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HR Update

National Human Relations News

An Update for Human Relations Professionals in the Printing Industry –July 2009

Supreme Court Rules on New Haven Fire Fighter's Case

On June 29, the U.S. Supreme Court ruled by a 5-4 split on the much anticipated *Ricci v. DeStefano* case involving New Haven, Connecticut's new promotion tests for lieutenants and captains in its fire department. The main reason for the media's coverage of the Court's decision is because Supreme Court nominee, Judge Sonia Sotomayor, ruled on the case in a one paragraph decision on the 2nd Circuit Court of Appeals.

In the New Haven case, the city contracted with an employment testing firm to develop a promotion test and study materials. That firm used city and national resources, interviews, and rode with the city's fire departments on calls to develop a job analysis of the positions, tests (written and oral), and study materials for such tests. The testing firm claims it took measures at every development stage to ensure that the tests and materials would be racial neutral. The city had limited positions available for promotion so as a result of internal rules, it was required to choose the highest scoring candidates. While black and Hispanic applicants did pass the test, only two Hispanic applicants scored among the highest, the rest were white. The city conducted several hearings trying to decide what to do and was eventually deadlocked upon a vote. Thus, the city decided not to use the test results, which resulted in the case at hand.

The long-term scope and impact of the ruling is uncertain at best, however, because the case on which it was based was very specific in its circumstances, involving a public employer and a method of evaluation which is not as widespread

as in past decades. Also because there was a strong appeal in the dissent written by Justice Ginsburg for the dilemma it creates to be corrected by Congress, it is likely that this issue is not yet settled.

As a matter of existing legal precedent, if a business adopts a race-neutral hiring or promotion standard that results in few or no minority hires or promotions, it is potentially vulnerable to a disparate impact lawsuit. Years of case law have proven that this can occur even when that was not the initial intent. Conversely, if the business adopts race-conscious measures to try to shield itself from liability (e.g. - by practicing affirmative action, adopting a standard that is more favorable to minority applicants, and the like), it opens itself up to "disparate treatment" lawsuits by an affected majority group.

In it's ruling, the Court modified precedent in this area. First, it found that the City's rejection of the test results is "express, race-based decisionmaking," which was effectively intentional disparate treatment. Next, it considered whether the City's effort to avoid disparate impact liability was justified as disparate treatment of the firefighters.

The majority opinion found that while the Court does allow the use of race-conscious measures to avoid disparate impact liability where there is "a strong basis in evidence" to conclude that such liability would otherwise arise, it found that no such evidence was presented in this case. Therefore, the refusal to certify the test results and instead to discard them was impermissible. On the other hand, the Court did acknowledge that

had the test results been certified, a case of *prima facie* disparate impact liability would have existed. However, with this ruling the Court established that race-conscious measures to avoid disparate impact liability will only be allowed in "narrow circumstances" and fear of legal liability because of potential disparate impact is not enough on its own to justify such a decision.

Following that reasoning, the Court found that "(t)he question is not whether that conduct was discriminatory, but whether the city had a lawful justification for its race-based action." Applying a "strong-basis-in-evidence standard," the Court concluded that the city did not have a lawful justification for its decision.

The ruling pointed out that had the city would not have been liable for potential disparate impact had it been able to show that the examinations were *job-related and consistent with business necessity* and *adopted an available alternative practice* that had less disparate impact but still served the City's needs.

Some legal experts think that in the short term, employers will probably get more reverse discrimination claims where businesses face some substantial risk of disparate impact liability, but will still be forbidden to use race-conscious measures to avoid it.

A key point for employers reading the court's ruling is that the city of New Haven used a newly developed test instrument, one that had not been used before. While the tests' developer claims that they were developed racial neutral, it had not been apparently tested as such. Employers who use employment tests sold on the open market from third party vendors should take some solace that reliability and validity tests have been already performed and any racial-bias issues have been screened out. If you are unsure about the tests your firm is currently using, ask about the publisher about validity and reliability studies for the test.

USCIS Says Form I-9 Can Be Used After June 30 Expiration Date

USCIS has [announced](#) that Form I-9, Employment Eligibility Verification (Rev. 02/02/09), will continue to be valid for use beyond the expiration date stated on the form, June 30, 2009.

USCIS has asked the U.S. Office of Management and Budget (OMB) to approve the continued use of the current Form I-9. Once the extension is approved by OMB, USCIS will update Form I-9. While this request is pending, the current Form I-9 (Rev. 02/02/09) will not expire. After approval, employers will be able to use either the Form I-9 with the new revision date or the Form I-9 with the 02/02/09 revision date.

DOT Rule Requiring Direct Observation of Urine Testing Passes Muster

The DC Circuit Court of Appeals recently ruled in *BNSF Railway v US Dep't of Transportation* that the Department of Transportation (DOT) did not act arbitrarily or capriciously in modifying its drug testing regulations in 2008 to subject transportation industry workers to direct observation during drug tests conducted when the worker returns to work after a positive drug test and during follow-up drug testing.

The court found that the agency had a "considered justification" for the rule, having determined that the growth the industry devoted masking drug test results along with returning employees' higher rate of drug use and heightened motivation to cheat, presented an increased risk of cheating on return-to-duty and follow-up tests. Moreover, as the regulations apply only to employees who failed or refused to take previous drug tests, the regulation balances the government's compelling interest in transportation safety with employees' freedom from intrusive searches. Therefore, even though the circuit court recognized the "highly intrusive nature of direct observation testing," it concluded that the regulations complied with the Fourth Amendment.

GAO: OSHA's VPP Program Lacking in Oversight

The Government Accounting Office (GAO) recently issued a report on OSHA's Voluntary Protection Program (VPP), finding its internal controls insufficient to ensure that only qualified worksites participate in the VPP. It also found that OSHA has not developed the proper goals or measures to adequately evaluate the program.

Among the findings were a lack of required documentation in VPP files for follow-up actions in response to fatalities and serious injuries. This was found to limit the ability for regional office's actions to be properly monitored at the national level. Such oversight included reviewing sites' safety and health systems and determining whether sites should remain in the program.

Begun in 1982 to recognize worksites with exemplary safety and health programs, the VPP program sets performance-based criteria for management commitment, employee involvement, hazard recognition and mitigation and employee training. Worksites that achieve VPP status are removed from programmed inspection lists and OSHA does not issue citations to those workplaces for standards violations that are promptly corrected.

GAO was asked to review (1) the number and characteristics of employer worksites in the VPP and factors that have influenced growth, (2) the extent to which OSHA ensures that only qualified worksites participate in VPP and (3) the adequacy of OSHA's efforts to monitor performance and evaluate the effectiveness of the VPP. GAO analyzed OSHA's VPP data, reviewed a representative sample of VPP case files and interviewed agency officials.

To address the most recent GAO report's findings and recommendations about the VPP, OSHA will review and address problems including program management and oversight policies and procedures; documentation policy for actions taken in response to fatalities and serious injuries at VPP sites; and goals and performance measures for the VPP and internal OSHA controls that ensure consistent compliance with VPP policies by the agency's regional offices.

EEOC's Proposed ADA Rule Would List Presumptive Disabilities

On June 17, 2009 a proposed revision of the Americans with Disabilities Act (ADA) Title I regulations was passed by a 2-1 vote by the commissioners on the U.S. Equal Employment Opportunity Commission (EEOC). The commission is currently not balanced along party lines and has a majority of Democrats to Republicans. Amendments to the Title I regulations have been proposed to incorporate the ADA Amendments Act's (ADAAA) new definition of "disability," which took effect Jan. 1, 2009.

The dissenting commissioner said that the creation of a presumptive list of disabilities, among other changes, went beyond the EEOC's rulemaking authority. However, Acting Chairman Stuart Ishimaru disagreed, saying that the proposed regulations, "embrace the spirit Congress intended" by defining disability broadly. As a result, ADA cases will focus on whether there was unlawful discrimination, rather than whether individuals have disabilities covered by the law.

The ADAAA still applies the same basic framework for whether a qualified person with a physical or mental impairment has a covered disability, namely whether the individual has an impairment that substantially limits a major life activity, or the person has a record of disability or is regarded as having a disability. But the ADAAA refined this definition and clarified that the ADA definition of disability should be construed broadly so determining whether someone has a disability does not require extensive analysis. The proposed revision has now have been sent to the Office of Management and Budget (OMB) for its review.

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Employee Recognition Program 2009 Calendar

Week of July 20-24: Mailers Week (in conjunction with the anniversary of the creation of the U.S. Postal Service on July 26, 1775).

Week of October 5-9: Customer Service Representatives Week (in conjunction with Customer Service Week).

Week of October 5-9: Bindery Week (coincides with the anniversary of the first patented folder by Cyrus Chambers, Jr. on October 7, 1856.).

For more information please click [here](#).

Get a Head Start on Your 2009 Best Workplace in the Americas Entry

You can download the entry forms (Part 1 and 2) [here](#). Deadline: September 11, 2009.



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