

## Boston Police Officers Win Back Pay In Biased Test Case

By [Lauren Berg](#)

Law360 (May 13, 2020, 5:37 PM EDT) -- A Massachusetts federal judge on Wednesday awarded back pay to a group of minority police officers who were denied promotions due to an exam twice found to be discriminatory, saying that the officers are presumptively entitled to the monies.

U.S. District Judge William G. Young agreed with the 10 Boston officers that the 1975 [U.S. Supreme Court](#) case [Albemarle Paper Co. v. Moody](#) holds that they should be awarded back pay when there is a finding of unlawful discrimination and that the "presumption in favor of retroactive liability can seldom be overcome," according to the 29-page order.

The judge found that the officers, in showing they were denied promotions on the basis of an unlawful exam, are presumptively entitled to back pay.

Wednesday's order comes after a three-day [October bench trial](#) on damages, in which counsel for the officers argued they are legally entitled to back pay after Judge Young ruled, twice, that a 2008 police promotion exam from sergeant to lieutenant violated federal discrimination law.

The city countered by saying the minority applicants, including some of the plaintiffs in the suit, did not do well in a subsequent exam given in 2014. That shows the 2008 test, even if unfair, is not the only reason many of the officers failed to be promoted, the city said.

Counsel for the city said its argument is buoyed by the so-called Lopez case, which wound its way through the court system contemporaneously to this case, which was led by Bruce Smith.

In the Lopez case, Senior U.S. District Judge George O'Toole found that a written test for promotion from patrolman to sergeant had a disparate impact on minorities and was not valid. But other factors, such as education and experience, could lead to finding the best candidates for promotions, meaning the test could still pass legal muster, the judge said.

But Judge Young has twice gone the other way on the exam in question in the Smith case,

ruling that the exam had a racially disparate impact on black and Latino officers and sticking with that ruling [in 2017](#) after the First Circuit upheld Judge O'Toole's findings in Lopez.

In his order Wednesday, Judge Young rejected the city's argument that it has rebutted the presumption that the officers would have been promoted from the 2014 exam — in which Boston said the 2014 exam was qualitatively better than the 2008 exam and yet had a greater adverse impact on black candidates.

"The fatal blow for Boston ... is a statement that both sides' expert witnesses agreed with: 'One cannot say that any specific individual plaintiff or group of plaintiffs who scored too low to be appointed on the 2014 exam would have scored too low, based on a similar exam, had such an exam been given in 2008,'" the judge wrote.

The judge found that, because both experts agreed that the 2014 exam reveals nothing about how these officers would have performed, the presumption has not been rebutted. The judge found that the officers are entitled to back pay.

In terms of how to calculate the back pay, Judge Young said the parties have "helpfully" stipulated to a calculation, but haven't reached an agreement as to the start and end dates for figuring out how much back pay should be awarded.

To remedy that, the judge adopted the officers' proposed start and end dates, except for those plaintiffs who "failed to mitigate damages" by taking the 2014 exam and whose back pay terminates on Boston's proposed end date.

The officers proposed the start date to be Nov. 18, 2011, the average promotional date of white candidates only, according to the order, with end dates of the "retirement date, the trial date for the eight non-promoted plaintiffs and the promotion dates of plaintiffs Leighton Facey and Marwan Moss."

Boston wanted the start date to be Feb. 16, 2012, the average promotional date of all candidates irrespective of race, with the end date to be July 4, 2014, when it says the officers "got the remedy they sought throughout this case — a content-valid, multicomponent, assessment-center-style exam," according to the order.

Judge Young agreed with the officers, for the most part, and ruled that the back pay ends with

either the officer's promotion date, retirement date if they were not promoted or, if neither promoted nor retired before the trial, then the trial date of Oct. 25, 2019. But he made the end date July 4, 2014, for those officers who didn't take the 2014 exam.

At the conclusion of his order, Judge Young commended Boston's efforts in redesigning the promotion exam.

The officers' attorney, Harold L. Lichten of [Lichten & Liss-Riordan PC](#), told Law360 on Wednesday that he and his clients are delighted with the judge's order siding with their argument that the finding of an invalid test means there exists a presumption that those discriminated against will receive back pay.

"This case has been going on for a long time," Lichten said. "This outcome means the officers are all going to get some substantial money. They'll be made whole, as if they had been lieutenants. Some of them are going to get back pay from as much as seven or eight years."

Counsel for the city did not immediately respond to a request for comment.

The police officers are represented by Harold L. Lichten, Benjamin Weber and Zachary Rubin of Lichten & Liss-Riordan PC and Stephen Churchill of [Fair Work PC](#).

The city is represented by Kay H. Hodge and John M. Simon of [Stoneman Chandler & Miller LLP](#).

The case is Smith et al. v. City of Boston, case number [1:12-cv-10291](#), in [U.S. District Court for the District of Massachusetts](#).

--Additional reporting by Chris Villani. Editing by Jay Jackson Jr.