



Ricci could impact agencies' testing, selection processes

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June 30, 2009
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WASHINGTON --Experts predict the Supreme Court's decision in *Ricci v. Destefano*, 109 LRP 38110 (U.S. 06/29/09), will have ramifications for the federal sector, particularly law enforcement agencies.

Federal employment attorney Joseph Kaplan told cyber FEDS® that agencies may want to think twice before reposting vacancy announcements based on the argument that they need "a wider pool of candidates" or "better qualified candidates."

If an agency wants to repost a vacancy announcement, it would have to meet the Court's standard of a "strong basis in evidence" that the selection method was biased. If the agency simply cites diversity as its sole reason for wanting to repost that announcement, "the judgment will be for the employee," Kaplan said.

Kaplan said the decision will also affect forms of testing where candidates are given scenarios to determine how they would act in a given situation. And if there are no minorities on selection panels, that could qualify as additional evidence that the exam had a disparate impact based on race.

For example, if an agency gives an oral examination and a member of the selection panel comments he has trouble understanding an individual who speaks English as a second language, that could meet the "strong basis in evidence" standard that the test had a hidden bias or was administered unfairly, Kaplan said.

Here is what other federal employment experts are saying about the decision:

- **Del. Eleanor Holmes Norton, D-D.C., former Equal Employment Opportunity Commission chairwoman**, who plans to introduce legislation to reverse the decision: The *Ricci* decision "puts employers between a rock and a very hard place by requiring the city of New Haven [Conn.] to promote candidates despite strong evidence that the underlying qualifying test has a grossly disparate impact on and discriminates against minority candidates. Congress, in writing Title VII of the 1964 Civil Rights Act, could not have been more clear that the policy of the statute is to encourage employers to correct their own practices and thereby to avoid, not invite, litigation. ... Instead, this Court invites employers to stare discrimination in the face and keep walking, to their peril."
- **Professor Kimberly West-Faulcon, Loyola Law School**: "Employers must have a performance-based reason to change the weight of selection criteria because they need better criteria or they need to find a better firefighter or better person for the [federal agency or department]. The key will be that when you change the process, you have a really good reason in addition to the point of racial disparity. What employers will need to do going forward is to find

better assessment tools."

• **Peter Mina, associate with Tully Rinckey PLLC:** "Why the dissenting justices were so upset is that based on the majority's call, [employees] must show a connection between the question [of race] and the duties of the position. That standard is lower for an employer. The decision makes it harder for someone seeking to not only show racial disparity, but also show that the testing itself is flawed. I think that is something that requires a lot of expert analysis. It's not something the average plaintiff is able to afford."