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Questions arise after watershed Supreme Court ruling

Frank Ricci (above) was one of the New Haven 20, firefighters who successfully argued before the Supreme Court this June that the city employed reverse discrimination in its scrapping of a promotional test that inordinately favored white candidates.

The "New Haven 20," as Frank Ricci and 19 of his co-workers are more commonly known, will be in Milford, CT on Sat., Sept. 12, selling t-shirts, pins, hats, and helmet decals. They will also be raffling off a fire helmet. Those unable to attend can visit the group's website, newhaven20.com, which contains a variety of donation options and merchandise offerings. The newest available item is a lapel pin that reads: "It's Not Just Us."

All proceeds will go to the New Haven 20 Legal Defense Fund, created by the firefighters to help them pay for five long years of legal fees. The New Haven 20 have been seeking promotions since January 2004; it appears they all will soon get one.

The New Haven 20 Case, officially known as Ricci v. DeStefano, placed the city of New Haven at the center of national news this summer, as the case made its way to the Supreme Court and then re-appeared as a talking point during the confirmation hearings of Supreme Court nominee Sonia Sotomayor, LAW '79.

The New Haven 20 consists of Frank Ricci and 19 other white and Hispanic firefighters who sued to uphold the results of a November, 2003 promotion exam, in which they obtained high enough scores to earn promotions to Lieutenant and Captain positions while not a single African American candidate scored well enough on the test to be awarded a similar promotion.

Ricci and his co-workers sued after New Haven's Civil Service Board scrapped the exam results, claiming they were discriminatory under the "disparate impact" definition, which refers to a policy that is not discriminatory "on its face" but ends up having a discriminatory effect. Since no African American firefighter would have earned a promotion if the test results were allowed to stand, the Civil Service Board concluded that the test, while impartial on its face, had the effect of discriminating against African American candidates.

The city of New Haven won in district court, then again in the Appeals Court of the Second Circuit, where a panel, which included Sotomayor, dismissed the firefighters' claim. But on June 29, 2009, the Supreme Court ruled, 5-4, in favor of the New Haven 20.

For Karen Lee Torre, lead counsel for the New Haven 20, the Ricci case was about the "pushback against the use of race and Title VII by some to gain an unearned and unfair advantage over others."

The case has now been remanded to the Second Circuit Court of Appeals, which will likely send it back to Federal District Court to enter judgment for the plaintiffs and determine appropriate damages. After six years of fighting, the New Haven 20 have finally won their claim.

The New Haven Fire Department will likely see the addition of 13 Lieutenants and seven Captains, but otherwise it will absorb the ruling smoothly.

“The vast majority of the NHFD supported our clients’ cause,” stated Torre. “I am not sure I would characterize the [dispute] as one between my clients and the NHFD.”

The heart of the New Haven 20 case, the promotion exam itself, remains a hotly disputed topic even after the Supreme Court has rendered its verdict. Promotion exams for New Haven firefighters consist of a written component, which is worth 60 percent of a test-taker’s overall score, and an oral component, which comprises the other 40 percent.

Supreme Court Justice Ruther Bader Ginsburg’s dissent stresses the city’s rigidity in adhering to the 60-40 written-oral breakdown and the likely correlation between the structure of the exam and the ensuing results, in which African-American and Hispanic firefighters severely underperformed their white counterparts.

“New Haven did not consider what sort of ‘practical’ examination would ‘fairly measure the relative fitness and capacity of the applicants to discharge the duties’ of a fire officer,” Justice Ginsberg’s opinion stated.

Martin O’Connor, a professor at the University of New Haven and former New Haven Fire Chief, defends the Court’s ruling. “Many people point to ‘pencil and paper’ exams as the principal problem with promotional practice in Fire Service, claiming that they unfairly discriminate against certain groups of individuals,” O’Connor said. “Although the exams should never, in my judgment, be the sole testing method, it seems reasonable to me that one measure of an individual’s capacity for assuming a leadership role in a profession is his or her mastery of the basic professional literature associated with the profession.”

O’Connor, who participated in the negotiations which led to the implementation of the 2003 promotion exam, takes particularly strong issue with the “[suggestion] that these weights were negotiated to perpetuate a segregated officer corps.” He added, “I can categorically say that this was not the case,” noting that, had the results of the exam been upheld, several minority candidates would actually have received, as several officers have since left the fire department and African American candidates were high on the list of eligible replacements.

“At the time this memorandum was negotiated,” O’Connor continued, “there was a widespread fear that the promotional process had become overly politicized and that allowing a higher weight for the ‘oral’ component would inject a higher degree of possible political influence into the process” due to a belief that oral exams were scored less objectively than written ones.

“People are quick to quote the old adage that you don’t put a fire out with a pencil or a book,” O’Connor said. “But if the fire service is to truly serve our community in the best possible way, its fire officers had better know what is in the books that our professional community has produced over the last 20 years, material about which there is almost universal professional consensus and which constitutes best practices. That is part of the way we test lawyers, teachers, doctors, barbers, and real estate agents.” Yale Professor of Political Science and vocal critic of both the actions New Haven took and Supreme Court’s verdict, David Cameron, however, pointed to the existence of alternative testing procedures,

including a practical component called an “assessment center,” which “[evaluates] the on-the-scene judgment of candidates in crisis situations.” But Cameron, who has authored several Op-Eds about the New Haven 20 case in publications such as the Boston Globe and New Haven Register, believes the city had a chance to properly evaluate the exam and failed to take it.

“After the results came back, [the city] should have conducted a validation study as the federal government’s uniform employment guidelines advise,” said Cameron.

“Had it done so,” and if the study had concluded that the exam was in fact discriminatory, “it would have had a strong defense against a disparate treatment lawsuit by the white firefighters if it had thrown out the test results.” This is because the study would have found the tests had a “disparate impact on the Hispanic and African American candidates” and the study would have identified “an alternative means of assessing competence for promotion that did not have the same degree of disparate impact.”

“On the other hand, had a validation study been performed and had it found the tests did not have a disparate impact on the minority candidates and there was no other alternative form of assessment available, the city would have had a good defense against a [potential] disparate impact suit by the minority candidates if it then promoted the white firefighters.

“Because the city did not conduct a validation study and allow itself to be guided by the results of such a study, everyone lost,” Cameron said.

Backlash against the ruling—and against the plaintiffs themselves—has been just as loud as the support the New Haven 20 have received. Ricci, in particular, has come under scrutiny, earning himself the notorious label of “serial plaintiff” in certain circles.

Indeed, Ricci v. DeStefano wasn’t Ricci’s first brush with the justice system. In January, 1995, Ricci sued the city of New Haven, claiming that he was refused a job in the New Haven Fire Department because he was dyslexic. He won his job in a settlement two years later, but critics continue to cite the disparity between the philosophies espoused by Ricci in the two notable cases.

Brian Beutler, a writer for prominent liberal blog TalkingPointsMemo, wrote, “Ricci’s views on jurisprudence seem to begin and end with the proposition that legal protections against discrimination are great when they work in his favor, and unconscionable when they don’t,” [“New Haven Firefighter Originally Hired By Claiming Discrimination,” TalkingPointsMemo, 7/10/2009].

The International Association of Black Professional Firefighters (I.A.B.P.F.F.) has been a vocal opponent of the New Haven 20 throughout the proceedings, even creating its own website, diversityisamatterofnationalecurity.com, to organize its opposition to the firefighters’ claims. The I.A.B.P.F.F., known as the “New Haven Firebirds,” has drawn the attention of the plaintiffs, who cite them as the lone source of strife in the Fire Department going forward.

“The leaders of the Firebirds are largely responsible for the tension in the department,” said the New Haven 20’s lead counsel, Torre. “So long as those few individuals continue to make false charges of race discrimination in the department and seek essentially to rob their fellow firefighters of earned promotions, there will be continued tension.”

While the New Haven 20 case is mostly resolved, how the city plans to handle similar situations in the future is considerably less clear.

“Going forward, it would be my hope that the city would evaluate its testing alternatives,” O’Connor said. Yet O’Connor cautioned that all changes to the weighting of components of the promotion exam must be collectively bargained.

Torre does not see the need for such an evaluation. “There was nothing wrong with the exams at issue in this case and the NHPD should continue to promote command officers based on these type of job-related exams, for they quite accurately screen out the unqualified and marginally qualified and ensure that only the smartest, most knowledgeable, and [most] capable people assume command positions.”

“I do not see an end to the efforts by some to race-monger their way up the career ladder. That will continue as it is endemic to city politics and the civil service,” Torre said.

“But I think you will see not only New Haven but also other cities think twice before assuming their liberal view of the disparate impact doctrine will govern the day,” Torre continued. “Those days are over.”

Yet structural changes to the promotion exam are not the only path the city can, or should, take, according to Cameron. Validation studies are one way the city could have covered its tracks in the New Haven 20 case, and they are a tool that the city must continue to utilize; however, this does not necessarily mitigate racial bias, unconscious or otherwise.

Of particular concern to Cameron are the events that followed a recent exam administered by the New Haven Police Department for the position of sergeant. A total of 64 police officers took the exam, and 36 candidates—21 African Americans, 15 whites, and zero Hispanics—passed the test. The city did conduct a validation study, but the study concluded that the difference in pass rates by ethnicity was not large enough to conclude with confidence that disparate impact had occurred.

“It’s astounding the examiner could say that the [difference in] pass rates for the different groups—67 percent for whites and African Americans together, zero percent for Hispanics—[wasn’t] large enough to conclude with confidence that disparate impact occurred,” Cameron said. “The results in the police exam suggest that, as in the firefighters case, whether an exam is certified or not depends on the race of those on the promotion list.”

Regardless, in the coming months, Frank Ricci and the rest of the New Haven 20 will receive the promotions they thought they had earned almost six years ago. The New Haven fire department will move on.

“I think most—the department leadership, the white firefighters, and the minority firefighters—recognize that the responsibility for what happened doesn’t lie in the department itself or with one group of firefighters,” said Cameron.

“I know and respect each member of the New Haven 20,” adds O’Connor. “Like professionals in other disciplines they desire a system of promotion that is rigorous enough to allow the best candidates to succeed, is consistent with the best practices in our profession, and allows an equal opportunity to all

candidates. If the city takes steps in this direction, I think any true fire service professional would sign on.”

The question of what they will be signing on to lingers.

By Andrew Kaufman