

# LEGALINSIGHTS

FOR FIRE PROTECTION DISTRICTS

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

Volume 17, No. 2 -- Spring 2010

## Lessons from two reverse discrimination decisions

by Donald L. Potts

It is not surprising to learn that it is illegal to discriminate in employment based on a person's race. However, even when an employer does everything correctly, it may still be faced with a lawsuit alleging discrimination. Two recent cases involving firefighter promotional lists provide practical advice for surviving discrimination challenges. Coincidentally, both cases involved reverse discrimination, which means the plaintiffs were not minorities. While this fact is interesting to note, it does not affect the lessons to be learned from these cases. Civil rights laws prohibit discrimination based on any race (and other characteristics) and, with very small exceptions, the courts analyze them identically. The principles discussed in both cases apply to almost any form of discrimination (race, gender, religion, etc.) as well as promotion and initial hiring decisions.

### Analysis of Discrimination Claims

Courts analyze promotion discrimination claims using burden-shifting framework. The initial burden is always on the plaintiff to show that he or she was discriminated against. To make this showing, or *prima facie* case, the employee must show that: (1) he or she is a member of a protected class (race, gender, national origin, etc.); (2) he or she was qualified for a position; (3) he or she was rejected for the position; and (4) the position was given to someone outside the protected class who is similarly or less qualified than the plaintiff.

If the plaintiff makes this showing, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for promoting someone other than the plaintiff. The burden then shifts back to the employee to prove that the employer's claimed reason is a pretext meant to conceal the employer's discrimination.

### *Stockwell v. City of Harvey* Document Reasons for Employment Decisions

In *Stockwell v. City of Harvey*, 597 F.3d 895 (7th Cir. 2010), the City recently appointed a new fire chief, and decided to hire a deputy chief and three assistant chiefs. The City posted a sign-up sheet for firefighters who wanted to interview for the positions, which were open to any firefighter with at least ten years active service in the Fire Department. Nine firefighters signed up: five were white and three were African-American.

Before interviewing the applicants, the Chief offered the deputy chief position to a white officer who had not applied for one of the positions. The officer turned down the promotion, stating that he wanted to "ride on the engine."

The Chief developed a "written overview of the positions, which set forth both desirable and unacceptable qualities." Desirable qualities included

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## Introducing the Illinois Identity Protection Act

by Shawn P. Flaherty

Effective June 1, 2010, fire protection districts and other governmental entities must take affirmative measures to restrict public access to social security numbers (SSNs) and limit the manners in which such entities may utilize social security numbers. Starting July 1, 2010, the Illinois Identity Protection Act provides that, no state or local government agency may: (1) publicly post or display in any manner an individual's SSN; (2) print a SSN on any card required for an individual to access products or services provided by the governmental body; (3) require any individual to transmit his or her SSN over the internet unless the connection is secure or the SSN is encrypted; or (4) print any SSN on any materials mailed, e-mailed or otherwise delivered to the individual, unless required by State or federal law. Notably, even SSN disclosures required by State or federal law must not be printed on a postcard or other mailer where the SSN is visible on an unopened envelope or mailer. The Act provides that any person who intentionally violates the listed prohibitions of the Act is guilty of a Class B misdemeanor.

State and local governmental agencies must redact SSNs from any information provided to the general public for inspection or copying. Governmental employees must ensure that SSNs

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## Reverse discrimination decisions

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competence, loyalty, dedication and confidence. Unacceptable qualities included selfishness, complaining, dishonesty and undermining authority. Each candidate was interviewed and evaluated using a 1-5 scale in the categories of: initial impression, decorum, and appearance; character and honesty; personality and teamwork ethic; overall poise and general ability to communicate; and education and certifications.

After the interview process, three of the top four scores belonged to the African-American candidates. The white firefighter who was among the top four scores ultimately declined the promotion. The next highest score belonged to one of the plaintiffs, but the Chief did not offer him the position because the firefighter was planning to retire soon and the Chief believed that he was using the promotion solely to increase his pen-

sion benefits. The firefighter who had the sixth highest score also declined the promotion. The Chief skipped over the three lowest scores and offered the promotion to a white firefighter who had not applied for the position or participated in the interview process.

Four white firefighters sued, alleging that the City did not promote them because of their race. The trial court ruled against the plaintiffs, holding that they failed to establish a *prima facie* case of discrimination. The plaintiffs appealed, and the appellate court ruled against them, but for a different reason. The appellate court held that, assuming the plaintiffs established their *prima facie* case, they failed to show that the employer's non-discriminatory reason was a pretext.

The City prevailed because, with one

exception, it was able to show that it had made its decisions based on the desirable and undesirable qualities in the written overview that had been developed before the promotion process began. The plaintiffs argued that the City's justifications were not based in fact. For example, one plaintiff was rejected in part because the Chief thought he might "undermine management." He presented evidence to show that he would not undermine management, but the court held that this evidence was irrelevant. The court stated that as long as the City believed the reasons to be true at the time the decision was made, they were not pretextual even if they turned out to be false.

One plaintiff was rejected, not because of his desirable or undesirable qualities, but because prior to the interviews he had

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## Nursing mothers in the workplace: The legalities

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by W. Anthony Andrews

As a result of the recent health care reform effort, under the Patient Protection and Affordable Care Act of 2010 ("PPACA"), Congress amended the Fair Labor Standards Act to provide breaks for nursing mothers. Effective immediately, under Section 4207 of the PPACA, employers nationwide must provide a "reasonable break time" for an employee to express breast milk for her nursing child for one year after the child's birth. The employer must also provide a location "shielded from view and free from intrusion from coworkers and the public" (other than a bathroom stall) where an employee can express breast milk.

The new provision does not require an employer to pay for the reasonable break time provided. However, depending on the length of the break, in particular cases, the PPACA may run contrary to existing Department of Labor regula-

tions, which require employers to compensate for rest breaks of short duration (5-20 minutes). Moreover, the federal act does not preempt more protective provisions of state law, thus employers must consider both federal and state provisions.

In Illinois, the Right to Breastfeed Act, effective in 2004, guarantees nursing mothers the right to breastfeed in any location, public or private, as long as the nursing mother is otherwise authorized to be at that location. If the owner or manager of a public or private location (other than a residence or place of worship) denies a woman the right to breastfeed there, the mother may sue to enjoin future denials and recover attorney's fees and expenses.

Furthermore, since 2001, the Illinois' Nursing Mothers in the Workplace Act has required employers to provide

nursing women with reasonable unpaid break time each day to express breast milk, unless the break time would "unduly disrupt the employer's operations." The break time may run concurrently with any break time already provided to the employee. Additionally, employers must make reasonable efforts to provide nursing women a private room, which may not be a bathroom stall.

To comply with federal and state laws, Illinois employers may not prohibit nursing women from breastfeeding or expressing milk at their workplace and must provide them with reasonable times and private facilities to do so. Thus, to meet the requirements of state and federal breastfeeding law, employers should review and revise their policies and procedures, especially any pre-existing break time policies. Employers should consider reviewing the physical accommodations they would make available to nursing mothers. ■

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# Illinois Identity Protection Act

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cannot be obtained from public documents. Further, the Act prohibits governmental agencies from encoding or embedding a SSN in any magnetic strip, bar code, chip or other similar computer technology in lieu of removing the SSN as required under this Act. The Illinois General Assembly has allowed three limited variances to the general rule of non-disclosure because they are apparently deemed necessary for the execution of public administration.

First, state and local agencies and their employees may not collect, use or disclose any SSNs unless all of the following apply: (1) they are required to do so under any state or federal law, rules, or regulations, or the SSN is otherwise necessary for the performance of the agency's duties and responsibilities; (2) the need and purpose for the SSN is documented before collection of the SSN; and (3) the SSN collected is relevant to the documented need and purpose. Second, state and local agencies and their employees may not require an individual to use his or her SSN to access the internet or a website. Third, state and local agencies and their employees may not use a SSN for any purpose other than for the purpose for which it was collected.

## Listed Exceptions to Prohibitions

A number of exceptions to the Act are provided in the statute. The most notable exceptions are:

1. Entities may disclose SSNs to other governmental agencies or to its own agents, employees, contractors and subcontractors if the disclosure is necessary in order for the entity to perform its duties and responsibilities. Note there is a special requirement that governmental contractors and subcontractors must first pro-

vide the governmental agency with a copy of their policy that includes a provision to protect the SSNs provided to them to perform their duties.

2. SSNs may be disclosed as part of documents requested pursuant to a valid court order, warrant or subpoena.
3. SSNs may be collected, used and disclosed to ensure the safety of state and local governmental employees, as well as prisoners, wards of the state and persons working in or visiting state or local governmental facilities.
4. State and local agencies may collect, use and disclose SSNs for internal verification or administrative purposes. This would appear to include any payroll and tax purposes.
5. SSNs may be collected and used to investigate or prevent fraud, to conduct background checks, to collect debts, to obtain credit reports from consumer reporting agencies, to locate missing persons or lost relatives, or to locate persons who are due governmental benefits such as pension benefits.

## Identity Protection Policies

All local government agencies must adopt identity protection policies to comply with the Act. The policy must:

1. Specifically designate the Identity Protection Act;
2. Require all employees with access to SSNs in the course of their work duties to receive training on protecting the confidentiality of SSNs. Training must include instructions

on properly handling information containing SSNs from the time of collection through the time of destruction;

3. Direct that only employees who are required to use or handle information or documents containing SSNs have access to such information or documents;
4. Require that SSNs requested from an individual be provided in a format that allows SSNs to be easily redacted if required to be released as part of a public records request; and
5. Require the governmental agency to set forth a statement of the purpose or purposes for which the agency is collecting and using the SSNs when collecting SSNs from individuals.

The policy must be filed with the agency's governing board within 30 days after adoption. Additionally, the agency must advise its employees of the existence of the policy, and a copy of the policy must be made available to employees and the general public on request. Full implementation of the training aspects of the policy must occur no later than 12 months after approval of the identity protection policy.

Fire district administrators must be aware of the restrictions and mandates imposed by the Identity Protection Act. Boards should timely adopt appropriate identity protection policies and provide the necessary training to administrative personnel. General rank and file employees should have limited, if any, access to SSNs. The public should have virtually no access to SSNs unless an exception clearly applies. We trust this article is instructive in detailing the highlights of the new Act. Should you have any questions or require detailed information concerning this new legislation, please contact your fire district's attorney. ■

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## Reverse discrimination decisions

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informed the Chief he was planning to retire soon. The Chief wanted officers who would be in the positions for a long time, and, therefore, rejected the applicant. The plaintiff argued he had no concrete plans to retire, but again, the court focused on what the Chief believed at the time, not whether it was factually accurate.

The City had developed written standards and expectations for the position before the application process began. The Chief also scored each candidate on these standards during the interviews and maintained a written record of the scores. This job-related evaluation, coupled with contemporaneous records justifying the decisions, helped defeat arguments that the City fabricated its reasons after the fact.

### *Ricci v. DeStefano*

#### **Don't Discriminate Based on Fear of a Discrimination Lawsuit**

In *Ricci v. DeStefano*, 557 U.S. \_\_\_\_ (2009), the New Haven, Connecticut Fire Department conducted a promotional exam in which white firefighters outperformed minority firefighters. Faced with threats of lawsuits from minority firefighters, claiming the test was discriminatory based on the disparate impact, the City threw out the exam results and conducted a new test. The

City's efforts to avoid a lawsuit resulted in exposure to a different lawsuit filed by white and Hispanic firefighters who had scored highly on the first test. The white and Hispanic firefighters claimed the City had discriminated against them based on their race when the City discarded the test results.

The City defended its decision by essentially admitting the first test was discriminatory: not because there was any intent to discriminate, but because minority firefighters did not fare as well proportionately as white and Hispanic firefighters. The City argued that throwing out the first test and conducting another test was necessary to remedy the discrimination in the first test. The plaintiffs contended the first test was not discriminatory, and it would be unfair to discard the results based on the racial disparity in the scores.

The case was ultimately decided by the United States Supreme Court, which held that the City could not discard the test results. The Court did not entirely reject the City's argument, holding that it would be permissible to discard the test results if the City could show that it would be subject to liability based on a disparate impact claim. However, it was not sufficient for the City to show that it would have been sued; it must show that

a lawsuit likely would have been successful. This reasoning is based on the burden shifting analysis described above: the disparate racial impact of the test results created a *prima facie* case of discrimination, but the City could overcome the presumption by showing that the test was a legitimate, non-discriminatory justification for its action.

In *Ricci*, the evidence showed the test was a carefully crafted assessment of job related skills and knowledge and was therefore a legitimate, non-discriminatory basis for the promotion list regardless of the racial disparity in scores. Therefore, any lawsuit by minority firefighters challenging the results of the first test would be unlikely to succeed, and the City could not justify its decision to discard the test results. The City was ordered to certify the results of the first test and promote officers from that list.

Both *Stockwell* and *Ricci* show the importance of developing meaningful, job-related standards by which to measure candidates for promotion and initial hiring and maintaining documentation of each candidate's ranking. If fire protection districts follow these guidelines, they can be confident in their decisions, even in the face of a discrimination lawsuit. ■

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#### **OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.**

1804 North Naper Boulevard, Suite 350

Naperville, Illinois 60563

(630) 682-0085 [www.obkcg.com](http://www.obkcg.com) FAX (630) 682-0788

Shawn P. Flaherty, Editor [sflaherty@obkcg.com](mailto:sflaherty@obkcg.com)

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