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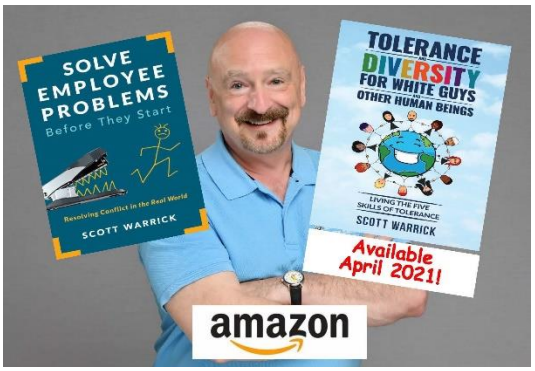

In my book, ***Tolerance and Diversity for White Guys … And Other Human Beings: Living The FIVE Skills of Tolerance***, I gave you an abbreviated version of the *Ricci* case. However, here is the full version of that landmark case.

Enjoy!

CHAPTER 3

The Micro Case For The Five Skills of Tolerance

Even if the executives buy into this program at the macro-level, that does not mean that the Five Skills of Tolerance program will be supported by the employees. Of course, few people today will stand up and say, "I am against diversity and tolerance. I have better things to do." Most people do not want to look like a bigot. Instead, people just simply won't support it. So, passive resistance ends up killing it because most people find more important things to do rather than come to a D&I event. It simply dies on the vine.

Enthusiastic buy-in is needed for any program to not only survive, but to thrive. You must have enthusiastic support for the Five Skills of Tolerance if it is to ever become self-regulating.

The United States Supreme Court and The *Ricci* Case

In *Ricci, et al., v. DeStefano*, the United States Supreme Court heard a case that brought the worst fears many people have over the issue of diversity in the workplace to the forefront of this debate in America. This case directly addressed the greatest micro issue we all face: **JOBS**

In *Ricci*, the New Haven Fire Department had eight positions come open for lieutenant and seven positions available for captain. In keeping with its standard process, any firefighter who wanted to be considered for these positions was required to take an examination for that job.

Late in 2003, seventy-seven candidates took the examination for the position of "lieutenant": 43 whites, 19 blacks, and 15 Hispanics. Out of those who took this test, 34 candidates passed: 25 whites, 6 blacks, and 3 Hispanics. At this same time, forty-one (41) candidates completed the examination for the position of "captain": 25 whites, 8 blacks, and 8 Hispanics. Out of those who took this test, 22 candidates passed: 16 whites, 3 blacks, and 3 Hispanics.

Since the White firefighters scored the highest on the lieutenant's exam, all the lieutenant positions were filled by Whites. As for the captain's exam, a Hispanic firefighter and White firefighters received the highest scores. None of the Black fire fighters scored high enough to be promoted.

So, in January 2004, Thomas Ude, New Haven City's Legal Counsel, had a meeting with Industrial/Organizational Solutions, Inc. (IOS), Vice President Chad Legel, who was the leader of the IOS team that developed and administered these tests. Based solely on the statistical results of the test, the New Haven City officials claimed that the examinations had illegally discriminated against minority candidates. However, in this meeting, Legel defended the validity of both examinations.

In designing these exams, IOS representatives interviewed incumbent captains and lieutenants and their supervisors to determine the essential tasks, knowledge, skills, and abilities that were essential for the lieutenant and captain positions. They rode along with and observed other on-duty firefighters. At every stage of the job analyses, IOS deliberately oversampled minority firefighters to ensure that the results, which IOS would use to develop the examinations, would not unintentionally favor White candidates.

Therefore, all of the material for the examinations was taken ***directly from approved source materials, which were all derived directly from duties required to successfully perform these positions.*** IOS also had third-party reviewers scrutinize the examination questions to ensure that the written test was

drawn from the source material and that the oral test accurately tested real-world situations that captains and lieutenants would face on the job. This process used by IOS to design these examinations had the highest possible level of legal validity possible since all of the testing materials came directly from the actual duties that are going to be required on the job. This is called "content validity."

The oral part of the examinations counted for 40% of the candidates' overall score, while 60% of the written portion counted for the rest.

In scoring the oral exams, IOS assembled a pool of 30 assessors who all held a rank higher than the positions being tested. In order to reduce the controversy that is typically involved in such examinations, the city insisted that all of the assessors come from ***outside*** Connecticut. IOS submitted the assessors' resumes to city officials for approval. All of these assessors were battalion chiefs, assistant chiefs and chiefs from departments of similar size to New Haven's throughout the country. ***Sixty-six percent of the panelists were minorities, and each of the nine three-member assessment panels contained two minority members***. Legal confirmed that IOS had selected oral-examination panelists so that ***each three-member assessment panel included one white, one black, and one Hispanic member.***

IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria.

After IOS prepared the tests, the city opened a three-month study period. IOS then gave the fire fighters a list that showed them where they could find all the answers to the examination's questions in the study materials they were given. Therefore, all the material for the examinations was taken directly from approved source materials, which were all derived directly from duties required to successfully perform these positions. In other words, IOS designed these tests to be as unbiased and as legally defensible as possible.

Now, in order to understand this area of the law, it is important to understand the two primary theories of illegal discrimination that exist under Title VII of the 1964 Civil Rights Act:

Disparate treatment and disparate impact

Under disparate treatment, or bad treatment, the theory is that an employer **intentionally** discriminated against an employee or prospective employee based upon his/her protected class status, such as race, color, sex or age, to mention a few. This is what most people think of when it comes to illegal discrimination.

However, under a theory of disparate impact, or bad impact, the employer did **not intend** to discriminate against anyone. Instead, an employer has adopted a policy or practice that unintentionally discriminates against a group of protected class individuals.

In order to first establish a case of illegal disparate impact, the employees must show that the employer has used a particular employment practice that causes a disparate impact against a certain protected class. This is accomplished by making the following "80% Rule Calculation."

The 80% Rule says that if an employer's selection rate for any protected class is **less** than 80%, or 4/5ths, of the group with the highest selection rate, then an ***inference*** of disparate impact will be shown to exist.

The following illustration shows how to perform such calculations:

80 PERCENT RULE CALCULATIONS: LIEUTENANT'S EXAM

STEP 1

Calculate the employer's selection rates for each group:

	PASSED		TOTAL TAKING TEST		
Whites	25	divided by	43	=	58%
Blacks	6	divided by	19	=	32%

STEP 2

Identify the group with the highest selection rate: Whites, with a 58% selection rate.

STEP 3

Calculate the percentage difference between the selection rates of these two groups:

$$\frac{32\%}{58\%} = 55\%$$

If the ratio between the two groups is less than 80 percent, then an ***inference*** of disparate impact exists. In this case, 55 percent is less than 80 percent, so an ***inference*** that New Haven Fire Department's test for the lieutenant's exam ***may*** have "unintentionally discriminated" against the black firefighters exists under a disparate impact theory.

80 PERCENT RULE CALCULATIONS FOR THE CAPTAIN'S EXAM

STEP 1

First, you calculate the employer's selection rate for each group:

16 Whites passed the test divided by 25 Whites who took the test = 64%

3 Blacks passed the test divided by 8 Blacks who took the test = 38%

STEP 2

You then identify the group with the highest selection rate, which in this case, it would be the Whites with a 64% selection rate.

STEP 3

Calculate the percentage difference between the selection rates of these two groups:

$$\frac{38\%}{64\%} = 59\%$$

STEP 3

You then calculate the percentage difference between the selection rates of these two groups:

38% pass rate of the Blacks divided by the 64% pass rate of the Whites =
59% difference between the two groups

If the ratio between the two groups is less than 80 percent, then an ***inference*** of disparate impact exists. In this case, 59 percent is less than 80 percent, so an ***inference*** that New Haven Fire Department's test for the captain's exam ***may*** have "unintentionally discriminated" against the black firefighters exists under a disparate impact theory.

Therefore, an ***inference*** of disparate impact was shown to exist since the difference between the

pass rates of the white and black firefighters was below 80% in both the lieutenant's exam (55%) and the captain's exam (59%).

Still, it is important to note that under the law, failing the 80% Rule Calculation is ***not proof of illegal discrimination.*** Instead, it merely raises the ***inference*** that there ***might*** be illegal discrimination occurring here. Since failing this statistical test only suggests that adverse impact might exist, New Haven still needed to determine if the tests were **"job related for the position in question and consistent with business necessity."**

If New Haven can show that these tests were valid, which means they were **"job related,"** then the black firefighters would have to prove that New Haven had another **alternative employment practice** available that had ***less disparate impact*** and serves the employer's legitimate needs but it failed to use it.

Of course, thanks to all the precautions IOS had taken to ensure these tests were free of bias and that they complied with all the necessary legal requirements for designing such tests, no such arguments existed.

Therefore, the final burden of proof lies with the black firefighters to show that another **alternative employment practice** was available for the city of New Haven to use that had ***less disparate impact*** and still served the employer's legitimate needs. Since no such system existed, the city of New Haven would prevail.

Of course, thanks to all the precautions IOS had taken to ensure these tests were free of bias, no such arguments existed.

Also, after each firefighter examination is given, the New Haven Civil Service Board ("CSB") is required to "certify," or approve, the ranked list of applicants who passed the test before the promotions are made effective. However, after meeting with Legel from IOS, Thomas Ude, New Haven City's Legal Counsel, sent a letter to the CSB telling them that under federal law, "a statistical demonstration of disparate impact … constitutes a sufficiently serious claim of racial discrimination."

In other words, Ude believed that these tests presented a case of disparate impact against the city and therefore illegally discriminated against the black firefighters.

Of course, as you now know, the city's attorney clearly misstated the law.

Now, wouldn't that make you pause and wonder why Ude would make such a mistake? How could he misinterpret the law on this issue so badly? Does it make you wonder if an alternative agenda is at work here? Read on, because the truth will come out later.

Ude therefore recommended that the Board ***not*** certify or approve the results of the examination, which would prevent the promotions of the white firefighters and the Hispanic firefighter who scored the highest on the examinations.

At the first meeting of the CSB, although they did not know at that point whether they had passed or failed, some firefighter/candidates urged the CSB to certify the test results. Michael Blatchley, a white firefighter, stated that "[e]very one" of the questions on the written examination "came from the [study] material. . . .[I]f you read the materials and you studied the material, you would have done well on the test."

Frank Ricci, also a white firefighter who was also unaware of the results at the time, stated that the test questions were based on the Department's own rules and procedures and on "nationally recognized" materials that represented the "accepted standard[s]" for firefighting.

In preparing for the exam, Ricci quit his second job in order to study 8 to 13 hours a day. Since Ricci had several learning disabilities, one of which was dyslexia, he paid one of his neighbors $1,000 to read all of these materials onto audio tape so he could "give it [his] best shot." Later, Ricci discovered that he had finished with the sixth highest score and would have been promoted into the position of lieutenant if the Board has certified the test results.

However, a representative from the International Association of Black Professional Firefighters, Donald Day from neighboring Bridgeport, Connecticut, "beseech[ed]" the CSB "to throw away that test," which he described as "inherently unfair" because of the racial distribution of the results. Day never

made any argument that the examinations were invalid or that they were not job-related, nor did he argue that the tests were administered unfairly or unequally. Day also did not argue that any other equally valid methods of testing these firefighters existed. Instead, based entirely on the statistical calculation that not enough black firefighters passed the exam, he argued that the results should be "thrown out" and the white firefighters should not be given their promotions.

Again, that is not what the law requires.

A representative from the International Association of Black Professional Firefighters, Ronald Mackey, argued that a validation study was necessary. However, he also suggested that the city should adjust the test results to "meet the criteria of having a certain number of minorities get elevated to the rank of Lieutenant and Captain." In other words, Mackey was suggesting that the city give **additional points to the Black firefighters** who took the test so more of them could be promoted into these positions over some of the Hispanic and White firefighters.

However, this practice, which is called norming test scores, became illegal in 1991. So, when Mackey made this suggestion, it had already been illegal for over a decade.

At the next meeting, on March 11, 2004, the CSB heard from several witnesses regarding the validity of these tests.

One of the witnesses the CSB spoke to was Vincent Lewis, a Black fire program specialist for the Department of Homeland Security and a retired fire captain from Michigan. In Lewis's view, the "questions were relevant for both exams." Actually, Lewis claimed that the New Haven candidates had an advantage because the study materials identified exactly where the firefighters could find the answers to the questions on the upcoming exams. Lewis said that in other fire departments, by contrast, "you had to know basically the . . . entire book."

Lewis concluded that any disparate impact that might have occurred was most likely due to the fact that Whites usually "outperform some of the minorities on testing" because "more Whites . . .

take the exam." In other words, Lewis said that the statistical calculations were unreliable because the ***raw numbers*** were too small to be statistically significant.

For example, let's say 80 Whites take a standardized test and 14 Blacks take the same test. (I chose these numbers because these are approximately the percentages of Whites and Blacks making up the total population of the United States according to the 2000 census, which is the census most applicable to this time period.) Let's then say that 40 Whites (50%) passed the test and 4 Blacks (29%) pass the test. These failure rates of the White and Black employees would present an ***inference*** of disparate impact under the law.

However, when you look at the raw numbers themselves, 40 Whites failed while only 10 Blacks failed. In other words, ***four times*** as many Whites failed the test as Blacks.

Does this mean that Whites are not as smart as Blacks?

Does that mean that there is a racial prejudice against Whites? Not at all.

The issue Lewis was bringing to the CSB's attention is clear:

You cannot consider the statistical analysis in a vacuum.

At some point, the raw numbers become so disproportionate to one another that the statistical comparison between the two groups becomes meaningless.

The raw data itself must be statistically significant.

This is the same thing as if I walked up to ten children in New York and asked them where the Statue of Liberty is located. If five get it right and five get it wrong, I could come to the erroneous conclusion that half of the kids in New York do not know where the Statue of Liberty is located. So, I conclude that half of the kids in New York City are not very smart.

Of course, that is an inaccurate conclusion because asking only ten children is not a representative sample of the number of children living in New York City. However, that is basically what Lewis is saying happens when you compare the pass/fail rates between Whites and Blacks if the raw numbers do not represent a statistically significant number of applicants.

At the final CSB meeting, on March 18, 2004, Ude, New Haven's City Attorney, again argued against certifying the examination results, even though the CSB's investigation found that the test was valid. Ude told the CSB that because the tests failed the "disparate impact" statistical test (80% Rule Calculation") and that he believed other less discriminatory examinations could be used, so the test results should not be certified. However, Ude never gave even one example of any "more reliable methods" that could have been used. Ude argued that the white firefighters and the one Hispanic fire fighter who scored the highest on these tests should be denied their promotions.

In the final vote, the CSB failed to certify the examination results, which resulted in this lawsuit. Eighteen firefighters joined in filing this lawsuit, 17 of whom are white, including Frank Ricci, and Ben Vargas, who is Hispanic. All of these firefighters passed the examinations but were denied a chance at promotion when the CSB refused to certify the results.

The firefighters who scored the highest on these tests and were denied their promotions claimed that since the City failed to certify the results of the exam based upon their race, the City had committed racial discrimination against them under Title VII of the Civil Rights Act, which bars intentional race-based employment discrimination.

Still, the city refused to certify the examination results, which resulted in this lawsuit.

On June 29, 2009, the U.S. Supreme Court delivered its opinion in the *Ricci* case. In a 5 to 4 decision, the Court held for Ricci and his fellow White and Hispanic firefighters.

Of course, once the city found itself in front of the U.S. Supreme Court, the truth of this case came out:

The city argued that it chose to not certify the results of the tests

because it was afraid that it would be sued by the Black firefighters

who did not pass the test under a theory of disparate impact.

Therefore, the city's position was that …

It should be allowed to discriminate against the Hispanic and White

firefighters who scored the highest on the examinations in order to avoid getting sued by the Black firefighters.

Yes, the city actually chose to illegally discriminate against the Hispanic and White firefighters in order to avoid getting sued by the Black firefighters. The city was more than willing to ***knowingly*** break the law and illegally discriminate against the Hispanic and the white firefighters so they would not be sued by the black firefighters. According to the Court, you cannot illegally discrimination against one group in order to satisfy the wants of another group, even if it is to avoid a lawsuit.

Of course, in the alternative, the city did not seem to be too worried over getting sued by the Hispanic and the white firefighters who were denied their promotions, which would also prove devastating to their individual careers and their families.

So, do you still agree with the controversial statements I made at the beginning of this book?

- No one should ever be denied a job or a promotion because of their demographics, such as race, color, religion, sexual orientation, and so on and
- Racism and bigotry are wrong, no matter who is doing it.

The U. S. Supreme Court agreed with these statements.

The Court held that the city illegally discriminated against the Hispanic and White firefighters because it decided not to certify the results of the exams based on their race. The Court said that there was no evidence that these tests were flawed in any way. There was also no evidence presented by the city that showed there were other equally valid and less discriminatory methods available.

However, there was an abundance of evidence presented to show that these tests were in fact job-related and consistent with the business necessity of the New Haven Fire Department. The Court concluded that there was ***no question these examinations were indeed valid***.

Therefore, the Court held that it was illegal for the city to fail to certify the results of these examinations and deny the White firefighters their promotions. Therefore, the city had committed illegal disparate treatment against the Hispanic and White firefighters.

Ricci And The Aftermath

In July 2009, both Ricci and Lt. Ben Vargas testified before the United States Senate Judiciary Committee.

Ricci stated that he studied harder for this exam than he had ever studied before in his life. Since he spent so much time studying, he was a "virtual absentee father and husband" for months. Again, in preparing for the exam, Ricci studied eight to thirteen hours a day and even paid one of his neighbors to read all of the massive examination materials into a tape recorder so he could listen to them later.

Ricci testified that the City of New Haven reduced people to "racial statistics" and divided people on racial lines.

Lt. Ben Vargas, who scored the sixth highest on the captain's examination, then testified. Vargas stated, "I am Hispanic, and proud of my Heritage. I am the proud father of three young sons. For them, I sought to better myself." Vargas then stated, "I do not want my sons to think their father became a captain because he was Hispanic and used his ethnicity to get ahead. Worse still is to jump the line ahead of others who are more qualified. There is no honor in that."

Vargas said he spent three months studying every day for the captain's exam. He said he "holed up" in a hotel at one point, bringing photos of his children so he could focus on studying.

"I was shocked when I was not rewarded for this hard work and sacrifice, but actually penalized for it," said Vargas. "I became not Ben Vargas, the fire lieutenant who proved himself qualified to be a captain, but a racial statistic."

Vargas said, "We did not ask for sympathy or empathy. We asked only for even-handed enforcement of the law."

As you could imagine, tensions ran high throughout the trial. Ricci and his fellow plaintiffs were openly called Klansmen, a reprehensible attack that any decent white person would find personally offensive. *1*

Also, before the lawsuit was even filed, Ben Vargas was physically attacked from behind in a public restroom. It was retaliation against him for helping to get these tests certified. *2*

I can personally relate to what these men are saying. I too know what it is like to isolate yourself from your family for months on end, to study late into the night and to go to class after working all day until you can barely walk, much less concentrate. For me, I will suffer the health effects for the rest of my life for torturing my body while I was in school and then building my career. It is the permanent price I have paid for getting where I am today, and it is unfair and illegal to tell me that I am the wrong color, just like it was wrong and illegal what the city of New Haven did to Ricci, Vargas and the others in this case.

I also wonder how hard the firefighters studied who did not score as well on these exams, black and white alike? Did they see their families? Did they eat bad food while they were studying? Did they seal themselves up in a motel room so they could learn these materials? Did they pay someone to record the materials for them so they could study them later? What price did they pay?

If I was one of the black leaders in this community who really wanted to help the black firefighters, I would have started getting involved way before these tests were even administered. I would have set up study groups, practice groups and practice tests. I would have drilled everyone in everything that was going to be covered until the firefighters were sick of it. If some of the firefighters did not know how to study for such a test, I would teach them how to do it.

I would have been proactive rather than reactive.

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Scott Warrick, JD, MLHR, CEQC, SHRM-SCP (www.scottwarrick.com) is both a practicing Employment Law Attorney and Human Resource Professional with almost 40 years of hands-on experience. Scott uses his unique background to help organizations get where they want to go, which includes coaching and training managers and employees in his own unique, practical, entertaining and humorous style.

Scott Trains Managers & Employees ON-SITE in over 50 topics, all of which can be customized **FOR YOU!**

LET SCOTT DESIGN A PROGRAM FOR YOU!

Scott combines the areas of law and human resources to help organizations in "Solving Employee Problems ***BEFORE*** They Start." Scott's goal is ***NOT*** to win lawsuits. Instead, Scott's goal is to ***PREVENT THEM*** while improving ***EMPLOYEE MORALE***.

Scott's book, ***Solve Employee Problems Before They Start: Resolving Conflict in the Real World***, is #1 Best Seller for Business and Conflict Resolution books! It was also named by EGLOBALIS as one of the best global Customer and Employee books for 2020-2021.

Scott's most recent book, ***Tolerance and Diversity for White Guys … And Other Human Beings: Living The FIVE Skills of Tolerance***, will be available on Amazon in APRIL 2021.

Scott's ***MASTER HR TOOL KIT SUBSCRIPTION*** is a favorite for anyone wanting to learn Employment Law and run an HR Department.

Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

Scott has also received the Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of HR Management and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

Scott's academic background and awards include Capital University College of Law (Class Valedictorian (1st out of 233) and Summa Cum Laude), Master of Labor & Human Resources and B.A. in Organizational Communication from The Ohio State University.

For more information on Scott, just go to **www.scottwarrick.com**.

1 William Kaempffer, Top 50: New Haven firefighters' case set national precedent, New Haven Register, July 14, 2018, https://www.nhregister.com/news/article/Top-50-New-Haven-firefighters-case-set-13070745.php. Retrieved September 26, 2020.

2 Ibid.