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EMPLOYMENT TESTS AND PERSONNEL SELECTION MAY 2013 CASE LAW UPDATE[1]

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Making improvements in the testing process without incurring *Ricci*-type liability. *Maraschiello v. City of Buffalo Police Dept.*, 709 F.3d 87 (2d Cir. 2013)

In *Maraschiello,* a white male police officer filed suit against the city police department and its police chief alleging impermissible race discrimination based on changes to the promotion testing process. The plaintiff was eligible for promotion to inspector based on his scores on a 2006 civil service examination. Under NY law, the City could promote any one of the top three scorers, and the plaintiff received the highest grade. He was ranked first on a list of candidates certified in December, 2006. For most of the next two years, however, there were no open inspector positions.

During this time, the City was in the process of changing tests, based in part on a series of lawsuits challenging exams prepared by the New York State Department of Civil Service. In October 2006, the City hired an expert, Nancy Abrams, to review the exams. Abrams concluded that the job analysis had not been updated in nearly thirty years, and the reliance on multiple-choice questions was not optimal for jobs requiring effective oral communications. *Id*. at 89. The City issued an RFP to have an independent consultant create a new exam, and selected Industrial/Organizational Solutions, Inc. to develop a promotional exam with a written and oral component.

The City administered the test in 2008, though the plaintiff elected not to take the new test. In April 2008, the City adopted a new inspector list, and the 2006 list expired. A white male placed first on the list (he was second behind plaintiff on the 2006 list), and he was selected to fill a vacancy created in March, 2008. The plaintiff filed a lawsuit alleging that the promotional decisions violated Title VII, citing the Supreme Courts' decision in *Ricci v. DeStefano.* While the district court denied a motion to dismiss, citing language in the RFP regarding the City's desire to avoid litigation similar to that brought in 1998 and 2002, it subsequently granted summary judgment, concluding that the case was factually distinct from *Ricci*. The Second Circuit agreed.

[1] This update covers decisions from January - April, 2013.

"*Ricci* theory" rejected

The Second Circuit began by reiterating that *Ricci* did not establish a new framework for Title VII litigation. It then agreed with the lower court that the City's decision to upgrade their testing process was distinguishable from the approach taken by the city of New Haven. In *Ricci*, the city threw out the results of the test based on the disparity in the results. Here, the City did not have a problem with "a particular set of results," but instead decided to more generally update and improve the testing process. *Id*. at 95. The City certified the 2006 results and maintained the plaintiff's eligibility until the new test—which plaintiff failed to take—was scored. According to the Court, employers are free to consider, before administering a test, how to make improvements in the process and/or test itself:

> Even if it were determined that the City's choice to adopt a new test was motivated in part by its desire to achieve more racially balanced results—and there is evidence in the record that at least suggests this—Maraschiello cannot demonstrate that the generalized overhaul of departmental promotional requirements amounted to the sort of race-based adverse action discussed in *Ricci*. Indeed, *Ricci* specifically permits an employer to "consider[ ], 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 race." 557 U.S. at 585, 129 S.Ct. 2658.
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> Although Abrams' statements regarding the reasons for this replacement are unnecessary for our conclusion, they lend it strong support. The statements indicate that the City chose to update its testing requirements, and subsequently its eligibility list, for reasons that had much more to do with an advanced understanding of job qualifications than with racial statistics. Maraschiello has not attempted to dispute this evidence. Completing the last phase of a long-planned adoption of a new standard is a far cry from rejecting a set of results out of hand because of their racial makeup. Updating an examination, a process specifically permitted by statute, does not "create[ ] a materially significant disadvantage with respect to the terms of ... employment." *See Williams v. R.H. Donnelley Corp.*, 368 F.3d 123, 128 (2d Cir.2004) (internal quotation marks omitted).

Id. at 95-96.

Employers can still be held liable for background checks—even if state law requires the checks to occur. *Waldon, et al. v. Cincinnati Public Schools*, Civil Action No. 12-677, 2013 WL 1755664 (S.D. Ohio Apr. 24, 2013)

In this case challenging the legality of background checks, the Court rejected a motion to dismiss based on the argument that the employer was simply following state law. In 2007, HB 190 amended Ohio law to "require criminal background checks of current school employees, even those whose duties did not involve the care, custody, or control of children." *Id*. at *1. The law required the termination of any employee who had been convicted of certain specified crimes "no matter how far in the past they occurred, nor how little they related to the employee's present qualifications." *Id*. The two plaintiffs worked for the school system for several years and had a record of excellent

service. They were terminated for convictions that were "decades old," including serving as a go-between in a $5 marijuana purchase. In total, ten (10) employees were terminated, nine (9) of whom were African-American.

The defendant moved to dismiss the lawsuit, arguing that it was simply following state law. The plaintiffs countered that Title VII trumps state law, and the Court agreed. According to the Court, the plaintiffs properly pled that the neutral decision had an unlawful disparate impact. Thus, the defendant needed to establish that the decision was job-related and consistent with business necessity. Citing the Eighth Circuit's decision in *Buck Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975), the Court held that the policy was a "close call," but that its sweeping disqualification (without considering when the conduct occurred or whether it was related to qualifications) could well violate Title VII.

The importance of expert testimony. *EEOC v. Kaplan Higher Educ. Corp.*, Civil Action No. 1:10 CV 2882, Slip Copy 2013 WL 1891365 (N.D. Oh. May 6, 2013)

In 2011, the District Court excluded the study of the EEOC's expert, Dr. Kevin Murphy, and granted summary judgment for Kaplan on the grounds that the EEOC failed to present sufficient evidence of disparate impact (the full summary of the Court's 2011 decision can be found in the testing paper, at 53-54). The EEOC was challenging the defendant's practice of using credit checks to screen applicants for employment. The disparate impact data was based on Dr. Murphy's study, which used a team of "race raters" to look at pictures of applicants to classify them into one of five race categories. The Court excluded the study on *Daubert* grounds. In this opinion, the Court denied the EEOC's motion for reconsideration. The EEOC argued that Dr. Murphy's study was not necessary to defeat summary judgment, because: (1) national data demonstrates that the use of credit checks has a disparate impact on minority applicants, and/or (2) a layperson could review the photos and classify the applicants (meaning *Daubert* did not apply). The Court rejected both arguments. As to the requirements of expert testimony, the Court held that visual race identification was beyond the capabilities of the Court (which is the trier of fact in a disparate impact case). *Id.* at *5. As to national data, the Court held that the EEOC failed to argue this previously. *Id.* at *4. While this conclusion was favorable to the employer, the EEOC is unlikely to make this mistake twice. Employers using credit checks as a screen should anticipate having to counter the relevance of national statistics, even if the local data does not show adverse impact.

Evaluating the timeliness of a challenge to a selection procedure. *Bryant v. Imery's Carbonates LLC*, Civil Action No. 4:11-cv-24, 2013 WL 535534 (E.D. Ala. Feb. 7, 2013)

This case addresses the timeliness of claims challenging the use of a selection procedure. According to the Court, a claim is timely as long as the Charge of Discrimination is filed within the appropriate number of days (here 180) after *any* administration of the test—even if the charging party had not taken the test in years.

The plaintiff worked as a mechanic in a processing facility. The collective bargaining agreement divides Imery's mechanics into two classes – A and B. B's who pass a written test become A's,

which entitles them to greater pay and benefits (though the job duties and work assignments remain the same). *Id*. at *1. Among other claims, the plaintiff alleged that the testing requirement constituted unlawful race discrimination (both disparate treatment and disparate impact). The plaintiff had taken and failed the test in 2007 and 2008. In 2009, the defendant reduced its work force by 25% and decided to achieve the reduction by eliminating the Mechanic B position. The plaintiff filed an EEOC charge in 2009 shortly after learning of the lay-off, and amended the charge in 2010 to include disparate impact.

The defendant moved to dismiss the disparate impact claim as untimely, since the charge was filed years after the test was administered to the plaintiff. The Court held that the claim was timely, however, because a white employee took and passed the test on January 12, 2010 (43 days before the plaintiff amended his charge). *Id*. at *8. Employers should note that this is somewhat of a unique factual situation. Here, the test is a permanent dividing line between two classes of employees, and can be taken at any time. Thus, the charging party continued to suffer long after he last took the test. This is different from a situation where a unique eligibility list is created each time that a test is administered. As the *Maraschiello* case summarized above demonstrates, failure to participate in a test administration will generally bar an individual from bringing claims in that more typical context.

Illustration of class-action treatment for legal challenges to testing procedures. *Kerner v. City and County of Denver*, Civil Action No. 11-256, 2013 WL 1222394 (D. Colo. Mar. 25, 2013)

The plaintiffs sought class certification of their disparate impact claims challenging the use of the AccuPlacer/WritePlacer test used to create eligibility lists for individuals seeking employment with the city and county of Denver. The Court granted certification, concluding that the legality of the test was a common issue among the class that predominated over other issues. The Court rejected the argument that individualized damage inquiries barred certification in this context. *Id*. at *3.