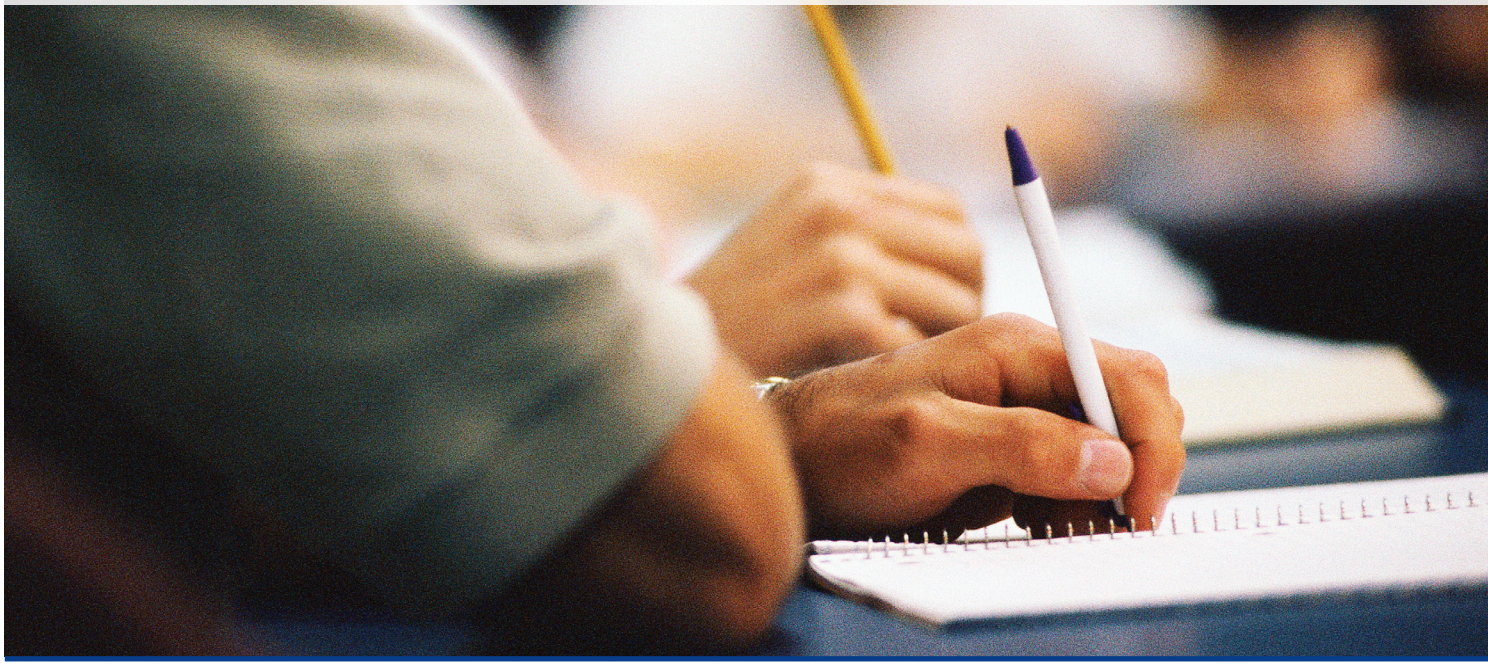
# Communities Should Examine **Civil Service Promotional and Layoff Strategies** to Avoid Discrimination Claims



*By Edward M. Pikula*

When municipalities are hiring and promoting, they need reliable information in order to make the best decisions. Often a civil service test is used as a tool to make these decisions, particularly for public safety positions. The use of such a test has implications beyond the initial hiring process, however. When budget constraints force a community to lay off employees, the community could face claims that the civil service rankings on which layoff decisions are based were, in fact, created by a discriminatory test.

One recent decision by the U.S. Supreme Court and two recent Massachusetts cases decided by the federal First Circuit Court of Appeals may cause concern and confusion for municipalities, not only when making promotional decisions

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based on a civil service exam, but also when making layoff decisions based on civil service seniority rankings.

One of those cases, still pending a trial, involves plaintiffs who allege that the state civil service promotional exam for police sergeants has a discriminatory impact. The First Circuit decided part of that case [Lopez v. Massachusetts, 588 F.3d 69 (1st Cir. Mass. 2009)] and ordered the dismissal of the Commonwealth of Massachusetts as a defendant from the case, while municipalities and the Massachusetts Bay Transportation Authority remain as defendants, solely based on their decision to use the civil service exam created by the state Human Resources Division. The trial, scheduled for this summer, could have wide-ranging financial implications for municipalities across the state [Lopez v. City of Lawrence, et al. No. 07-11693-JLT (D. Mass.)].

In the other Massachusetts case, Sullivan v. City of Springfield [561 F.3d 7, 9-13 (1st Cir. 2009)], several white police officers alleged that they were discriminated against on the basis of race in their civil service rankings and, therefore, when they were subjected to layoffs. The First Circuit Court of Appeals affirmed the entry of summary judgment for the city because plaintiffs failed to establish a race-based causal connection and because the defendant's acts fit within the scope of a consent decree.

If the plaintiffs in the Lopez case are successful, however, and a state-created and -administered civil service promotional exam is ruled as a sufficient basis for municipal liability when making promotional decisions, the case will raise the question of whether a municipality could be held liable for disparate impacts when making layoff decisions based on civil service rankings that could have been discriminatory in their creation. Municipal administrators need to be aware of these three recent federal cases and consider whether their municipality could risk exposure to a lawsuit based on promotional or layoff decisions that rely on state civil service exams.

Municipal employers who want to create a discrimination-free workplace should learn the characteristics of employment discrimination associated with promotions and layoffs. Such knowledge can help managers intervene to prevent discrimination or a perception of discrimination.

## Ricci v. DeStefano

Under Massachusetts law, municipal civil service public safety promotions must be made on the basis of competitive examinations, whether a state Human Resources Division examination or some other test (M.G.L. Ch. 31, Sects. 59 and 65). The Human Resources Division is given statutory authority to establish the form and content of these examinations. By statute, all examinations must "fairly test the knowledge, skills and abilities which can be practically and reliably measured and which are actually required" to perform the job. The Human Resources Division consults with labor representatives and professionals in the field to determine what skills and abilities are relevant for promotion to various positions.

In New Haven, Connecticut, the city had devised its own civil service promotional exam in an attempt to fairly test members of the fire department for promotion to captain and lieutenant. The results of the test indicated a sharp, disparate impact, however. African-American and Hispanic test takers did worse than the white candidates, and, based on the exam, no minority candidates would have been eligible for promotion. Black and Hispanic firefighters threatened to sue the city because of the disparate impact, and the city decided to abandon the test and declined to certify any successful candidates for promotion. At that point, the white firefighters sued, claiming that the city should not have abandoned the test, which they claimed was fair and properly administered.

In Ricci v. DeStefano [557 U.S. __, 1289 S.Ct. 2658 (2009)], the U.S. Supreme Court upheld the validity of New Haven's promotional test and ruled that the city's action in discarding the test violated Title VII of the federal Civil Rights Act. Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin [42 U.S.C. Sect. 2000e-2(a)(1) (disparate treatment)], as well as policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities [Sect. 2000e-2(k)(1)(A)(i) (disparate impact)].

The Supreme Court began with the premise that, absent some valid reason in defense, the city's actions in not making any promotions would violate Title VII's disparate-treatment prohibition. Since the city rejected the civil service test results because the higher scoring candidates were white, the court said that, unless well justified, this express, race-based decision-making is prohibited. "The question" as framed by the court, was "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."

The racial adverse impact in the New Haven case was described by the court as "significant," and it was undisputed that the city faced a prima facie case of disparate-impact liability (Ricci at 2677). On the captain exam, the pass rate for white candidates was 64 percent, while it was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates it was 31.6 percent, and for Hispanic candidates it was 20 percent. The pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80 percent standard set by the Equal Employment Opportunity Commission to implement the disparate-impact provision of Title VII [see 29 CFR Sect. 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 adverse impact"].

In order to defend its decision to abandon the test, the city then found itself arguing the assertions made by the minority applicants, who urged that the results not be used for promotional decisions because the exams at issue were not job-related and consistent with business necessity. The court held that "detailed steps" were taken by the city to "develop and administer the tests and … [there were] analyses of the questions asked to assure their relevance to the captain and lieutenant positions."

A prima facie case of disparate-impact liability—essentially, a threshold showing a significant statistical disparity—was described by the court to be "far from a strong basis in evidence that the city would have been liable under Title VII had it certified the results," and, therefore, an insufficient basis for the city to disregard the test. The city could be liable

for disparate-impact discrimination only if the examinations were not job-related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that the city refused to adopt; the court concluded that there was no "strong basis in evidence" to establish that the test was deficient in either of these respects.

"Fear of litigation alone," the court wrote, "cannot justify the City's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. Discarding the test results was impermissible under Title VII. … If, after it certifies the test results, the City faces a disparate-impact suit, then in light of today's holding the City can 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."

The lesson of the case appears to be that "disparate treatment" is worse than a prima facie case of "disparate impact," and disparate impact may be justified in some cases, though such cases were not expressly described by the court. The court appears to have decided that the city of New Haven overreacted to the threat of a lawsuit based on statistical evidence that, the court held, was insufficient to justify disparate treatment, even though it was sufficient to prove a prima facie case of disparate impact.

Seniority rankings based on civil service exams would be followed in reverse order if they are used as the basis of layoff decisions.

## Lopez v. Lawrence

How does a city or town know when a statistical disparity is sufficient to ignore test results and use criteria in addition to a written exam? In Ricci, the Supreme Court ruled that a decision to not use the test was a "race-based" decision and was therefore unsustainable absent a "substantial basis in evidence that the employer would be liable for disparate impact discrimination." In Lopez v. Lawrence, the defendants find themselves in the same shoes as the city of New Haven; by not rejecting civil service exam results developed by the Human Resources Division (or developed with HRD assistance), the municipalities and the MBTA could be held liable under Title VII.

In the Lopez case, scheduled for trial this summer, minority police officers brought a disparate-impact race claim under Title VII against the Human Resources Division, the agency that prepares and administers promotional examinations for local police officers under the state's civil service system. The plaintiffs have also sued their municipal employers (various cities across the state) and the MBTA as the appointing authorities who make the police promotions decisions. The claim against the Human Resources Division, which was dismissed, and the claim against the appointing authorities are identical: that the state promotions examinations have an impermissible disparate impact on minority candidates.

The federal First Circuit Court of Appeals dismissed the plaintiffs' suit only against the state defendants on the grounds that the state was not the officers' "employers" within the meaning of Title VII and that the state was therefore immune from suit under the Eleventh Amendment of the Constitution, which provides for sovereign immunity. The First Circuit holding, however, in no way evaluates the conduct of the remaining defendants toward the plaintiffs.

The municipal defendants and the MBTA now find themselves defending a test they neither prepared nor administered against a claim that promotional decisions based on the test are in violation of Title VII due to the test's discriminatory impact. Unlike the city of New Haven, the defendants in Lopez cannot choose to abandon the test results, as the promotions have been made. Any decision by the cities or the MBTA to reject the results of the examination because of concern over whether the results had a disparate impact on minorities would constitute a race-based decision that could only be justified if there is a "substantial basis in evidence" of disparate impact discrimination.

The plaintiffs in Lopez allege the civil service "examinations have, over the last twenty years, been shown to have a significant adverse impact upon minority (black and Hispanic) test takers while not having been shown to be valid predictors of job performance for a police sergeant." The case against the cities and the MBTA is that, although the examination was administered and scored by the Human Resources Division, the use of the examination has adverse impacts on promotions in each of the police departments at issue. The defendants have asserted that they do not believe that the plaintiffs can make a prima facie case based on the statistics alone, and that business necessity requires the use of the Human Resources Division's expertise. Defendants have also asserted that public policy in Massachusetts compels the use of the merit system and satisfies the standard of job relatedness and business necessity. Until this case is decided, these issues will remain a source of uncertainty and the catch-22 created by Ricci will continue to loom.

## Sullivan v. Springfield

What will happen if the expected local aid cuts lead to more municipal layoffs this summer? Seniority rankings based on civil service exams would be followed in reverse order if they are used as the basis of layoff decisions. If the exams have a disparate impact, however, then the layoffs would, theoretically, be infected with the same disparate impact as a "mirror image." Such a hypothetical was the basis of a lawsuit in another recent case from the First Circuit.

The events giving rise to the dispute in Sullivan v. Springfield are entwined with the facts related to a consent decree involving the state's civil service testing and hiring system and entered more than thirty years ago in Castro v. Beecher [365 F. Supp. 655 (D. Mass. 1973)] and the statutory and administrative framework governing the hiring of police officers in municipalities subject to the state's civil service law. The Castro-Beecher consent decree requires the creation of two separate civil service lists by the Human Resources Division: one of minority appli-

cants "who pass a … police entrance examination and are otherwise qualified for appointment on the basis of existing requirements," and another of non-minority candidates "who pass a … police entrance examination and are otherwise qualified for appointment on the basis of existing requirements." The consent decree then specifies that "candidates shall be certified on the basis of one candidate from [the minority list] for every candidate certified from [the non-minority list]." Plaintiffs in the Sullivan case claimed that the city of Springfield racially reordered the seniority list at the time of layoffs, even though the Human Resources Division had already reordered the list at the time of hiring.

The plaintiffs argued that if the city had not racially reordered a civil service hiring list as it went through the various qualification procedures under the Castro-Beecher consent decree for the purposes of retaining minorities, they would have greater seniority and would not have been laid off at all, or would have been recalled more quickly. In effect, the plaintiffs alleged that the city of Springfield, like New Haven in the Ricci case, had made a race-based decision to remedy past disparate impact.

Both the federal District Court and the Appeals Court held that the plaintiffs had failed to offer sufficient evidence to allow a "reasonable fact finder" to conclude that the city's actions were based on race. Summary judgment was entered for the city, and the courts dismissed the claim that the city had caused the plaintiffs to be laid off sooner than minority officers and called back later than such officers, thereby causing lost wages and injuries. Essentially, the court ruled that it was not clear on the evidence presented how or why the plaintiffs were laid off or recalled in the order that they were. The court ruled it was not enough for plaintiffs to show that the city may have used an impermissible racial classification; there needed to be a causal link between the classification and the adverse action (i.e., the plaintiffs being given their particular rankings). Without any clear proof, plaintiffs only had speculation that there may have been a causal chain, without supporting evidence, which was insufficient to survive summary judgment.

The First Circuit also noted that the language of the consent decree, evidence concerning past discriminatory practices, and common sense as to the intended operation of the consent decree supported the conclusion that the city was well within the scope of the decree to attempt to reorder. More specifically, the appellate court decision supports the city's right to reorder the seniority list in furtherance of the Castro-Beecher consent decree. While not specifically discussed in the Sullivan case, in effect, the lack of proof of discriminatory impact in the Ricci case was evident in the past practices and undisputed in the record of the Castro-Beecher consent decree, and the language of the consent decree could provide a common sense rationale for discriminatory treatment by the city to try to comply with the consent decree. It should be noted, however, that the opinion specifically avoids the issue of whether a "desire to adhere to … understanding of the legal requirements of the Castro decree" mitigated an improper discriminatory intent.

While not explicitly stated, it could be argued that the Sullivan case is one where the Ricci requirement of a "substantial basis in evidence that the employer would be liable for disparate impact discrimination" was present, thereby justifying "disparate treatment."

## Promotion and Layoff Strategies

Municipal promotions and layoffs must be done without discriminating against protected class members. The applicable provisions of Title VII of the Civil Rights Act of 1964 (protected class members based on race, sex, color, religion, national origin), as well as the protected classes of age and disability under provisions of the federal Age Discrimination in Employment Act and the Americans with Disabilities Act, prohibit employers throughout the country from making employment decisions, including promotions and layoffs, using protected bases as a criteria. Massachusetts law (M.G.L. Ch. 151B) mirrors and expands these protections.

The Ricci, Lopez, and Sullivan cases point out the catch-22 circumstances that municipalities can find themselves in when trying to make promotional or layoff decisions based on written civil service exams, particularly where the exams are state-prepared and state-administered. Using written civil service tests exposes a municipality to a risk of a "disparate impact" lawsuit, while attempts to make decisions in reaction to disparate impact claims caused by exams can result in reverse-discrimination claims.

Municipal employers are advised to use legal counsel and statisticians to guide their promotion and layoff strategies, examining their impact on women and other protected minorities.

Municipal employers are advised to use legal counsel and statisticians to guide their promotion and layoff strategies, examining their impact on women and other protected minorities. A comprehensive audit will identify potential vulnerability and will help to ensure that data and documentation exist to show that any disparities are the result of valid nondiscriminatory factors. If disparities cannot be ascribed to nondiscriminatory factors, a problem area has been identified that must be addressed by management.

Appropriate protocols and criteria for layoffs (length of service or seniority, worker status [temporary, part-time or contract], documented job performance data, work functions, etc.), and an effort to assure consistency in the statutory notification process, can minimize the risk of adverse impacts and provide justification for each layoff decision.

In order to avoid claims where a civil service testing component is involved, municipalities should also consider adding a non-written testing component (e.g., an

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oral examination and/or role playing) to the promotion process. State law (M.G.L. Ch. 31, Sect. 5(l)) allows municipalities to seek and obtain a delegation agreement from the Human Resources Division. Where a municipality develops and conducts its own examination pursuant to a delegation agreement, it is still required to comply with Chapter 31; Section 27 of Chapter 31 provides that, in making an appointment or promotion, the appointing authority is limited to selecting from among only the three highest-scoring candidates willing to accept promotion (i.e., the "2n + 1" rule). Moreover, the delegation agreement will not, in and of itself, prevent lawsuits.

It's important to remember that if the promotional process is insulated from an attack based on discrimination, a future layoff that follows seniority based on the exam process should also be insulated.