at 2676 (citation omitted).
33. *Id*. at 2677.
34. *Id*. at 2678.
35. *Id*.; 42 U.S.C. § 2000e-2(k)(1)(A), (C).
36. 129 S. Ct. at 2678.
37. *Id*. at 2679-81.
38. *Id*. at 2681.
39. *Id*. at 2699.
40. *Id*. (emphasis added).
41. *Id*. at 2700-01.
42. *Id*.
43. *Id*. at 2701-02.
44. *Id*. at 2703.
45. *Id*. at 2704-05.
46. *Id*. at 2706.
47. *Id*. at 2707.
48. 637 F. Supp.2d 77 (E.D.N.Y. July 22, 2009).
49. *Id*. at 83-84 (emphasis in original).
50. 2009 U.S. Dist. LEXIS 74221 (August 20, 2009).
51. *Id*. at *17-19, 26, 35-36, 37.
52. *Id*. at *19-25.
53. The record does not indicate whether the decision actually had issued prior to the status.
54. *Id*. at *38-41.
55. *Id*. at *41.
56. *Id*. at *44-45.
57. *Id*. at *43.
58. 129 S. Ct. at 2677.
59. *Id*. at 2677.
60. 129 S. Ct. at 2681 (emphasis added).
61. *Id*. at 2676. ♦

Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes and the equal employment opportunity laws.

IELRA Developments

Failure to Comply with Arbitration Award Ruling Reversed

In *Griggsville-Perry Federation of Support Personnel v. IFT-AFT*, Local No. 4141, No. 2009-CA-0027-S (IELRB 2009), the IELRB reversed and remanded to the arbitrator an ALJ's decision that Griggsville-Perry Community Unit School District No. 4 ("District") violated the IELRA by refusing to comply with a binding arbitration award.

On September 11, 2009, the ALJ issued a Recommended Decision and Order, concluding that the arbitration award – which had ordered reinstatement of an employee – after the arbitrator found her dismissal to be "procedurally and substantively arbitrary," was binding. The District filed exceptions, arguing that the arbitrator had exceeded his authority under the CBA by imposing a "reasonable cause" standard for discharge where none had been bargained. The District cited *Board of Educ. of Harrisburg Community Unit School District No. 3 v. IELRB, 277 Ill*. App. 3d 208 (4th Dist. 1992), in which the Appellate Court found that an arbitrator had exceeded his authority by requiring "just cause" for dismissal where the CBA contained no such requirement and where the parties' bargaining history indicated that the employer had specifically refused to adopt such a requirement. The Appellate Court remanded the case to the IELRB to remand to the arbitrator, with instructions to not apply a "just case" requirement and to fashion a remedy, finding that the arbitrator had failed to properly considered Harrisburg.

Failure to Comply with Arbitration Award Ruling Upheld

In Int'l Brotherhood of Electrical Workers #197 v. Illinois State University, Case No. 2009-CA-0001-S, the IELRB upheld the Administrative Law Judge's (ALJ) determination that Illinois State University (ISU) violated the IELRA by failing to comply with a binding arbitration award and that IBEW was not entitled to attorney's fees.

IBEW filed a grievance against ISU alleging non-compliance with the collective bargaining agreement ("Agreement"). The grievance proceeded to arbitration pursuant to the procedures outlined in the Agreement. The arbitrator ruled in favor of IBEW and ordered ISU to give specific assignments to electricians, instead of repair workers. One month after the decision, ISU informed IBEW that it would not comply with the arbitrator's decision and IBEW promptly filed an unfair labor practice charge.

The IELRB concluded that ISU violated Sections 14(a)(8) and, derivatively, 14(a)(1) and that the ALJ had properly rejected the University's four defenses to non-compliance with the arbitration award. The Board cited the United States Supreme Court for the proposition that when the parties have contracted to have disputes settled by an arbitrator, a court cannot simply reject an arbitrator's decision simply because it disagrees. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc*., 484 U.S. 29, 37-38 (1987). The Board also stated that illinois courts consistently refer to public policy rationales for favoring resolution of collective bargaining disputes through arbitration. ("[B]ecause the parties have chosen by contractual agreement how their dispute is to be decided, and judicial modification of an arbitrator's decision deprives parties of their choice.") *AFSCME v. Dept. of Central Mgm't Services*, 173 Ill.2d 299, 671 N.E.2d 668 (1996). The IELRB considers the following to determine whether Section 14(a)(8) has been violated: (1) whether there is a binding arbitration award; (2) the content of the award, and (3) whether there has been compliance with the award.

IELRB ordered a cease and desist and affirmatively ordered ISU to (1) comply with the arbitration award; (2) make the electricians whole (with interest at a rate of seven percent); (3) make available to the Board copies of records and reports necessary to analyze the amount due; (4) post for sixty days a 'Notice to Employees' of the Order; and (5) report in writing within thirty-five days the steps taken to comply with the order.

Despite upholding the arbitration award, the Board affirmed denial of IBEW's motion for attorney's fees. The Board stated that attorney's fees are granted only in "egregious circumstances" and such sanctions had been ordered only three times in the last 25 years. The Board agreed with the ALJ that ISU's reasons for non-compliance did not amount to frivolous litigation, even though its defenses were not meritorious.

IPLRA Developments

Police Sergeants Found to be Public Employees

In *Metropolitan Alliance of Police, Sergeants Chapter No. 534 and Village of Oak Brook*, No. S-RC-09-057 (ISLRB 2009), the State Panel held that police officers in the rank of sergeant were public employees within the meaning of the Illinois Public Labor Relations Act and certified the Metropolitan Alliance of Police as their exclusive representative. The Administrative Law Judge determined that the sergeants were not excluded under the Act's supervisory exemption because they did not have authority to perform any of the statutory indicia of supervisory authority with the requisite independent judgment. The village filed exceptions.

To qualify as supervisors under the Act, peace officers must perform work that is substantially different from that of subordinates, have authority to perform at least one of 11 enumerated supervisory functions, and consistently exercise independent judgment in connection with supervisory activities. The Village argued, *inter alia*, that the sergeants were statutory supervisors because they had significant discretionary authority to affect subordinates' terms and conditions of employment through performance evaluations. The ALJ found that the evaluations had a direct effect on annual pay increases, but denied that the sergeants exercised the requisite independent judgment in completing the evaluations where they were jointly prepared by two or three sergeants or a sergeant and a lieutenant. Because the evaluations had to be submitted to Lieutenants in all cases, sergeants did not exercise supervisory authority merely by completing them.

In *American Federation of State, County and Municipal Employees, Council 31 and State of Illinois, Department of Central Management Services*, No. S-RC-08-036 (ISLRB 2009), the Union filed a representation petition to represent 1,250 employees of the Department of Central Management Services ("Employer") in the classification of Public Service Administrator. The Employer argued that 323 of the employees were excluded from coverage of the Illinois Public Labor Relations Act under the exemptions for supervisory, confidential, or managerial employees and that it was entitled to a hearing on the matter. Under *American Federation of State, County and Municipal Employees, Council 31 and State of Illinois* 24 ¶ PERI 112 (IL LRB-SP 2008), if a party before the Board fails to advance facts that, if proved, would entitle it to prevail, the Board need not convene a hearing. Accordingly, the initial ALJ directed the Employer to make an offer of proof as to each disputed employee for the purpose of determining whether the Employer could establish a *prima facie* case for exclusion so as to warrant a hearing. The Employer submitted offers as to 102 employees. Thereafter, the Board directed a representation election, but the Employer impounded the ballots pending resolution of the disputed positions. It then submitted offers of proof as to the remaining 221 disputed employees.

The Board agreed with a substituted ALJ that the Employer was entitled to a hearing as to 74 of the disputed employees, but it further found that the Employer had established the existence of questions of fact or law warranting a hearing as to the exempt status of another six of the disputed employees. Because the offers of proof regarding the remaining 243 disputed employees did not make out a *prima facie* case for exclusion, the Board held that the Employer was not entitled to hearing regarding the exempt status of those employees.

Timeliness of Filings with the Board

In the consolidated cases, *Yurevich and State of Illinois, Department of Central Management Services*, Case No. S-CA-09-058 (ILRB State Panel, 2009) and *Pugh and State of Illinois, Department of Central Management Services* S-CA-09-062 (ILRB State Panel, 2009), the State Panel addressed the procedural issue of timeliness in filings with the Board. The Board upheld an ALJ's decision finding that the Department of Central Management Services ("State") had violated Section 10(a)(1) of the Act by discharging the charging parties. The ALJ found that the State had defaulted by filing its answer to the charging parties' complaint two days late. The ALJ accepted the admissions set forth in the complaint as true, concluded that the State had violated the Act, and ordered that the charging parties be reinstated.

The State filed exceptions arguing that the ALJ abused her discretion because a two day delay did not prejudice the complaining parties and also that the ALJ should have granted a variance under Section 1200.160 of the Board's rules. The Board rejected both exceptions noting that there were no "extraordinary circumstances" which would have justified the State's delay. Specifically, the Board faulted the State for failing to attach proof of service to its answer and for using the State's internal mail system instead of the U.S. Postal Service, thereby making it "virtually impossible to ascertain" when the answer was actually mailed.

Status Quo During Interest Arbitration

In *International Association of Fire Fighters, Local 95 and Village of Oak Park*, Case No. S-CA-07-085 (ILRB State Panel, 2009), the State Panel upheld an ALJ's order dismissing an unfair labor practice complaint alleging a unilateral change in a mandatory subject of bargaining in violation of Sections 10(a)(4) and 14(l) of the Act. IAFF, Local 95 ("Union") alleged that the Village of Oak Park ("Village") violated the Act when during the pendency of interest arbitration it unilaterally, and without notice to the Union, ceased paying a 15 percent longevity benefit.

The Village argued that it was justified in suspending payment of the longevity benefit based on the terms of an interest arbitration award, which specifically provided that if a third party with jurisdiction were to find the longevity payment was not considered wages for purposes of calculating pension benefits, the benefit would revert back to the terms outlined in a prior contract. The arbitration award indicated that such a reversion was only a remote possibility. However in 2007, the Village actively solicited, and ultimately received, an opinion from the Illinois Department of Financial and Professional Regulation ("IDFPR") which found that treating the 15 percent longevity bonus as salary was in fact inconsistent with the pension code, thereby triggering the reversionary language in the parties' interest arbitration award.

The Board acknowledged that under Sections 10(a)(4) and 14(l) the parties were required to maintain the status quo while at impasse, and throughout the period of impasse, in terms of the procedures outlined in Section 14 of the Act for security employees such as firefighters. However, the Board found no merit in the Union's claims that surreptitiously obtaining the 2007 opinion letter violated the duty to bargain. Similarly, the Board found that adherence to the terms of the arbitration award could not be viewed as disturbing the status quo. Therefore, despite the apparent bad faith on the part of the Village, the Union's charges were dismissed.

Seventh Circuit Employment Law Update

In *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010), the Seventh Circuit considered whether a plaintiff may establish liability under the ADA by proof that the employer was motivated by both lawful and unlawful reasons. The court held that the United States Supreme Court's recent decision in *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343 (2009), foreclosed mixed-motive analysis in the ADA context.

In *Gross*, the Supreme Court held that because Congress failed to amend the ADEA to explicitly authorize recovery under a mixed-motive theory in age discrimination claims when it amended Title VII to permit such recovery, proof that age was simply a motivating factor in an employer's decision could not suffice to establish liability under the ADEA. The Seventh Circuit in Serwatka read Gross to suggest that when an anti-discrimination statute lacks language authorizing mixed-motive recovery, such claims are not viable under that statute. Because there was no provision in the ADA akin to Title VII's mixed-motive provision, the court held that the ADA renders employers liable for age discrimination only to plaintiffs who prove "but for" causation between the adverse employment action and the plaintiff's actual or perceived disability. The court rejected the argument that ADA § 12117(a), granting plaintiffs the same "powers, remedies, and procedures set forth in [Title VII §§ 2000e-4 - 2000e-9]," permitted a court to cross-reference Title VII's mixed-motive liability provision. The court reasoned that "although [§ 12117(a)] cross references the *remedies* set forth in [Title VII] for mixed-motives cases, it does not cross reference [Title VII § 2000e-2(m)], which renders employers *liable* for mixed-motive employment decisions." 591 F.3d 957 at 962 (original emphasis).

Applying the "but for" causation requirement, the Seventh Circuit vacated the district court's award of declaratory and injunctive relief, along with a portion of attorney's fees and costs, since the award was based solely the jury's mixed-motive finding.

In *Serafinn v. Local 722, Int'l Brotherhood of Teamsters*, 2010 U.S. App. LEXIS 5279 (7th Cir. 2010), the Seventh Circuit reviewed for abuse of discretion a United States District Court for the Northern District of Illinois rejection of Local 722's proposed jury instruction that would permit the Local to avoid liability for impairing the free speech rights of an ex-president if it could show that it would have disciplined him even if he had not engaged in protected speech. The Seventh Circuit held that the district court committed no prejudicial error in rejecting the instruction and requiring the ex-president to prove that "but for" his exercise of free speech, he would not have been disciplined.

Serafinn was a three term president of a Local of the "Teamsters for a Democratic Union." a "dissident faction" opposing the leadership of the International's current president, James P. Hoffa. He claimed that his opponent in the 2001 election and the region's joint council president colluded to bring internal disciplinary charges against him for violating union rules by referring himself to a power plant job ahead of others on the Local's list, when their real motive was to punish him for meeting with local union

executives and publishing a newsletter critical of his opponent. The Local argued that the discipline was solely for violations of the union's work-referral rules.

A jury found that the Local had retaliated against the ex-president for exercising free speech in violation of the Landrum-Griffin Act, and awarded $50,000 in compensatory and $55,000 in punitive damages. The Local appealed, arguing that it was error to reject its "'mixed motive' jury instruction."

The Seventh Circuit affirmed the district court's decision, finding that because the court rejected the Serafinn's proposed motivating-factor instruction, the Local's proposed liability-limiting mixed-motive instruction was not significant. Citing the United States Supreme Court's recent decision in *Gross v. FBL Fin. Servs., Inc*., 129 S.Ct. 2343, (2009), for the proposition that shifting the burden of persuasion is not permitted unless authorized by express statutory language, the Seventh Circuit held that because the district court was not allowed to alter the burden because not so-authorized by the Landrum-Griffin Act, its discretion was appropriately confined.

In *Union Pacific Railroad Company v. Brotherhood of Locomotive Engineers*, the Supreme Court held that the Seventh Circuit erred in holding that the National Railroad Adjustment Board violated constitutional due process by dismissing sua sponte five employees' claims. 130 S.Ct. 584 (Dec. 8, 2009) (affirming *Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region v. Union Pacific R.R*., 522 F.3d 746 (7th Cir. 2008). A split panel of the NRAB had dismissed the employees' claims because there was no proof in the record to satisfy the Railway Labor Act's requirement of pre-arbitration "conferencing."

The RLA imposes conferencing as an intermediate step in its minor dispute resolution process before the parties proceed to arbitration. The NRAB found this requirement was jurisdictional in nature, could not be waived, and therefore dismissed the employees' complaints. The union brought a claim in the Northern District of Illinois to vacate the NRAB's award arguing that the conference requirement under the RLA was not jurisdictional and had in fact been waived by the employer.

The district court dismissed the union's complaint, the 7th Circuit reversed the dismissal, and the Supreme Court affirmed the judgment—but on statutory rather than constitutional grounds. The Supreme Court specifically declined to resolve a constitutional question which has split the circuit courts of appeal: whether the federal courts have jurisdiction to review NRAB proceedings for due process violations.

The Court reasoned that reaching that constitutional issue was not appropriate in this case because in section 152 of the RLA Congress had granted the NRAB jurisdiction to adjudicate grievances of railroad employees that remain unsettled after pursuit of internal procedures. The conferencing requirement, which appears in section 153 of the RLA, was only a "claim processing rule" and not a jurisdictional limitation. Because the NRAB does not have authority to decline the jurisdiction granted to it by Congress, the Court found that the NRAB's dismissal of the employee's claims on jurisdictional grounds clearly violated the express language of the RLA which requires the board "to conform, or confine itself, to matters within the scope of [its] jurisdiction."

In reaching this conclusion the Court found that the regulations promulgated by the NRAB and the prior decisions of the NRAB, which suggested that the conferencing requirement may be jurisdictional in nature, were not controlling because "Congress alone controls the Board's jurisdiction," and "Congress gave the Board no authority to adopt rules of jurisdictional dimension."

In *O'Neal v. City of Chicago Police Dept*., 588 F.3d 406 (7th Cir. Nov. 17, 2009), a female police officer ("O'Neal") sued the Chicago Police Department ("CPD") under Title VII after being transferred out of the Narcotics unit, alleging race and gender discrimination. As part of a settlement of a dispute over the collective bargaining agreement, O'Neal was later transferred back into the Narcotics unit, but was subsequently transferred an additional ten times among various units. In 2007, O'Neal once again filed suit against the CPD, alleging that the transfers were in retaliation for her 2002 law suit, and as well filed a charge of sex discrimination with the EEOC. The district court entered summary judgment on the CPD's behalf, which O'Neal appealed. The appellate court affirmed the district court's grant of summary judgment, noting that in both her retaliation and discrimination charges, her charges were time-barred except as to her two most recent transfers.

With regards to her retaliation claim, while the court found that O'Neal had sufficiently alleged the first two prongs of a prima facie case — that she had engaged in protected activity by filing suit in 2002 and again by filing a grievance in 2006 and that she had suffered an adverse action taken by the CPD in the form of her transfers-the court found that O'Neal had failed to present sufficient evidence that she had been transferred because of her protection actions. The court found that under the direct method of proof, the evidence presented, in the form of statements from her Lieutenant calling her a "complainer" and other similar names, and a previous statement by the same

Lieutenant referring to O'Neal as having previously "dated a gang banger," did not amount to direct evidence when made without reference to O'Neal's protected actions. The court also found that O'Neal did not present sufficient evidence to fulfill the third prong under the indirect method of proof. The court noted that under this method, O'Neal needed to present evidence that she met the CPD's legitimate expectations, that she was treated less favorably than similarly situated employees who did not engage in protected activity, and that any nondiscriminatory reasons for the CPD's adverse actions were pretextual. The court found that O'Neal was unable to provide sufficient evidence that she was meeting the CPD's legitimate expectations, because she failed to rebut the CPD's assertions that she was borderline insubordinate, had a confrontational attitude, and suffered from an inability to conduct street operations.

The court also found that O'Neal's sex discrimination charge failed because she was similarly unable to demonstrate a causal connection.

Continued Confusion as to Meaning of Ledbetter Fair Pay Act of 2009

Courts continue to struggle with the proper interpretation of the Ledbetter Fair Pay Act of 2009. The Act– the first piece of substantive legislation signed into law during the Obama administration– clearly overruled the Supreme Court's 2007 decision in Ledbetter v Goodyear Tire & Rubber Co., 127 S. Ct 2162 (2007) which had held that a plaintiff who claimed unequal pay caused by long-ago discriminatory performance evaluations could not base such a claim upon previous time-barred acts. Yet the new law's scope remains unclear as to its application to a wide array of employment practices that directly or indirectly result in continued unequal pay.

The differing interpretations stem from the statute's ambiguous phrase "a discriminatory compensation decision *or other practice*" which affects an employee's salary. The question with which the federal courts have been struggling is whether the "*other practice*" attacked by the employee must itself be a practice related to the setting of compensation, as opposed to some other act (i.e a demotion, failure to promote, reassignment, etc.) that has merely an indirect relation to the employee's compensation.

Many of the cases decided under the Act to date have concerned the troublesome issue of whether a plaintiff can claim unequal pay due to a long-ago promotion denial. After all, an employee who failed to obtain a promotion ten years in the past may still, today, be receiving lower wages than if he or she had gained the promotion. The first appellate court decision to address the promotion issue is Schuler v PriceWaterhouseCoopers, LLP, 2010 U.S. App. LEXIS 2998 (D.C. Cir. 2010. There, the D.C Cir held that the employer's long-ago failure to promote the plaintiff to partner did not constitute "a compensation decision or other practice" within the meaning of the new Act. The Court reasoned that "In employment law, the phrase 'discrimination in compensation' means paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position." Id. at 9-10.

The dispute is far from resolved, however, because district courts have split on the issue. For example, in Gentry v. Jackson State University, 610 F. Supp. 564 (S.D. Miss. 2009), the Court held that a professor's time-barred claim of denial of tenure did not prevent him from alleging unequal pay at present. Similarly, a Florida court has held that lower pay caused by a demotion that occurred 16 years in the past was actionable under the Act. Bush v. Orange County Corrections Department, 597 F. Supp. 1293 (M.D. Fla. 2009).

Particularly troublesome for employers will be factual situations such as that involved in Mikula v Allegheny County, 583 F. Supp. 181 (3d Cir. 2009). There, the Third Circuit held that the employee's unanswered request for a raise creates a perpetual cause of action under the new Act. Thus, informal requests for a raise or better job assignment may be seen as constituting an "other practice" under the new Act that provides a never-ending cause of action for employees to challenge unequal pay. ♦

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