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HAROLD L. LICHTEN

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In 2003, Harold L. Lichten successfully represented a group of white plaintiffs in a reverse-discrimination suit over racial hiring quotas in the Boston Police and Fire departments.

Under that system, the city maintained separate lists of minority and white candidates — each ranked by exam score — and hired one minority for each white until blacks and Latinos were no longer underrepresented.

Though the policy often resulted in minorities being hired over other candidates with better scores, Lichten took heat from fellow plaintiffs' lawyers for helping end a system that also promoted diversity.

Now Lichten is celebrating victory in a case that, instead of undermining diversity in the Boston Police Department, could increase minority representation in its higher ranks.

In *Smith v. City of Boston*, Lichten represented a group of minority police officers who claimed the exam used by the department to determine promotions to lieutenant was unfairly biased against black and Latino candidates. Following a 10-day bench trial, U.S. District Court Judge William G. Young ruled that the exam, which whites passed at a significantly higher rate than minorities, had a "racially disparate" impact on blacks and Latinos while failing to reliably measure attributes actually needed for the job.

So now Lichten finds himself receiving attention for a case that strengthens affirmative action after previously attracting attention for one that weakened it. However, the Boston lawyer says he's been a supporter of affirmative action all along.

"The only reason I took the quota cases back then is because I thought they were an improper way of putting a band-aid on a bigger problem: the tests themselves," Lichten says, emphasizing that the best way for the city to ensure a diverse police force is to do away with the tests and adopt innovative assessments used elsewhere that measure the actual skills needed for the job.

"Hopefully you'd get more minority selections that way, but more importantly, you'd definitely get better police supervisors," he says. "Using a written, multiple-choice, rote memory exam to pick superior officers is like using bar exam scores to pick judges. It's ludicrous."

Lichten is quick to note that he could not have won the case without co-counsel Stephen S. Churchill of Fair Work in Boston, who took on the task of proving the exam disparately impacted minorities in a statistically significant way.

"Steve essentially had to learn statistical analysis and examine and cross-examine experts on that," Lichten says. "I never could have done that."

> "Using a written, multiple-choice, rote memory exam to pick superior officers is like using bar exam scores to pick judges. It's ludicrous."

Q. *Why is this case so important?*

A. Hopefully, it's the beginning of the death knell for these multiple-choice civil service exams for police and fire promotions that don't produce the best sergeants, lieutenants and captains. And second, it's likely to increase the number of minority superior officers around the state, which is very important given the tensions in minority communities throughout Massachusetts and the country.

Q. *What was the biggest challenge in handling this case?*

A. Going to trial after having just lost an almost identical case before [U.S. District Court Judge George A. O'Toole Jr. involving the exam given to prospective sergeants]. We'd already appealed Judge O'Toole's decision to the 1st Circuit, and I've always believed since it came down that it was wrong. But Judge Young has always been known to be an independent thinker, and he essentially disagreed with Judge O'Toole.

Q. *One flaw Judge Young found with the test was that the questions — which focused on a candidate's ability to understand and explain material in written form — weren't sufficiently job related. Yet police lieutenants have to manage internal investigations, provide directives about new policies, prepare reports and process all sorts of paperwork. So why is it unfair to require lieutenants to demonstrate literacy?*

A. This exam doesn't really test literacy; this exam tests for rote memory skills. You study [a set of] texts for six to eight months, and the questions and answers are taken almost verbatim from the textbook. Now let's say you want to get at a candidate's ability to write a report following an arrest that'll stand up in court. What you could and should do is devise a simulation where you bring a person in, tape record them, videotape them, say so-and-so was arrested, and have them write a sample report justifying what they did, which is evaluated for particular criteria.

Q. *What if the test did measure skills such as reasoning, judgment and the ability to counsel subordinates? If there were still a racial scoring disparity, would the plaintiffs in this case have a legitimate claim?*

A. The answer I've always given and still give is that if you devise a really fair test, one that actually tests for attributes like supervisory ability, judgment and interpersonal skills, and at the end minorities don't do well, it's still legal. The law says if there's disparate impact, the defendant can still prevail by showing the test is a valid test. And I'm OK with that.

Q. *Others might say that for a job as important and difficult as police lieutenant, the most qualified officers should be promoted regardless of race. How do you respond?*

A. I actually agree. I agree with that proposition because the tests they've been giving for years notoriously don't pick the most qualified candidates. They pick those who are good at studying and memorizing. I've heard stories from police officers that it's not uncommon to go out sick for a month or two before the exam so you can study and then get an advantage over the person working hard on the street.

Q. *If, as a remedy, the plaintiffs are ultimately promoted to lieutenant, is there concern that their authority will be undermined by a perception that they sued for their position rather than they earned it?*

A. That's a possibility. But there's nothing I can do to protect against those presumptions, which aren't fair in my view.

— Eric Berkman