

Fire & Police Selection, Inc.

Dan A. Biddle, Ph.D. Presenting:



Make the Right Choice...

Test Validation and the USSC Ricci v. DeStefano Case

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Fire & Police Selection, Inc.

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About Fire & Police Selection, Inc. (FPSI) – Since 1997

- Over 80 Physical Ability Test installations at fire departments across the U.S.
- Over 600 personnel and fire clients across the U.S.
- Entry-level written, physical, interview assessments, manipulative skills tests, cognitive ability tests, and personality tests available for selection of fire personnel
- Fire promotional tests and assessment exercises
- Work Styles Inventory for *predicting firefighter job performance*
- Comprehensive Examination Battery for Entry-Level Firefighters
- ***New*** National Fire Select Test (NFST™) for Entry-Level Firefighters



Introduction

- Sister company of Biddle Consulting Group, Inc.
 - Experience in over 200 state and federal discrimination cases
 - 40-50 employees
 - 6 Divisions:
 - EEO Litigation
 - EEO/AA Services & Consulting
 - Compensation Audit
 - OPAC Testing Software
 - CritiCall Dispatcher Testing Software
 - Encounter Testing Software



Some of Our Fire Clients

■ **Test Preparation Manual:**

- Anchorage, AK
- Mesa, AZ
- Burbank, CA
- Glendale, CA
- Menlo Park, CA
- Santa Monica, CA
- Poudre, CO
- New Hampshire Fire Academy, NH
- Las Vegas & North Las Vegas, NV
- Tualatin Valley Fire & Rescue, OR
- Chattanooga, TN
- Virginia Beach, VA
- Tacoma, WA

■ **Physical Ability Test:**

- 41 cities and counties in LA / Orange County
- Anchorage, AK
- Fresno, CA
- Monterey County, CA
- Baton Rouge, LA
- Plano, TX



Some of Our Fire Clients

■ **Comprehensive Examination Battery Test:**

- Chandler, AZ
- Flagstaff, AZ
- Tempe, AZ
- Orange County, CA
- Tracy, CA
- Baltimore City, MD
- Henderson, NV
- Northern Nevada Consortium, NV
- Salt Lake City, UT
- Austin, TX
- Richmond, VA

■ **Work Styles Inventory Test:**

- White Rock, BC
- Menlo Park, CA
- Durango, CO
- Northern Nevada Consortium, NV
- Ogden, UT
- Salt Lake City, UT
- Richmond, VA
- Virginia Beach, VA



Entry-Level Written Tests

- Test Preparation Manual (TPM)
- Comprehensive Examination Battery (CEB)
- Practical Skills Test (PST)
- Work Styles Inventory (WSI)
- Certified Firefighter Test (CFT)
- Writing Ability Test (WAT)



The Supreme Court Rules in Ricci v DeStefano



First ... Let's start with the "two big lessons" from Ricci

- Lesson #1: Don't redact test results after a test has been given unless the test was professionally reviewed and found to be obviously not valid.
- Lesson #2: Validate tests before they are given, so you won't be faced with lesson #1.



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Ricci v DeStefano

Background

Title VII v Equal Protection

Ricci in The Supreme Court

The Testing Issues

Implications For Employers



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Overview of Ricci In Court

Promotional Exam

Professionally Developed
Lieutenant and Captain positions
African Americans achieved lower passing rates
City threw out test results

District Court

White and Hispanic examinees filed reverse discrimination claim
District Court rejected plaintiffs claim

2nd Circuit Court

Court cited prior cases upholding municipality race conscious interventions to address Title VII issues
Circuit Court also rejected plaintiffs claims

Supreme Court

Slim majority on Supreme Court ruled that District and Circuit Courts were in error
No "strong basis in evidence" necessary to justify race-conscious solution



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The Test Had Various Levels of Adverse Impact...

- Nine African American examinees passed and received scores that would qualify them for promotion. However:
 - White applicants passed the Lieutenant examination at a higher rate than of African Americans (58.1% to 31.6%).
 - White applicants passed the Captain examination at a higher rate than of African Americans (64.0% to 37.5%).



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New Haven refused to certify the results of the promotional examination.

A group of 17 Whites and 1 Hispanic firefighter filed a suit alleging reverse discrimination.



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Title VII v. Equal Protection



A Difficult Choice

New Haven had two choices:



Prepare to defend the test in the face of substantial disparities and questionable validity.

Withdraw the test in the hopes of avoiding a Title VII suit, or

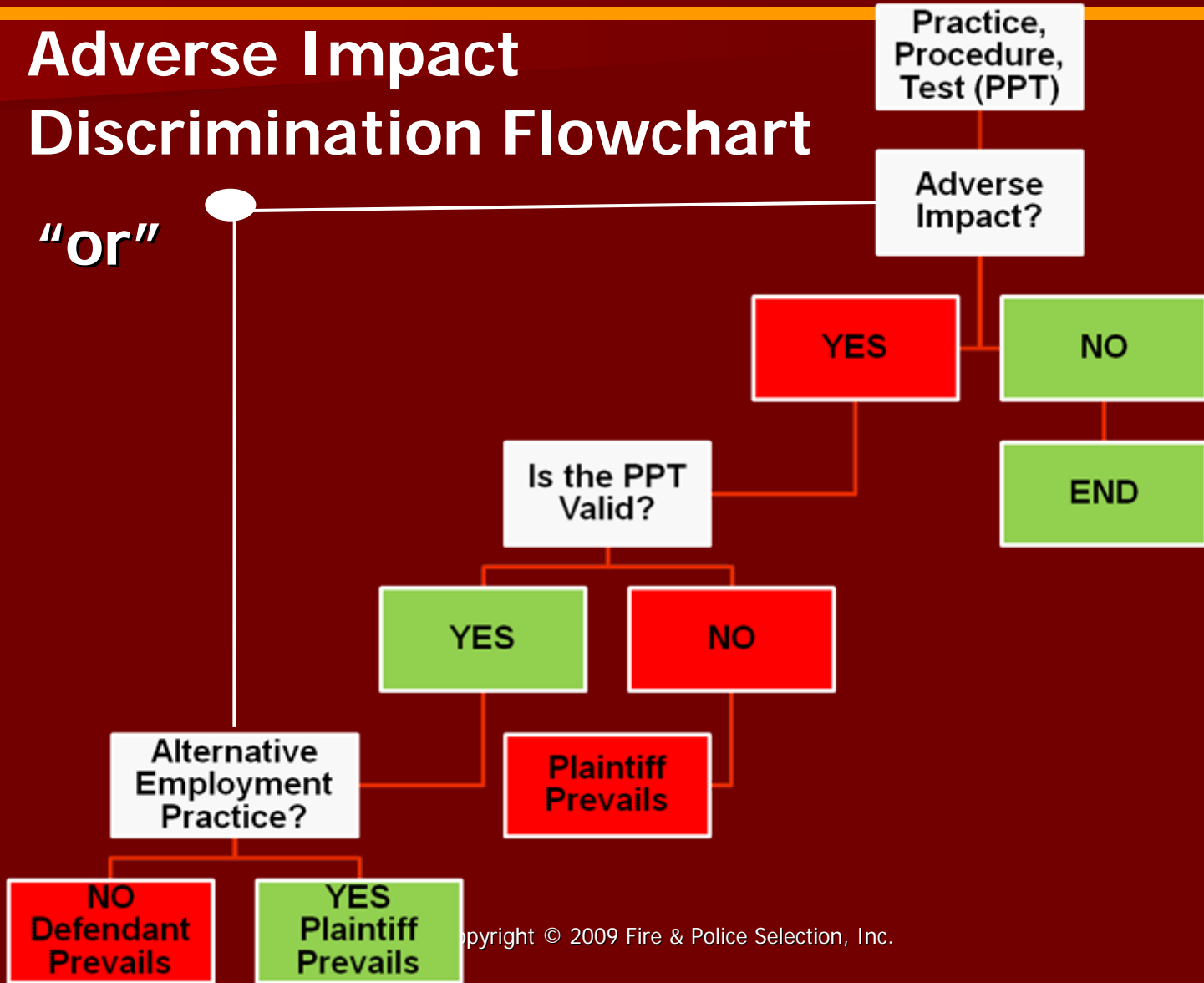


New Haven decided to withdraw the test.



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Adverse Impact Discrimination Flowchart





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TECHNICALLY

- City's decision did not deny anyone a promotion.
- Test score did not guarantee a promotion.
- On re-test, examinee may still be on top.

THE REAL WORLD

- City's decision did disadvantage those who passed the original examination.
- Time would impact the potential earning power of those eligible for promotion.
- Other personal facts could intervene and eliminate the possibility of promotion.



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The Issue of Validity in Ricci


Test Validation is a Secondary Issue

- The importance of using a valid and reliable personnel selection and promotion instrument is almost universally agreed upon.
- A quick glance of the Ricci case might lead one to believe this is just a run-of-the-mill question of test validity.
- While questions of validity may be at play, the Court has used the case for something far larger.



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The Core Issue

- Since Griggs v Duke Power (and still today), it has been law that some level of race-consciousness is necessary.
 - Title VII requires affirmative race-based actions when a disparate impact violation *would* otherwise results
 - Under current USSC law (e.g., Croson-Adarand), public employers can already use “race-conscious remedies” to remedy previous and prevent future discrimination (provided the solutions survive the “strict scrutiny” test and are “sufficiently narrowly tailored”).
-  **versus**
- The Equal Protection Clause of the 14th Amendment implies that all must be treated equally and that decisions be made in an atmosphere of color-blindness.



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Equal Protection

Goal: A "color-blind" society

Title VII

Goal: To evaluate and rectify discrimination by being "color-conscious"

- *Is Title VII at odds with Equal Protection?*
- Scalia (concurring opinion) stated: "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."



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Ricci in the Supreme Court



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Ricci in the Supreme Court

- Defendants were on a collision course with a disparate impact claim.
- Defendants made a racially-motivated decision (i.e., threw-out the test)—which can be considered at odds with the concept of color-blindness and equal protection.
- Plaintiffs claim they were injured as a result of this race-conscious decision.
- Without more, however, this kind of decision making process is not necessarily illegal under Title VII. Otherwise, Title VII, would be inconsistent with itself.



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Ricci in the Supreme Court

- The Supreme Court noted that the central question at hand was:
 - Does the purpose of avoiding adverse impact liability (and the likely pending lawsuit) excuse what otherwise would be prohibited disparate treatment discrimination?
 - In other words, whether seeking to reduce/eliminate adverse impact (Title VII) permits making race-conscious decisions (Equal Protection).
- The Court noted that race-based decisions which are themselves designed to address past discrimination—a decision which would itself be based on race—are constitutional ONLY where there is a **“strong basis in evidence”** that this remedial action is necessary.



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Ricci in the Supreme Court

Decision:

- “We conclude that race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate impact statute. The respondents, we further determine, cannot meet this threshold standard.”
- “Allowing employers to violate the disparate treatment prohibition on a mere good-faith fear of disparate impact liability would encourage race-based action at the slightest hint of disparate impact.”



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Ricci in the Supreme Court

What constitutes evidence sufficient for an organization to make such race-based decisions?

...a threshold showing of a statistically significant adverse impact (Connecticut v Teal, 457 U.S. 440, 446) and nothing more is far from a *strong basis in evidence* that the City would have been liable under Title VII had the city certified the test results.

This is because adverse impact itself is not discrimination under Title VII. Adverse impact is defensible if: a) a test can be shown to be job related, b) consistent with business necessity, and c) no equally valid alternative is available and which would exhibit lower levels of adverse impact.



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Ricci in the Supreme Court

- The **City argued** that the test was not job related or consistent with business necessity.
- The **Court ruled**:
 - This claim is contradicted *by the record*.
 - The promotional test's development was clearly documented and included detailed description of the development steps.
 - Administration procedures were clearly outlined.
 - Claims that specific items were not valid or did not rely on skills necessary to firefighting were fully addressed.
 - The City turned a blind eye to evidence related to the validity of the test.



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Ricci in the Supreme Court

- The **City argued** there were equally valid alternatives with lesser adverse impact.
- The **Court ruled (re: alternative tests):**
 - There is no evidence that alternative tests with lesser adverse impact were available which the employer refused to adopt. However, the Court did note that although an “assessment center” approach would likely have provided equally valid results with lesser adverse impact, previous testimony indicated that an assessment center was not feasible for the City in this examination.



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Ricci in the Supreme Court

- **The Court ruled (re: alternative uses of the tests):**
 - That there is no evidence to show that the composite weighting was not objective and arbitrary (in response to testimony that a different scoring approach would have allowed the City to consider African American candidates for promotional positions).
 - That changing the City charter to allow a different interpretation of test results (i.e., banding) would violate Title VII's prohibition of race-based adjustment of test results **(because such change would have been done after the test and exclusively based on race)**.



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Ricci in the Supreme Court

- In short, the Court implied, by citing the “strong basis in evidence” requirement, that employers better think twice before simply tossing-out test results because they didn’t like the numbers.



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Ricci and the Issue of Test Validity



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Were the Tests used by New Haven Valid According to Federal and Professional Standards?

- Was a 70% cutoff score properly calibrated to the job?
- Did the 60% / 40% weighting scheme represent the best balance of skills needed on "Day One"?
- Was ranking on the list justified?
- Would the SMEs have rated the test content as "job linked" and "department relevant"?
- Answer? "Maybe" to all 4 questions!
- Without investigating the JA/CVR, *we can't really tell...*



Ricci Case Evaluation Factors

Evaluation Factor/Criteria	Cutoff Score Justification	Test Component Weighting	Ranking Support	Test Reviewed/Linked by SMEs
Required When Adverse Impact is Present?	YES	YES	YES	YES
Uniform Guidelines?	5H, 14C7, 15C7	14C6, 15C10	YES	YES
APA Standards	St. 2.14-15; 14.17	St. 3.13; 14.16	Sect. 1	St. 14.9
SIOP Principles	p. 46-48	p. 49	p. 46-48	p. 22+
Typically Evaluated in Title VII Testing Cases?	YES	YES	YES	YES
Reviewed in Ricci via Validity Study?	NO	(NEGOTIATED)	NO	NO (1 SME)
Subjected to Expert Review?	NO	NO	NO	NO (1 EXPERT)



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How Could the USSC Rule the Tests Were “Justified” When There are Dozens of Circuit-Level Cases Where Defendants Have Lost Cases on These Very Issues?

- This was a reverse discrimination case and a Title VII case
 - It was not your typical Title VII adverse impact / validity case
- The **defendants were actually incentivized** to DISPROVE the validity of the test
- And the plaintiffs were also incentivized to not contest the validity (i.e., not to open the issue)
- The result of this conundrum? NO VALIDITY STUDY ON RECORD.
- Court left to “rule based on record” alone



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- *The Net Effect = No validation study on record*
- *USSC left to "a record that concentrates in substantial part on the statements various witnesses made to the CSB."*



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Show What *Did* the Court Rule On?

- It's discriminatory to throw out test results *without a strong basis in evidence*, which in this case was adverse impact without clear evidence on the record against:
 - 1: The validity of tests, or
 - 2: Suitable "substantially equally valid" alternatives
 - 3: Actual pending lawsuits



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Wasn't It Discriminatory for the City to Throw out Exam Results Solely on the Basis of Race?

- Yes, however... It's complicated—here is the situation:
 - To throw out the results *solely* based on the racial results **IS** discrimination (against those who passed the test).
 - BUT... using test results that were not actually validated and balanced **IS ALSO** discrimination (against those who failed).

	Lieutenant and Captain Combined		
	Pass	Fail	Took
Whites	41	27	68
Blacks	9	18	27
Hispanics	6	17	23
TOTAL	56	62	118



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The Test

- **Based on the limited record**, the City's attempts to undermine the validity of the test were not successful.
 - A formal validation study was never submitted to the City or the Court (the City didn't want it . . . the plaintiff's didn't want it scrutinized).
 - The Court found: "There is *no genuine dispute* that the examinations were job-related and consistent with business necessity" because there was no substantive challenge presented to any court for review.
 - "*Based on the record* the parties developed through discovery, there is no substantial basis in evidence that the test was deficient in either respect." (validity or suitable alternatives)



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Ricci v. A Typical Testing Case

- Ricci was a *Title VII case that included a test*
- It was not a typical "testing case"
- In testing cases, "evidence" makes its way onto the record via a complex process whereby:
 - the adverse impact is substantiated,
 - validity is argued, and then
 - alternatives with less adverse impact are evaluated



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Ricci v. A Typical Testing Case

- After proving AI, the defense typically levies their “best validity case”
- Plaintiff rebuts validity findings
 - “Fatal” flaws are put forth
 - Alternatives are suggested
 - Evidence contrary to validity is presented
- Following this typical process, both experts would file declarations, undergo a series of depositions and then prepare their evidence for trial



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Ricci v. A Typical Testing Case

- None of these steps were followed in the Ricci case...by contrast:
 - The validity study from the original developers of the test was “blocked from evidence” by the City
 - The validity study was never subjected to scrutiny from opposing experts
 - Experts were not certified, examined, and cross-examined
 - No opposing expert reports were filed and evaluated
 - No expert depositions were taken by either side



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Ricci v. A Typical Testing Case

- Then *what did the court consider* "on the record"? The "testimony" weighed by the USSC was offered at the CSB hearing by **three professionals** (Only 1 of the 3 experts actually looked at the test).
- None of these experts submitted declarations. None went through the Voir Dire process. None testified in court and went through the direct, cross, re-direct, and re-cross examinations.



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The Impact of the “Evidence Record”

“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 served the City’s needs but that the City refused to adopt... We conclude there is ***no strong basis in evidence*** to establish that the test was deficient in either of these respects. We address each of the two points in turn, ***based on the record*** developed by the parties through discovery—***a record that concentrates in substantial part on the statements various witnesses made to the CSB.***”



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The Impact of the “Evidence Record”

- ***The City turned a blind eye to evidence that supported the exams' validity.*** Although the contract with [its consultant] contemplated that [the consultant] would prepare a technical report consistent with EEOC guidelines for examination-validity studies, ***the City made no request for its report.***
- After the January 2004 meeting between [the consultant] and some of the city-official respondents, in which [the consultant] defended the examinations, the City sought no further information from [its consultants], ***save [an] appearance at a CSB meeting to explain how it developed and administered the examinations. [The consulting firm] stood ready to provide respondents with detailed information to establish the validity of the exams, but respondents did not accept that offer.*** [Bold added.]



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Important Validity Issues

- Three test validation issues were “raised” and relevant in Ricci, but traveled uncontested through the typical judicial process:
 - Setting Cutoff Scores (70% arbitrary)
 - Establishing Job-Related Weights (60% written test / 40% oral interview)
 - Test “Use” Support (for Ranking)
- Let’s review each...



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Federal/Professional Standards re: Test Use, Including Cutoffs, Weights, and Ranking

- Federal Standards:
 - Uniform Guidelines on Employee Selection Procedures, 1978 (U.S. DOL, EEOC, DOJ)
 - 1991 Civil Rights Act
- Court Precedence
- Professional Standards:
 - The Standards for Educational and Psychological Testing (1999), developed jointly by American Educational Research Association (AERA), American Psychological Association (APA), National Council on Measurement in Education (NCME)
 - Principles for the Validation and Use of Personnel Selection Procedures, 2003 (SIOP)



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Setting Cutoff Scores

Using a fixed, arbitrary (but “negotiated”) cutoff (e.g. 70%) has some pros and cons...

- **Pro:** Everyone knows the game rules ahead of time.
- **Pro:** 70% seems like it’s the same as a “C-.”
- **Con:** It’s arbitrary, and thus necessarily either over- or under-shoots the actual competency level required for the job. Consider: Doctors / Airlines / Typing Speed.
- **Con:** Not likely defensible in litigation.
- **Con:** May not consider “Normal expectations of acceptable proficiency in the workplace” (Guidelines, 5H).
- **Con:** Leaves the employer open for an “alternate use” challenge (what about alternative cutoffs with less AI?)
- **Con:** How do you justify this cutoff (if arbitrary) to the applicant who scored 69.9%?



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Setting Cutoff Scores

- A More Job-related and Defensible Practice:
 - Set cutoff scores based on the *actual requirements of the job*
 - Consider “Normal expectations of acceptable proficiency in the workplace” (Guidelines, 5H)
 - Usually requires SME-level data or ratings
 - USSC has supported the “Modified Angoff” cutoff technique
- Consider factors such as:
 - Is the test supported by content validity information or criterion-related information?
 - How critical are the KSAs measured?
 - Does the test measure “baseline” or “differentiating” KSAs?
 - How would current incumbents perform on this test?



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Establishing Weights

- In Ricci, the 60% / 40% weights were “negotiated” and “objective” but were not based on job analysis research.
- “...because that formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason. ***Nor does the record contain any evidence*** that the 30/70 weighting would be an equally valid way to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions.”



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Test Use (Ranking)

There are professional and federal requirements surrounding “test use” including ranking (vs. pass/fail)

- UGESP 5G - The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines.
- UGESP 14C9 - If a user can show that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons.



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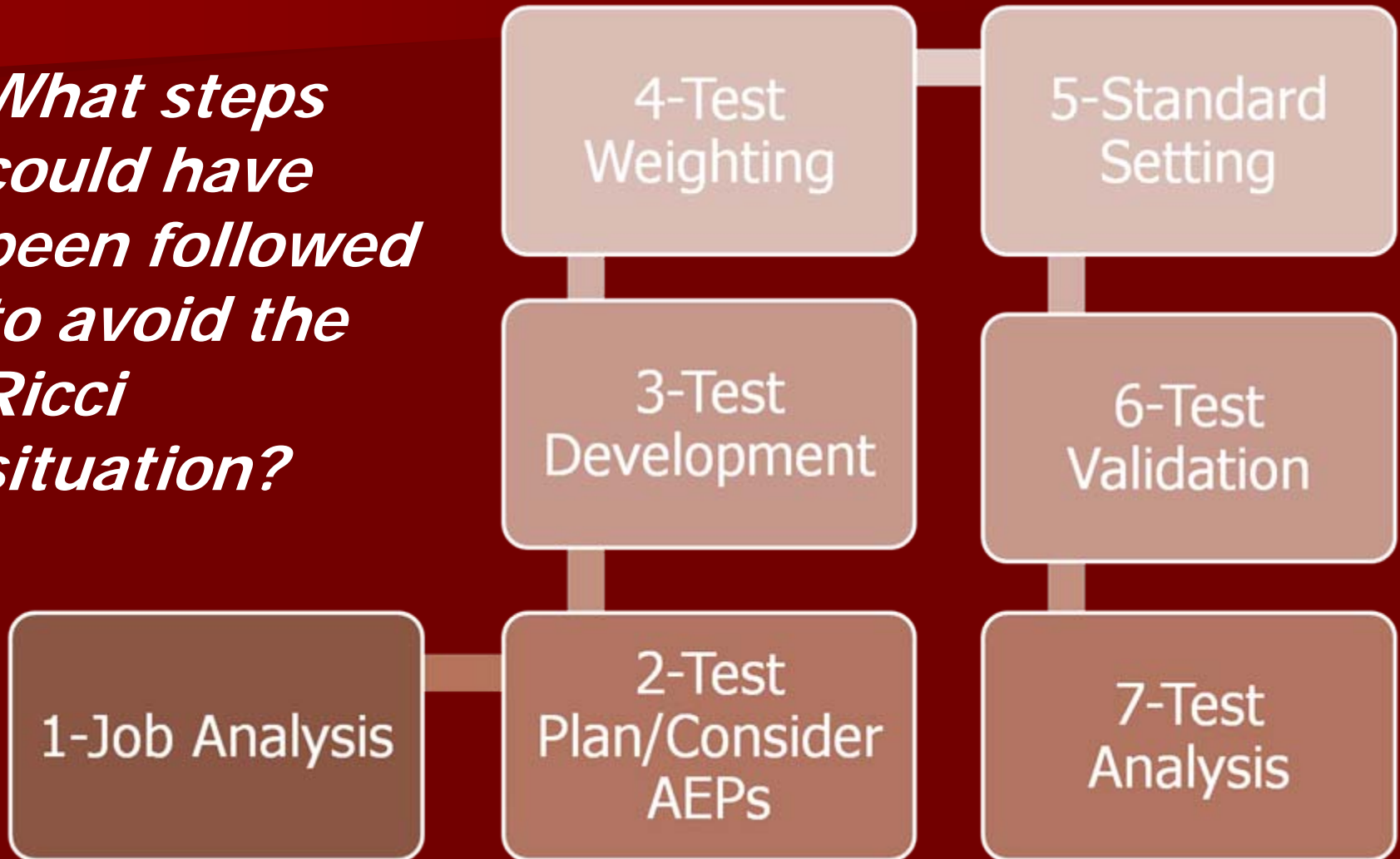
Possible Ricci Outcomes: Who Wins?

Party	Throw Out The Test	Redo The Test	Use Non-Valid/Unbalanced Tests	Use Valid/Balanced Tests
Majority Group	LOSE No Promotions (unfair)	LOSE No Promotions (unfair)	LOSE	WIN
Minority Group	WIN Chance for a New Process	WIN	LOSE	WIN
City of New Haven	LOSE Oncoming Lawsuit	LOSE (Current) WIN (Future)	LOSE	WIN



Validation Process Flow

What steps could have been followed to avoid the Ricci situation?





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Post Ricci: Implications for Employers and Lessons Learned



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Implications for Employers

There are many lessons to be learned from the Ricci decision, including:

1. The Ricci case DOES NOT change the law as it relates to the burden-shifting requirements outlined in Title VII (e.g., **U.S. v. City of New York, 07-cv-2067 (NGG)(RLM); 7/22/09**).
2. The US Supreme Court upheld the use of tests in personnel selection and promotional examinations—there was no implication that tests should not be used.
3. Valid and legally defensible tests will, at times, have adverse impact against protected groups.



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Implications for Employers

4. Design a system of selection that is legally defensible and based on sound testing/validation principles.
5. Determine—in advance—whether equally valid assessment alternatives with lower adverse impact are available. This requires a thorough understanding of the validity and utility of various selection methods.
6. Implement the selection system and use statistical analysis to evaluate the results from a psychometric (test development) perspective as well as for identifying adverse impact.
7. Decide—up-front—what your scoring strategies will be including pass points, weighting, etc.



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Implications for Employers

8. Listen to the test validation and development experts. Fight against any political influences that would change the results or dismiss the process all together. Let the results stand on their own if it can be demonstrated they are “job-related for the position in question and consistent with business necessity.”
9. Have competent legal counsel guide your organization through the application of the “*strong basis in evidence*” standard if your organization wishes to take discriminatory action that is designed to prevent a broader discriminatory result.



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Implications for Employers

10. Everyone has a race and is protected under Title VII. Do NOT simply throw-out an exam if the results are not what are expected or desired. In addition to a statistically significant disparity, there also needs to be a “strong basis in evidence” to support a lack of test validity/defensibility or a legitimate alternate employment practice (e.g., see McDonald v. Santa Fe Transportation, 427 U.S. 273, 1976, which held that Title VII, whose terms are not limited to discrimination against members of any particular race, prohibits racial discrimination in private employment against white persons upon the same standards as racial discrimination against nonwhites).



Let's conclude with the "two big lessons" from Ricci

- Lesson #1: Don't redact test results after a test has been given unless the test was professionally reviewed and found to be obviously not valid.
- Lesson #2: Validate tests before they are given, so you won't be faced with lesson #1.



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Questions?