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COMMENTS

THE GEORGIA POWER CASE: ANOTHER FEDERAL AGENCY COMES OF AGE, OR, “MY GOD! OUR EMPLOYER-CLIENT’S TESTING PRACTICES ARE BEING CHALLENGED BY THE EEOC?!”

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories as much as the concept of a fourth dimension unsettles our three-dimensional thinking.

Justice Robert H. Jackson*

I. PROLOGUE: THE EMPLOYER’S GROWING DILEMMA

Shortly after the Equal Employment Opportunity Commission (EEOC) came into existence,¹ one commentator remarked that the new federal agency was nothing more than a “poor enfeebled thing.”² How things have changed since 1964! One very important United States Supreme Court case,³ a number of Congressional amendments to Title VII of the Civil Rights Act of 1964⁴ and a

* From *Federal Trade Comm. v. Rubberoid Co.*, 343 U.S. 470, 487 (1952).

1. Civil Rights Act of 1964 Pub. L. No. 88-352, Title VII, 78 Stat. 262, 42 U.S.C. §§ 2000e to 2000e-15 (1970).

2. M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 205 (1966).

3. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

4. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107. As originally enacted, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970), prohibited discrimination in employment on grounds of race, color, religion, sex and national origin. It created the Equal Employment Opportunity Commission, which was authorized to receive charges of discrimination, to investigate such charges and, where it had reasonable cause to believe a charge to be true, to attempt to eliminate the alleged discriminatory employment practice by informal conciliation and persuasion. If conciliation failed, the charging party was entitled to sue in federal district court. The process is described in SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 61-102 (1966).

number of significant lower federal court cases, of which *United States v. Georgia Power Company*⁵ is one of the latest and perhaps most significant, have all contributed to the development of a very powerful federal agency. Since most of the judicial and Congressional activity contributing to the increased clout of the EEOC has occurred within just the last two to three years,⁶ the precise nature and full extent of the EEOC's new power remains unclear. However, there can be no question that the EEOC has changed from a weak agency with limited powers of persuasion and investigation⁷ into a potentially very powerful enforcement mechanism⁸ complete with, what is in effect, substantive rule-making power.⁹ Further, the EEOC has been given prosecutorial power originally reserved to the Attorney General of the United States.¹⁰ There are those who contend that the EEOC has grown altogether too powerful,¹¹ and it seems fair to observe that at least some of those associated with the EEOC have become intoxicated with the agency's new power.¹²

Certainly, discrimination of any sort is not to be encouraged, but as this article will demonstrate the pendulum has now swung too far in the direction of providing protection for the minority employee, especially in the area of employment testing. While discrimination in hiring and promoting still exists and should be eliminated, the employer's rights must not be totally disregarded. The growing power of the EEOC, particularly in the area of employment testing,¹³ has placed many of the nation's employers¹⁴ in a

Among other things, the 1972 amendments to Title VII enable the EEOC to sue private employers if conciliation fails, and gives the agency Jurisdiction over state and local government employment. Also, the amendments preserve the individual claimants right to sue.

5. *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

6. The Griggs case was handed down in March of 1971.

7. Note 1 *supra*.

8. See THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (BNA August, 1973), a commentary published by the Editorial Board of the Bureau of National Affairs.

9. By virtue of the interpretation given to Griggs by some commentators. See notes 56-58 *infra*. Cf. discussion at 554-56 *infra*.

10. Title 42 U.S.C. § 2000e-6 (c) (1972).

11. See MINORITY REPORT OF THE HOUSE EDUCATION AND LABOR COMMITTEE REPORT ON H.R. 1746, 1972 U.S. CODE CONG. & AD. NEWS 2167, *et seq.*

12. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

13. According to the EEOC GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, 29 C.F.R. § 1607.2 (1973), a "test" is defined as, . . . any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not re-

potentially exposed and virtually indefensible position.¹⁵ By way of introduction, it must be observed that the EEOC guidelines on employment testing, which are to be found in the EEOC Guidelines on Employee Selection Procedures¹⁶ are quite difficult to understand¹⁷ and almost impossible to apply.¹⁸ According to one commentary, the EEOC guidelines on employment testing,

. . . if applied literally . . . would raise the cost of testing for many employers beyond tolerable limits, forcing the abandonment of testing programs which, although they may be valid, cannot be validated at a tolerable cost. . . . In sum, the Guidelines appear designed to scare employers away from any objective standards which have a differential impact on minority groups because, applied strictly, the testing requirements are impossible for many employers to follow.¹⁹

It is significant that the above observation was made at a time when the EEOC was still a comparatively "enfeebled" agency.²⁰

After the United States Supreme Court, in *Griggs v. Duke Power Company*,²¹ eliminated the requirement that a complainant demonstrate that an employer intended to discriminate by using a

stricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

14. Title 42 U.S.C. § 2000e (b) (1972) applies to employers with more than fifteen employees.

15. Most of this article will be given over to a demonstration of the indefensible position of the employer *vis-a-vis* the EEOC in the area of employment testing.

16. 29 C.F.R. Part 1607 (1973).

17. See *Chance v. Bd. of Examiners of The City of New York*, 330 F. Supp. 203, 220 (S.D. N.Y. 1971), where the court remarks on how reluctant the court is to "invade the profession characterized by an expertise not shared by us. . . ." Cf. Comment, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1127-31 (1971) and Note, 1972 COLUM. L. REV. 900, 905. See also, note 37 *infra*.

18. See *Rowe v. General Motors Corp.*, 457 F.2d 348, 355 (5th Cir. 1972) and CCH EEOC Decisions (1973) ¶ 6329; Cf., Note, *Civil Rights Law—Fair Employment Testing and Title VII of the Civil Rights Act of 1964*, 20 KANSAS L. REV. 334, 341 (1972); Also, Comment, 84 HARV. L. REV. 1109, 1127 and 1972 U.S. CODE CONG. & AD. NEWS 2144.

19. See, 84 HARV. L. REV., note 18 *supra* at 1131. In addition to being unclear, there is considerable doubt as to the legitimacy of the guidelines. See discussion at 554-56 *infra*.

20. Certiorari had just been granted in *Griggs* at the time the comment in Harvard was written. See 84 HARV. L. REV., note 19 *supra* at 1132 n.109.

21. Note 3 *supra*.

particular testing procedure,²² employers discovered that even a good faith effort to comply with the EEOC guidelines was far from adequate. The United States Court of Appeals for the Fifth Circuit held that:

. . . The problem is not whether the employer has willingly—yea, even enthusiastically—taken steps to eliminate what it recognizes to be traces or consequences of its prior pre-Act segregation practices. Rather, the question is whether on this record—and despite the efforts toward conscientious fulfillment—the employer still has practices which violate the Civil Rights Act of 1964, as amended.²³

In addition to the fact that the *Griggs* case appeared to give a substantive impact to the EEOC guidelines on employment testing,²⁴ the 1972 amendments to Title VII of the Civil Rights Act of 1964²⁵ gave to the EEOC quite extraordinary powers of enforcement.²⁶ Although it is entirely too early to determine exactly how the EEOC will exercise this enforcement power,²⁷ indications are that the EEOC will attempt to limit further the employer's possible responses to the testing guidelines. For example, as the guidelines are presently drafted, an employer not wishing to go to the trouble and expense of validating an employment test which has a differential impact²⁸ on minority groups has the option of not only dropping that particular test but of discontinuing objective testing altogether.²⁹ However, there is some evidence that the EEOC may be moving in the direction of requiring that employers who administer

22. According to the Supreme Court in *Griggs*, note 3 *supra* at 432:

The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees. . . . We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.

23. *Rowe v. General Motors Corp.*, note 18 *supra* at 355.

24. See discussion at 528-32 *infra*.

25. Note 4 *supra*.

26. These powers are examined at 535-36 *infra*. Cf. BNA commentary, note 8 *supra*.

27. For example, the prosecutorial powers derived from the Attorney General will not officially vest in the EEOC until March, 1974. See note 10 *supra*.

28. An employment test which adversely affects a higher proportion of blacks than whites has a "differential impact" on blacks.

29. See Comment, *Equal Opportunity—Griggs v. Duke Power Co.*, 6 SUFFOLK L. REV. 209, 215 (1971), to the effect that, because of *Griggs*, many companies have dropped aptitude tests. Cf. Note, 17 VILL. L. REV. 147, 156 (1971).

objective tests continue to do so.³⁰ Indeed, there is even some evidence that the EEOC may require employers not presently using objective tests to begin administering such tests, if the agency concludes that they may be engaging in discriminatory hiring practices.³¹

Therefore, prior to *United States v. Georgia Power Company*,³² employers who administered objective tests which had a differential impact on minority groups found themselves facing the unpleasant prospect of a costly challenge to their testing procedures, irrespective of their good faith efforts to validate those tests. Moreover, there was some uncertainty whether such employers could simply "give up the field" and stop administering objective tests altogether.³³

The *Georgia Power* case promises both to strengthen the hand of the EEOC and further frustrate the good faith efforts of the employer who sincerely wishes to validate properly his objective tests. Although extensively analyzed later in this article, the *Georgia Power* case merits some preliminary comment. It is certainly not perfectly clear from a reading of *Griggs v. Duke Power Co.* that the Supreme Court intended to give the force and effect of substantive law to all the EEOC guidelines on employment testing, despite the fact that some commentators have read *Griggs* as so providing.³⁴ There is much that can be said in favor of not giving the EEOC guidelines the force and effect of law; indeed, the guidelines are very much in need of a complete reworking.³⁵ Nevertheless, the Fifth Circuit blandly asserts that the EEOC guidelines on employment testing "should be followed absent a showing

30. See, for example, CCH Empl. Prac. Guide ¶ 5156 (EEOC March 27, 1973); Cf. 1972 COLUM. L. REV., note 17 *supra* at 924.

31. According to CCH EEOC Decision (1973) ¶ 6328:

Since Respondent's highly subjective hiring system has had a disproportionate impact on minority group members, it is unlawful absent a showing of business necessity. See *Griggs v. Duke Power Co.*, *supra*; and in light of Respondent's recent record of discriminating against minority groups in several respects, as concluded herein, it is essential that the system be objective in nature and be such as to permit review.

32. Note 5 *supra*.

33. Of course, the employment test is a valuable tool whereby the employer can gain some indication of how well an individual will discharge the responsibilities of a given job. However, the more expensive the tool becomes, the more likely it is the employer will have to forego using the employment test, no matter how useful. Cf. 84 HARV. L. REV., note 19 *supra* at 1127 n.82.

34. Blumrosen, note 12 *supra* at 98.

35. See discussion 551-56 *infra*.

that some cogent reason exists for noncompliance."³⁶

Aside from the fact that the *Georgia Power* case obviously strengthens the hand of the EEOC, it creates some very serious difficulties for the employer. Determining whether or not an employer's testing mechanism is in compliance with the EEOC guidelines on employment testing is an extremely difficult task.³⁷ It must be remembered that even though the *Georgia Power* Company had gone to the trouble and expense of hiring an industrial psychologist to validate its employment tests, the Court of Appeals held that the defendant had failed, and failed badly,³⁸ to conform its testing procedures to the EEOC guidelines.³⁹

How can a practitioner adequately advise an employer-client as to his rights and duties under the EEOC guidelines? The *Georgia Power* case raises the very real possibility that even advising an employer-client to hire an industrial psychologist may prove inadequate. Unfortunately, there are no EEOC "approved" standard employment tests;⁴⁰ it seems clear, under the present guidelines, that most employers will have to "validate"⁴¹ all examinations, especially standard, commercial examinations,⁴² themselves.

While the *Georgia Power* case occasioned this article, the commentary herein will not be limited to an analysis of the meaning and impact of this single case. There is a definite paucity of practice-oriented material on employment testing law as far as the

36. *Georgia Power*, note 5 *supra* at 913.

37. See discussion 544-51 *infra*. Regarding the difficulty of determining whether or not an employer is testing in compliance with the EEOC guidelines, consider the following candid observation contained in the majority report of the House Committee responsible for drafting what finally became the 1972 amendments to Title VII of the Civil Rights Act of 1964:

It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.

This kind of expertise normally does not reside in either the personnel or legal arms of employers. . . .

1972 U.S. CODE CONG. & AD. NEWS 2144.

38. The Court in *Georgia Power* described the company's efforts at validation as being "irrelevant." Note 5 *supra* at 916-18.

39. See discussion 536-43 *infra*.

40. See STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS AND MANUALS (American Psychological Association 1966) STANDARDS C4.2, C4.9; *but cf.* EEOC GUIDELINE 1607.7 at 29 C.F.R. Part 1607 (1973).

41. For articles discussing various theories of validation, see note 202 *infra*.

42. 84 HARV. L. REV. note 19 *supra* at 1121. *Cf.* Note, *Intelligence Testing Beyond Griggs v. Duke Power Co.*, 49 CHI.-KENT L. REV. 82-83 (1972).

practitioner with an employer-client is concerned. This article provides the practitioner with some suggestions as to how to: 1) Render adequate advice to his employer-clients as to their rights and duties under the EEOC guidelines on testing, insofar as such advice is possible under the present guidelines; and, 2) Discern weaknesses and inadequacies in the present statutory and administrative matrix, as reinforced by a long line of federal court cases, which the practitioner may be able to turn to a client's advantage in a confrontation with the EEOC.

II. THE DEVELOPMENT AND PRESENT STATUS OF EMPLOYMENT TESTING LAW

A. *In the Beginning.*

The law in this area really stems from a Congressional reaction to the 1964 decision of the Illinois Fair Employment Practices Commission in *Myart v. Motorola, Inc.*⁴³ Many interpreted this decision as banning any employment test which adversely affected a minority group, irrespective of whether the test could be justified on the basis of business need.⁴⁴

During the Senate debate on the bill which was to become Title VII of the Civil Rights Act of 1964, the proponents of the bill were at pains to point out that the proposed Title VII would permit the use of job-related⁴⁵ tests.⁴⁶ However, a number of senators, led by Senator Tower of Texas, feared that the *Motorola* case might be used as precedent by the EEOC for the purpose of doing away with any employment test which might have some adverse affect on a minority group.⁴⁷ The proponents of the bill argued that the *Motorola* case could not be so used by the EEOC primarily because the EEOC did not have enforcement powers similar to those of the Illinois FEPC:⁴⁸ i.e., the EEOC was to be equipped with only

43. *Myart v. Motorola, Inc.*, Ill. FEPC No. 636-27, reproduced in full at 110 CONG. REC. 5662 (1964), modified sub nom., *Motorola, Inc. v. FEPC*, 58 L.R.R.M. 2573 (Ill. Cir. Ct. 1965), *revd.*, 34 Ill. 2d 266, 215 N.E.2d 286 (1966).

44. Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1649-54 (1969); see also, Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 707-10 (1968). Cf. discussion at 84 HARV. L. REV., note 19 *supra*, at 1123-26.

45. See notes 97 & 98 *infra* and accompanying textual quotes.

46. 110 CONG. REC. 13503-04 (1964).

47. *Id.* at 13492. Note Tower's remarks opposing quota system, *id.* at 9027, 13492.

48. *Id.* at 13504.

limited powers of persuasion and investigation.⁴⁹ Senator Tower was unconvinced. Senator Tower, therefore, introduced an amendment to Title VII which was intended to insure that employers could use job-related employment tests in making decisions relating to hiring and promoting, even if such testing had an adverse affect on a minority group.⁵⁰ Senator Tower's amendment⁵¹ passed on a voice vote without debate and is now included in Section 703(h) of Title VII as follows:

. . . [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.⁵²

In responding to the above amendment both the EEOC and the courts have relied heavily on the legislative history surrounding the adoption of that amendment. Indeed, the decision in *Griggs* turned on a determination of whether or not the EEOC had properly divined the Congressional intent underlying Section 703(h).⁵³ However, it is not at all clear just how helpful this legislative history really is.⁵⁴

While it is fair to draw a negative inference from the legislative history surrounding Section 703(h) that the Senators did not attempt to proscribe some system of "validating" an employment test to insure that it's job-related [thus the Supreme Court's holding in *Griggs* that "the conclusion is inescapable that the EEOC's construction of Section 703(h) to require that employment tests be job related comports with congressional intent"], it does not follow

49. This situation has been altered by the 1972 amendments to Title VII. See discussion 535-36 *infra*.

50. Note 46 *supra* at 13492; Tower's first amendment was rejected by the Senate. Note 46 *supra* at 13505. Tower modified his amendment and, as modified, it passed. See note 51 *infra*.

51. Note 46 *supra* at 13724. It seems clear that neither Tower amendment was meant to give carte blanche to use any test, regardless of its discriminatory effect or irrelevance to productivity on the job. See 84 HARV. L. REV., note 19 *supra* at 1125 n. 72.

52. Title 42 U.S.C. § 2000e-2 (h) (1964).

53. *Griggs*, note 3 *supra*, *passim*.

54. According to 84 HARV. L. REV., note 19 *supra* at 1126:

The remarks are all, of course, somewhat ambiguous—and perhaps misleading—for there is no indication in the legislative history that the Senators ever conceived of the possibility that general intelligence tests may not be related to suitability for hiring, or 'trainability.'

that the detailed and complicated requirements of validation presently contained in the EEOC guidelines are in any way mandated by the legislative history underlying Section 703(h),⁵⁵ nor does the Supreme Court so hold in *Griggs*. Although some commentators,⁵⁶ some courts⁵⁷ and even the EEOC itself⁵⁸ have read *Griggs* as approving the EEOC guidelines *in toto* because consonant with the intent of Congress, a central thesis in this article will be that *Griggs* went only so far as to approve of the EEOC's interpretation of Section 703(h) as requiring the use of job-related tests where a minority group is adversely affected by a company's testing procedures.⁵⁹ There is nothing in *Griggs* or in the legislative history underlying Section 703(h) which can be read as obviating a challenge to any or all of the technical requirements of the EEOC guidelines on employment testing for any number of reasons.

B. The EEOC and the Administrative Response to and "Interpretation" of Section 703(h).

It is certainly true that the EEOC was born an "enfeebled" agency. Of course, this was the will of Congress and not merely the result of Congressional oversight.⁶⁰ The EEOC was originally empowered to undertake "technical" studies necessary to effectuate the purposes and policies of Title VII.⁶¹ Further, where a charge of discrimination came to the attention of the EEOC, the agency was given the authority to make a finding of reasonable cause and thereafter to commence non-binding "conciliation" proceedings.⁶² Finally, the EEOC was given the power to promulgate certain *procedural* regulations.⁶³

Originally, the EEOC was not given the power to enforce the provisions of Section 703(h).⁶⁴ If the EEOC attempt at conciliation

55. It seems that many of the aspects and potential ramifications of validation never entered the minds of the congressmen responsible for Title VII. See 84 HARV. L. REV., note 19 *supra* at 1126.

56. Note, *Constitutional Law -Equal Protection—Employment Tests*, 21 DE PAUL L. REV. 580, 593 (1971); cf. Blumrosen, note 12 *supra* at 96-99.

57. To a certain extent, the Georgia Power case does this. See discussion 536-43 *infra*.

58. CCH EEOC Decision (1973) ¶ 6329.

59. See, especially, discussion 528-32 *infra*.

60. Note 48 *supra*.

61. Title 42 U.S.C. § 2000e-4 (f) (5) (1970).

62. Title 42 U.S.C. § 2000e-5 (a) (1970).

63. Title 42 U.S.C. § 2000e-12 (1) (1964). It should be pointed out that this power has not been expanded upon by Congress. See discussion at 537-38 *infra*.

64. As Senator Case, one of the co-sponsors of Title VII, stated: "Only a Federal court would have the authority to determine whether or not a practice is in violation of the act

failed, then either the complainant or the Attorney General—but not the EEOC—could file suit in federal district court.⁶⁵ The EEOC was not given, and *to this day does not possess*, statutory authorization to issue substantive regulations.⁶⁶

Almost from the beginning, the EEOC strained to find ways to exceed the Congressional limitations on the power of the agency.⁶⁷ Professor Blumrosen, first EEOC Chief of Conciliations and current agency consultant, recently described in great detail early agency efforts to circumvent the Congressional limitations originally placed on the EEOC's power.⁶⁸

After first asserting that many employers introduced employment tests in the early 1960's in order to avoid the full force and effect of anti-discrimination laws, Professor Blumrosen describes the great frustration felt within the agency relative to EEOC conciliation efforts, especially where discrimination was charged in the area of employment testing.⁶⁹ One particularly frustrating conciliation effort in 1966 was almost directly responsible for the formulation of the EEOC guidelines on employment testing. According to Professor Blumrosen,

As we flew back to Washington, we reflected on the setback we had just received. We concluded that further conciliation efforts concerning testing would be useless unless the Commission published a clear, official statement *delineating what the law required*. Without such official support, efforts at persuasion would fail because of the employer's intense interest in retaining his testing programs. We therefore decided to press within the EEOC for the adoption of guidelines *that would resolve the legal questions concerning discriminatory testing*. We encouraged dis-

and only the court could enforce compliance." 110 CONG. REC. 7026 (1964). *See also, Id.* at 6205 and 12461-2.

65. BNA commentary, note 8 *supra* at 142.

66. Note 63 *supra*.

67. Perhaps it was simply inevitable that the EEOC would become a powerful agency, since there seems to be, as some commentators have suggested, some sort of law at work to the effect that a federal agency will naturally grow larger and more powerful with each passing year. *Cf. Large, Is Anybody Listening? The Problem of Access in Environmental Litigation*, 1972 WIS. L. REV. 62, 71-75.

68. Blumrosen, Note 12 *supra*. Professor Blumrosen stated in an earlier article that the EEOC has consciously sought to construe Title VII "as broadly as possible in order to maximize the effect of the statute on employment discrimination without going back to Congress for more substantive legislation." Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission*, 38 GEO. WASH. L. REV. 695, 702-03 (1970).

69. Blumrosen, note 12 *supra* at 60.

cussions with the Offices of Research and Compliance and the involvement of outside specialists in the testing field, and sought the opinion of the EEOC's General Counsel. The Commissioners and staff acted on our urging. As a result, the Commission issued its guidelines on employment testing on August 24, 1966.

The guidelines represented the EEOC's interpretation of Section 703(h) of Title VII [Emphasis supplied]⁷⁰

The requirements of the EEOC guidelines on employment testing have been the subject of extensive commentary.⁷¹ While it is felt that much of this commentary has, with certain reservations,⁷² accurately described the *content* of these guidelines, insofar as humanly possible, it is strenuously urged that few commentators have taken to task the basic adequacy of these guidelines.⁷³ The adequacy, necessity and basic legitimacy of the present guidelines will be commented upon at length later in this article.⁷⁴ For the moment, it will be sufficient to describe the manner in which and the procedure by which the EEOC actually formulated and adopted the guidelines on testing. Professor Blumrosen may again be relied upon to supply the necessary information.

Since the authority to issue guidelines is based on the authority to interpret Title VII, these guidelines are a fortiori 'interpretative' rules within the meaning of the Administrative Procedure Act. *As a consequence, no hearing or public participation in the guideline-making process is required.* Therefore, in preparation for the testing guidelines, the EEOC Office of Research *called together a group of testing experts*, to whom Ken Holbert and I explained the nature of the problem of discrimination with which we were confronted, and asked them to prepare a statement. That statement was later reviewed by the General Counsel and his staff, and by the Commissioners before issuance.

The . . . guidelines constituted a Commission endorsement of contemporary psychological testing standards developed by professional associations [Emphasis supplied].⁷⁵

70. *Id.* at 60-61.

71. See authorities collected at note 202 *infra*.

72. *I.e.*, as alluded to at 546 *infra*, although many commentaries have proved to be, at the very least, rather successful attempts to explain the various theories of validation, it is perhaps inaccurate to say that they have been able to shed a great deal of light on the EEOC testing guidelines. This latter observation holds especially true for the individual who lacks a background in industrial psychology. See discussion at 545-47 *infra*, generally.

73. The comment at 84 HARV. L. REV., note 19 *supra*, is one notable exception.

74. See discussion at 551-56 *infra*.

75. Blumrosen, note 12 *supra* at 61, 97.

Thus did the EEOC guidelines on employment testing come into existence.

The lower federal courts initially reacted to the EEOC guidelines by pointing out that, while the EEOC could issue suitable procedural regulations, the agency had no substantive rule-making power,⁷⁶ and that while the agency guidelines were entitled to appropriate respect they were not conclusive on the courts.⁷⁷

With regard to any administrative *rulings* which the EEOC made, however, at least one lower federal court held that they had the force and effect of law⁷⁸ since the Congress had seen fit to provide that good faith reliance on such rulings could be used by an employer as an affirmative defense.⁷⁹ This latter decision notwithstanding, there is nothing to indicate that even the EEOC seriously viewed the guidelines as having the force and effect of law,⁸⁰ prior, of course, to *Griggs v. Duke Power Company*.

C. *The Griggs Mandate.*

As with any landmark decision, the case of *Griggs v. Duke Power Company*,⁸¹ has occasioned a great deal of commentary.⁸² Nevertheless, because *Griggs* is so fundamental to employment testing law, and because it is felt that the case has frequently been misread, a detailed analysis of *Griggs* would appear to be in order.

Thirteen incumbent Negro employees of the Duke Power Company commenced a class action against that company pursuant to Title VII of the Civil Rights Act of 1964, alleging that the company had openly discriminated on the basis of race in the hiring and assigning of employees at the company's Dan River plant.⁸³

The Dan River plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Testing.⁸⁴ Until August of 1966,

76. *Dobbins v. Local 212, Int'l Brotherhood of Electrical Workers*, 292 F. Supp. 413 (S.D. Ohio 1968).

77. *International Chemical Workers Union v. Planters Manufacturing Co.*, 259 F. Supp. 365 (N.D. Miss. 1966).

78. *Air Transport Ass'n of America v. Hernandez*, 264 F. Supp. 227 (D.C. 1967).

79. Title 42 U.S.C. § 2000e-12 (b) (1964). Neither the holding in *Hernandez* nor the general vitality of this section seem to have been compromised at all by either *Griggs* or the 1972 amendments to title VII.

80. Even Blumrosen concedes this. Note 12 *supra* at 95 n. 143.

81. Note 3 *supra*.

82. Over fifteen law review articles have been written specifically on *Griggs*.

83. *Griggs*, note 3 *supra* at 426.

84. *Id.* at 427.

Negroes were employed only in the Labor Department.⁸⁵ In 1955 the company initiated a policy making a high school degree mandatory for initial assignment to any of its departments except Labor.⁸⁶ In 1965, when the company abandoned the policy of restricting Negroes only to the Labor Department, it extended the high school education requirement to restrict transfer from Labor to any other department to employees with a high school education.⁸⁷

The company added a further requirement for new employees on July 2, 1965, *the date on which Title VII became effective*. To qualify for placement in any department but the Labor Department it became necessary to register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education.⁸⁸ In September, 1965 the company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor to an "inside" job by passing two tests—the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test.⁸⁹ The Court in *Griggs* determined that neither of these tests were intended to measure the ability to learn or perform a particular job or category of jobs.⁹⁰ Also, the Supreme Court noted that the EEOC in one case had found that use of a battery of standardized tests, including the Wonderlic and Bennett tests used by Duke, resulted in 58% of the whites passing the tests, as compared with only 6% of the blacks.⁹¹

85. *Id.* at 427 n. 2.

86. *Id.* at 427.

87. *Id.*

88. *Id.*

89. *Id.* at 428.

The Wonderlic serves to measure the mental ability of adults for hiring and placement in business and industry. The test is considered an economical and convenient instrument but allegedly suffers from the fact that there has been inadequate correlation between performance on the test and success in training for specific jobs (Basically the objection raised by the plaintiffs in *Griggs*). See SIXTH MENTAL MEASUREMENT YEARBOOK (O. Buros ed. 1965).

The Bennett test emphasizes, through the use of pictures about which short questions are to be answered, the understanding of mechanical principles as applied to a wide variety of everyday life situations. See A. ANASTASI, *PSYCHOLOGICAL TESTING* 362-63 (ed. 1968).

Psychologists have questioned the validity of tests such as the Wonderlic for years (RECENT DEVELOPMENT, *Civil Rights - Equal Employment Opportunity*, 17 VILL. L. REV. 147, 156 (1971)), and therefore the specific holding in *Griggs* as to the Wonderlic and Bennett tests did not shock too many people. However, the general implications of *Griggs* were unsettling to a good many employers.

90. *Griggs*, note 3 *supra* at 428.

91. *Id.* at 430 n. 6.

Before proceeding to a discussion of the Supreme Court's decision in *Griggs*, it should be noted that the facts of that case strongly suggest the existence of an actual discriminatory intent on the part of the company in the use of the aptitude tests. For example, prior to 1965, the Duke Company had an express policy of restricting Negroes to the Labor Department.⁹² Also, the company first required that new employees take aptitude tests on the very same day Title VII became effective.⁹³ Finally, the tests in question were instituted on the *judgment* of the company that they would generally improve the overall quality of the work force: no meaningful study of their relationship to job-performance ability was even attempted.⁹⁴ The potential significance of these facts will be commented upon in a later section.⁹⁵

In *Griggs*, the Supreme Court specifically held that:

The [Civil Rights Act of 1964] *proscribes* not only overt discrimination but also *practices that are fair in form, but discriminatory in operation*. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

. . . .

But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any requirement must have a manifest relationship to the employment in question [Emphasis supplied].⁹⁶

"The Court's holding is not complex, job-ability and employment qualification tests must be reasonably related to the job for which they are required."⁹⁷ Or, put another way, the "*Griggs* decision has put to rest any question concerning the use of non-job-related general ability tests. Such tests are definitely prohibited by Title VII."⁹⁸

However, it is not at all clear what specifications employment testing must meet in order to satisfy the job-relatedness standards.⁹⁹ At least one commentator has gone so far as to assert that

92. *Id.* at 427.

93. *Id.*

94. *Id.* at 431.

95. See note 234 *infra* and accompanying textual comment.

96. *Griggs*, note 3 *supra* at 431-32.

97. 17 VILL. L. REV., *supra* note 89 at 155.

98. See 20 KANSAS L. REV., note 18 *supra* at 341.

99. *Id.* Cf. *Griggs v. Duke Power Co.: The Requirements of Title VII in Employee Testing*, Comment, 6 GEORGIA L. REV. 194, 202 (1971).

the EEOC guidelines were *adopted* by the Supreme Court in *Griggs*.¹⁰⁰ There is also an EEOC decision which declares that the guidelines were *approved* in *Griggs*.¹⁰¹ Of course, there is also the Fifth Circuit's decision in the *Georgia Power* case which certainly appears to acquiesce in the view that if *Griggs* did not adopt the guidelines *in toto*, the Supreme Court nevertheless came quite close to doing so.¹⁰²

As was indicated earlier,¹⁰³ a central thesis in this article is that *Griggs* went only so far as to approve of the EEOC's *interpretation* of Section 703(h) as requiring the use of job-related tests where a minority group is adversely affected by a company's testing procedures. What follows is everything the Supreme Court had to say relative to the EEOC guidelines in *Griggs*:

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting Sec. 703(h) *to permit only the use of job-related tests*. The administrative interpretation of the Act by the enforcing agency is entitled to great deference . . . Since the Act and its legislative history support the Commission's *construction*, this affords *good reason to treat the guidelines as expressing the will of Congress*.

. . . .
From the sum of legislative history relevant in this case, *the conclusion is inescapable that the EEOC's construction of Sec. 703(h) to require that employment tests be job-related comports with congressional intent* [Emphasis supplied].¹⁰⁴

Above all, it must be remembered that the Court was responding to a contention of the Duke Power Company, to the effect that Section 703(h) specifically permitted the use of *general* intelligence tests *unrelated to any job*, when the Court made the foregoing observations with respect to the EEOC's interpretation of Section 703(h).¹⁰⁵

The entire thrust of the earlier part of the *Griggs* decision was directed at establishing the validity of the requirement that any employment *practice* which operates to exclude Negroes is prohib-

100. 21 DF PAUL. L. REV., note 56 *supra* at 593.

101. Note 58 *supra*.

102. See discussion at 536-43 *infra*.

103. See 523 *supra*.

104. *Griggs*, note 3 *supra* at 433-34, 36.

105. The Court refers to this contention in the paragraph immediately preceding the beginning of the excerpt from *Griggs* quoted in the text, which quote is referenced to note 104 *supra*.

ited by Title VII if it cannot be shown to be related to job performance.¹⁰⁶ The defendant, Duke Power Company, responded by arguing that Section 703(h) constituted, in effect, an exception to this general rule.¹⁰⁷ This, in turn, forced the Supreme Court to examine the legislative history underlying Section 703(h) to determine whether or not the Congress had, in fact, intended that Section 703(h) constitute an exception to the general proposition that an employment practice which operates to exclude Negroes cannot be allowed under Title VII unless job-related.¹⁰⁸ The Supreme Court both begins¹⁰⁹ and ends¹¹⁰ this examination of the legislative history underlying Section 703(h) with a statement that the EEOC had construed Section 703(h) to permit only the use of job-related tests. In other words, the Supreme Court only uses the EEOC interpretation of Section 703(h) to buttress its own conclusion that Section 703(h) proscribes the use of tests which are not job-related (where those tests adversely affect a minority group): *the Court stops far short of placing its unqualified imprimatur on the EEOC guidelines on testing.* In order to strengthen both the authority of the EEOC interpretation and, hence, the validity of the Court's conclusion with respect to Section 703(h), the Court cites authority for the long-established doctrine that a good deal of weight is to be given to the construction put upon an act by an enforcing agency.¹¹¹ With the aid of the EEOC construction of Section 703(h) as permitting only the use of job-related tests, and by virtue of its own analysis of the legislative history underlying Section 703(h), the Supreme Court concludes that the defendant's contention (that Section 703(h) stands as an exception to the general proposition that employment practices which operate to exclude Negroes are not allowed under Title VII unless job-related) must fail.¹¹²

Given the ambiguous nature of the Court's assertion that the guidelines express the will of Congress,¹¹³ and in view of the

106. Note 96 *supra* and accompanying textual quote.

107. Note 105 *supra*.

108. See discussion at 521-23 *supra*; cf. discussion in Griggs, note 3 *supra* at 433-36.

109. Griggs, note 3 *supra* at 433.

110. *Id.* at 436.

111. *Id.* at 434.

112. *Id.* at 436.

113. It is unfortunate that the Supreme Court makes the statement that there is "good reason to treat the guidelines as expressing the will of Congress." Griggs at 434. One must, however, first consider the fact that the Court only makes this one reference to the relationship between the EEOC guidelines and legislative history: beyond this one reference, the Court speaks only of the correctness of the EEOC's 'interpretation' or 'construction' of

Court's quite apparently limited intention in the latter part of *Griggs* simply to rebut the defendant's contention¹¹⁴ relative to Section 703(h), there is little reason to infer a judicial intention on the part of the Supreme Court to adopt *in toto* the EEOC guidelines on testing. Had the Court intended to impart the force and effect of law to the EEOC guidelines, it seems altogether unlikely that they would have used anything but the clearest and most unmistakable language. This conclusion follows with even greater force when one remembers that the EEOC testing guidelines are of a highly detailed and technical nature.¹¹⁵ Does it not seem likely that the United States Supreme Court would have examined, to some extent, the content of those guidelines, or at least made some passing reference as to why the Court approved of that content, before the Supreme Court placed its unqualified imprimatur on those guidelines?

While it is at least arguable that the Supreme Court in *Griggs* approved of the EEOC's issuance of interpretative guidelines indicating the application of Title VII to general classes of situations,¹¹⁶ there is nothing in *Griggs* or in the legislative history underlying Section 703(h) of the Civil Rights Act of 1964 which can be read as obviating a challenge to any or all of the technical requirements of the EEOC guidelines for any number of reasons.¹¹⁷ It is, of course, recognized that there are those who are of the opinion that the Supreme Court adopted or approved all of the EEOC Guidelines on Employee Selection Procedures in *Griggs*, at least to some extent.¹¹⁸ The above analysis of the *Griggs* case

Section 703 (h) to the effect that that section is intended to permit the use of only job-related tests. *Griggs* at 433-36.

114. See note 107 *supra* and accompanying text.

115. See, e.g., discussion at 549-51 *infra*.

116. Blumrosen, note 12 *supra* at 95.

117. As to some of the challenges which might be made to the EEOC testing guidelines, see discussion at 549-56 *infra*.

118. See notes 56-58 *supra*.

Professor Blumrosen views *Griggs* as giving an extraordinary amount of substantive weight to the EEOC guidelines on testing. According to Blumrosen:

The process used by the Supreme Court in determining the *validity* of EEOC guidelines involves a search through the legislative history for a clear demonstration that the EEOC interpretation was not intended. *If the matter is ambiguous* or if the legislative history supports the interpretation of the EEOC, the *Griggs* analysis *requires* that the district courts follow the guidelines [Emphasis supplied].

Blumrosen, note 12 *supra* at 98-99.

Professor Blumrosen's remark that the above analysis "confers great responsibility on the EEOC [Blumrosen, note 12 *supra* at 99] . . ." is somewhat of an understatement. It would

should, however, provide the practitioner who must advise and defend employer-clients with the wherewithal to resist the growing¹¹⁹ tendency to read *Griggs* as foreclosing challenges to the guidelines. In this regard, the practitioner may wish to argue, as one commentator has suggested,¹²⁰ that the guidelines may be incorporated into the common law on an *ad hoc* basis, thus allowing for a careful examination of the individual guidelines in the context of cases to which they are applicable. If the practitioner were to employ this latter argument, he should stress the fact that *Griggs* did not analyze the content of the guidelines, thus lessening the chances that the court will raise a strong presumption in favor of the guidelines' validity.¹²¹ Much more will be said with respect to various challenges which the practitioner may make to the guidelines in a later section of this article.¹²²

A detailed analysis of the *Griggs* decision necessitates an examination of the various other aspects of the Supreme Court's holding in that case. Indeed, as has been suggested already, the Supreme Court's discussion of Section 703(h) is almost incidental to its primary holding regarding the general thrust¹²³ of Title VII. In other words, it is only because the defendant contended that Section 703(h) constituted an exception to the general purpose and requirements of Title VII¹²⁴ that the Supreme Court was then forced to address itself to the legislative history underlying Section 703(h) in order to demonstrate that all that it had said with respect to Title VII generally was equally applicable to Section 703(h).¹²⁵

be more correct to point out, especially in view of the analysis of *Griggs* offered at 528-33 of the text, that Blumrosen's above analysis confers upon the EEOC unwarranted (and illegal; see discussion at 554-56 *infra*) substantive rulemaking power.

119. See discussion of Georgia Power case at 536-43 *infra*.

120. 1972 COLUM. L. REV., note 17 *supra* at 920. This commentary represents a dissent from those who read *Griggs* as approving of the testing guidelines because of Congressional history. After discussing the *Griggs* treatment of the EEOC guidelines, this commentary concludes:

. . . [T]here is no evidence that Congress intended to give the EEOC regulations the status of law. To give them that status would effectively deprive the courts of the authority to interpret Title VII. Hence the proper function of the guidelines is to serve as non-binding aid to the court.

1972 COLUM. L. REV., note 17 *supra* at 920. As a subsequent discussion (551-56 *infra*) demonstrates there are arguments against relying too heavily on the guidelines even if they are treated as nothing more than "an aid to the court."

121. The Georgia Power case seems to raise such a strong presumption. See discussion at 536-43 *infra*.

122. See discussion at 551-56 *infra*.

123. Note 96 *supra* and accompanying textual quote.

124. Note 107 *supra*.

125. See note 105 *supra* and discussion at 530-31 *supra*, generally.

The primary holding in *Griggs*¹²⁶ may be broken down into three component parts. If an employment *practice*¹²⁷ is (1) shown to have an adverse impact on a minority group, *and* (2) the practice cannot be justified on the basis of business necessity (i.e., if the practice cannot be shown to be related to job performance), *then* (3) irrespective of the employer's motivation, the practice is proscribed. Each of these component parts will be analyzed in view of what the Supreme Court said in *Griggs* and in view of what courts and commentators have said since *Griggs*.

(1) Since the Court in *Griggs* failed to indicate just how much of a discriminatory impact had to be demonstrated before Title VII guarantees could be triggered, this aspect of the Court's decision has occasioned a good deal of post-decision discussion. One writer has extensively analyzed the type of statistical evidence that must be brought forward by a plaintiff to establish a *prima facie* case of discrimination and his discussion is recommended to the practitioner.¹²⁸ At least one commentator has suggested that where there is slight or no evidence of a discriminatory impact, then the use of any objective standard would be valid.¹²⁹ In this regard, a 1968 district court case held that a discrepancy of five to ten percent between the scores of blacks and whites taking a test is not sufficient to show discrimination.¹³⁰

(2) The Court in *Griggs* seems to have clearly rejected any loose or subjective measure of "business necessity" by requiring that any device or mechanism used to select or transfer employees must be "demonstrably a reasonable measure of job performance."¹³¹ However, once a business necessity has been established, there is case law to the effect that employment statistics [tending to show a discriminatory effect] cannot be used alone to outweigh a defendant's evidence of business necessity.¹³²

The Fourth Circuit added an interesting twist to the concept of business necessity.

126. Note 123 *supra*.

127. Which would include, but obviously would not be limited to, employment testing.

128. 1972 COLUM. L. REV., note 17 *supra* at 909-23; *cf.* Blumrosen, note 12 *supra* at 91-92.

129. 6 GEORGIA L. REV., note 99 *supra* at 201 n. 49.

130. *United States v. H.K. Porter Co.*, 296 F. Supp. 40, 78 (N.D. Ala. 1968).

131. *Griggs* note 3 *supra* at 436; *cf.* Blumrosen, note 12 *supra* at 82. It should be remembered that, in the area of employment testing, business necessity is determined by the conducting of a validation study. *See* discussion of validity at 547-48 *infra*.

132. *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 446 (5th Cir. 1971).

. . . [T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be *available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact* [Emphasis supplied].¹³³

The italicized portion of the above quote represents an extension of *Griggs*.¹³⁴ It appears that the EEOC now applies this analysis of business necessity to employment testing.¹³⁵ More particularly, consider the following from a 1971 EEOC decision:

. . . [I]f there is a reasonable alternative method of achieving the same goal, i.e., the safe and efficient operation of the Tool Planner job, which alternative has a lesser impact on minority groups than the test, *then the use of the test is arbitrary, i.e., unnecessary, and therefore unlawful* [Emphasis supplied].¹³⁶

(3) If nothing else is clear in *Griggs*, it is clear that the employer can be found to have violated Title VII irrespective of whether or not he intended to do so.¹³⁷ If an employment practice has a discriminatory effect, and if that practice cannot be justified on the basis of business necessity, then the practice is prohibited, no matter the good faith efforts of the employer to blunt the discriminatory effect.¹³⁸

It may not be technically correct to say that *Griggs* has placed the employer under a burden of strict liability.¹³⁹ Nevertheless, in view of the Fourth Circuit's stringent test for business necessity and its requirement that a demonstrated business necessity will still be insufficient if there is an alternative method of achieving the same business purpose,¹⁴⁰ the employer's burden certainly comes very near to being one of strict liability.

Before concluding this analysis of *Griggs v. Duke Power Co.*, the practitioner with employer-clients is reminded that the em-

133. *Robinson v. Lorrillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971); *cf. Rowe v. General Motors Corp.*, note 18 *supra* at 354; *Johnson v. Pike Corp. of America*, 332 F. Supp. 490, 495-96 (C.D. Cal. 1971).

134. *Cf. Bernhardt, Griggs v. Duke Power Co.: The Implications for Private and Public Employers*, 50 TEXAS L. REV. 901, 914 n. 92 (1972).

135. Note 58 *supra*.

136. *Id.* at 4588.

137. Note 23 *supra* and accompanying textual quote.

138. *Griggs*, note 3 *supra* at 431.

139. *See, e.g., Blumrosen*, note 12 *supra* at 71-72.

140. Note 133 *supra* and accompanying textual quote.

ployer has a very heavy burden of proof under *Griggs*, indeed. “. . . Congress has placed on the employer the burden of showing that any given [testing] requirement must have a *manifest* relationship to the employment in question [Emphasis supplied].”¹⁴¹

D. The 1972 Amendments to Title VII: The EEOC “Arrives”

The decision in *Griggs v. Duke Power Co.* greatly encouraged the EEOC,¹⁴² since the agency read this decision as approving the EEOC Guidelines on Employee Selection Procedures.¹⁴³ In other words, the EEOC saw the guidelines as more than mere procedural interpretations after *Griggs*, which conclusion has undoubtedly been greatly reinforced by the *Georgia Power* case.¹⁴⁴

While it can be strongly argued that the EEOC’s interpretation as to the *Griggs* impact on the guidelines is very largely the product of wishful thinking,¹⁴⁵ there can be absolutely no doubt that the agency received some very real power in 1972.

The original powers granted to the EEOC under Title VII of the Civil Rights Act of 1964 have already been described.¹⁴⁶ According to the Majority Report of the House Education and Labor Committee on H.R. 1746, the bill which eventually resulted in the 1972 amendments to Title VII:

H.R. 1746 remedies the failure to include effective enforcement powers in Title VII by enacting a new Section 706 (Section 4 of the bill) which empowers the Commission, after it has exhausted the procedures for achieving voluntary compliance, to issue complaints and hold hearings . . . and to seek enforcement of its orders in the Federal Courts.¹⁴⁷

In addition to the aforementioned powers, two years from the effective date of the 1972 amendments, March 24, 1972, all the

141. *Griggs*, note 3 *supra* at 432.

142. Blumrosen, note 12 *supra*, *passim*.

143. Note 58 *supra*.

144. See discussion at 536-43 *infra*.

145. According to Professor Blumrosen:

The decision has poured decisive content into a previously vacuous conception of human rights. It shapes the statutory concept of ‘discrimination’ in light of the social and economic facts of our society. The decision restricts employers from translating the social and economic subjugation of minorities into a denial of employment opportunity, and makes practical a prompt and effective nationwide assault by both administrative agencies and the courts on patterns of discrimination.

Blumrosen, note 12 *supra* at 62.

146. See discussion at 523-26 *supra*.

147. MAJORITY REPORT OF THE HOUSE OF EDUCATION AND LABOR COMMITTEE ON H.R. 1746, 1972 U.S. CODE CONG. & AD. NEWS 2145.

United States Attorney General's prosecutorial powers relative to pattern or practice discrimination will be transferred to the EEOC.¹⁴⁸ Also, the 1972 amendments expanded the EEOC's jurisdiction to employees of state governments and to employers with more than 15 employees.¹⁴⁹

The 1972 amendments do not preclude the right of private litigants to commence an action under Title VII.¹⁵⁰ Also, it is important to note that the 1972 amendments do not *in any way* alter the provision of Title VII which specifies that the EEOC "shall have authority from time to time to issue, amend, or rescind *suitable procedural regulations* [Emphasis supplied]. . . ."¹⁵¹

Because the 1972 amendments to Title VII are of such recent vintage, it is too early to determine just how the EEOC will exercise its new enforcement powers. However, the new enforcement powers, coupled with the EEOC's firm conviction that its testing guidelines have considerable substantive weight, should make for a very aggressive agency, especially in the area of employment testing.

E. United States v. Georgia Power Company: and the Agency's Power Keeps on Coming.

As mentioned previously, it is felt that the Fifth Circuit's decision in *United States v. Georgia Power Company*¹⁵² will tend both to strengthen the hand of the EEOC and further frustrate the good faith efforts of the employer who sincerely wishes to properly validate his objective tests. A careful analysis of the *Georgia Power* case should demonstrate the correctness of this observation.

The Georgia Power Company was charged with a great deal more than just discriminatory testing. In addition to two private class actions, the Attorney General of the United States had commenced a "pattern or practice" suit against the company alleging that the company had engaged in a pattern of discriminatory behavior for a number of years.¹⁵³

As of December 25, 1970, only 543 of the company's 7515 employees were black (7.2%) despite the existence of a large pool

148. Title 42 U.S.C. § 2000e-6 (1972).

149. For a detailed discussion of the 1972 amendments to Title VII of the Civil Rights Act of 1964, see BNA commentary, note 8 *supra*, *passim*.

150. Title 42 U.S.C. § 2000e-5 (f) (1) (1972).

151. Title 42 U.S.C. § 2000e-12 (a). See discussion at 554-56 *infra*.

152. Georgia Power note 5 *supra*.

153. Georgia Power note 5 *supra* at 910.

of black applicants for positions.¹⁵⁴ Until July 29, 1963, an open and unvarying policy of the company prevented black persons from competing for any but the most menial and low-paying jobs within the corporate structure.¹⁵⁵

Though the *formal* prohibition of black advancement and transfer to traditionally white jobs was terminated in 1963, little statistical difference in job placements of blacks had occurred by January 10, 1969, when the Attorney General filed suit against Georgia Power.¹⁵⁶ Beginning in 1960, all new employees were required to have high school diplomas, and beginning on August 19, 1963, all new employees were in addition required to pass a battery of tests developed by the Psychological Corporation.¹⁵⁷ On November 19, 1964, the educational and testing requirements were suspended for hires into the laborer classification *upon agreement by them not to progress further in the company without meeting those requirements.*¹⁵⁸

As was necessary in the foregoing analysis of *Griggs*,¹⁵⁹ it must be pointed out that the facts of this case strongly suggest the existence of an actual discriminatory intent on the part of the Georgia Power Company in the use of its aptitude tests. In addition to the obvious, past discriminatory tendencies of the company, it must be remembered that tests were first used for screening job applicants on August 19, 1963, less than one month after the discontinuation of formal job segregation.¹⁶⁰ Further, the tests were initiated without *any* prior study of their ability to predict likelihood of successful job performance, and the first formal attempt to validate them came shortly after the Attorney General's filing of the "pattern or practice" suit.¹⁶¹ The potential significance of these facts will be commented upon in a later section.¹⁶²

A significant difference between *Griggs* and the *Georgia Power* case centers about the fact that, while in *Griggs* the company made no effort to prove that its tests were related to job performance,

154. *Id.*

155. *Id.*

156. *Id.* at 911.

157. *Id.*

158. *Id.*

159. See p. 528 *supra*.

160. *Georgia Power*, note 5 *supra* at 912; *cf.* the District Court's Findings of Fact Nos. 40-45, *United States v. Georgia Power Company*, 3 EPD ¶ 8318 (N.D. Ga. 1971) at 7083-84.

161. *Georgia Power*, note 5 *supra* at 912.

162. *Cf.* note 95 *supra*; See note 234 *infra* and accompanying textual comment.

the Georgia Power Company acknowledged its *Griggs* burden to validate the tests it had used and attempted to carry that burden with extensive expert opinion evidence (the Hite Study).¹⁶³ The Georgia Power Company introduced a mass of statistical data, developed by an industrial psychologist, by which the company sought to prove "a demonstrable relationship between test scores and job performance."¹⁶⁴ Dr. Hite, the company's industrial psychologist, decided to conduct a validation study employing what is known as "concurrent validation (a process in which a representative sample of *current* employees is rated, then tested and their scores are compared to their job ratings)."¹⁶⁵

The District Court found that, while the testing procedures of the Georgia Power Company did not meet the EEOC validation requirements,¹⁶⁶ nevertheless,

. . . the testing program used by Georgia Power Company is of significant help to the Company in predicting the job performance of applicants for employment and promotion, inasmuch as it has been demonstrated that there is a positive correlation between test results and job performance.¹⁶⁷

In finding for the company, the lower court was obviously swayed by the testimony of the government's experts that there is no test known or available which could meet the EEOC requirements, and that it would take at least two years for a company to develop a testing program to meet all the EEOC criteria for validity.¹⁶⁸ At one point, the lower court describes this testimony by the government's experts as "rather startling."¹⁶⁹ Accordingly, the District Court held that:

In connection with the tests, they are 'professionally developed'. They were 'adopted after meaningful study of their relationship to job performance ability' long before the Act [*i.e.*, the Civil Rights Act of 1964] was effective. They are 'predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job. . . .' They have been validated in a professional manner. . . . *By no means are they*

163. Georgia Power, note 5 *supra* at 912.

164. *Id.* at 911.

165. *Id.* at 912.

166. Georgia Power District Court opinion, note 160 *supra* at 7086, Finding of Fact No. 63.

167. *Id.* at 7086, Finding of Fact No. 63.

168. *Id.*

169. *Id.* at 7092 n. 8.

*perfect. Hopefully, future studies and developments in the field of psychological testing will produce a program even more meaningful to all employees, black and white. At present, however, for the reasons stated they are deemed permissible and not a practice in violation of the Act [Emphasis supplied].*¹⁷⁰

Before proceeding to an analysis of the Court of Appeals decision in this case, some attention should be given to the critical response occasioned by the District Court opinion, *prior* to the decision rendered on appeal. According to one commentator,

If the decision in *Georgia Power* is reversed and employers are required to conform their test requirements to the EEOC standards and if the testimony in *Georgia Power* that no test known today can conform to those standards is correct, *then all employment testing will be unlawful*. If the decision is not reversed, courts must decide each case upon the evidence presented. Validity will be a reasonable, not an absolute, standard. . . .

The EEOC standards are concededly very rigid, and, as pointed out in *Georgia Power*, their enforcement could lead to a complete prohibition of testing [Emphasis supplied].¹⁷¹

One other writer points out that the plaintiffs appealed from the District Court's decision in *Georgia Power* on the ground that, *because of the EEOC's greater expertise in the area of testing*, the guidelines should be the applicable standard.¹⁷²

The United States Court of Appeals for the Fifth Circuit reversed the District Court's decision in *Georgia Power*, at least in effect.¹⁷³ The unanimous decision of the three Judges who heard

170. *Id.* at 7092: the decision of the District Court in *Georgia Power* is consonant with that of the holding in the Porter case, note 130 *supra*.

171. 20 KANSAS L. REV., note 18 *supra* at 342-43.

172. 1972 COLUM. L. REV., note 17 *supra* at 919-20.

173. The Court concludes its discussion of *Georgia Power's* testing practices and attempts at validation by pointing out [*Georgia Power*, note 5 *supra* at 917-18] that:

We conclude that the district court erred as a matter of law in relying on the Hite Study to find that *Georgia Power* had met the burden of manifesting its tests were job-related

Moreover, standards for testing validity comprise a new and complicated area of the law. While the Hite Study did not demonstrate compliance with the Act, we hesitate to penalize this litigant, the first to confront such a demanding burden of proof, for failing to introduce a more rigorous study *Therefore, rather than now proscribing the testing program which Georgia Power has used, we remand this phase of the case to the trial court with directions to permit the company a reasonably prompt*

the appeal undertook a most detailed analysis of Dr. Hite's validation study, applying to that study the technical requirements of the EEOC testing guidelines.

At the outset, it must be admitted that the Court of Appeals levels some very valid criticism at Dr. Hite's study. However, it is strenuously urged that the validation efforts of Dr. Hite could have been successfully taken to task without recourse to and blanket approval of the technical requirements of the EEOC guidelines.

In the first place, the Court makes the determination that the validation study conducted by Dr. Hite was, in fact, irrelevant to the testing procedures actually employed by the Georgia Power Company.¹⁷⁴ This determination, which should have pretermitted any necessity of evaluating Hite's study in terms of the validation requirements of the EEOC, seems entirely valid. In fact, Dr. Hite even admitted that "I made no study of the Company's method whatsoever."¹⁷⁵

Notwithstanding the Court of Appeal's determination that Dr. Hite's study was irrelevant to the actual testing practices of the company, the Court proceeds to analyze Hite's study in terms of the validation requirements contained in the EEOC guidelines on testing. This analysis accords the guidelines a great deal of weight, despite some very persuasive evidence that called into question the basic premises of those guidelines. For example, the Court concludes that the employer must, in compliance with EEOC Guideline 1607.5(b)(5), establish differential validity where technically feasible.¹⁷⁶ This means that the employer must generate data and report results separately for minority and nonminority groups.¹⁷⁷ An American Psychological Association sanctioned report declares:

This hypothesis, that test scores have different meanings for different subgroups, requires extensive research for confirmation or rejection; existing evidence is inadequate to determine whether aptitude tests actually discriminate unfairly because of their different validities from one subgroup to another.¹⁷⁸

opportunity to validate the testing program applied to plaintiffs, in accordance with the principles enunciated in this opinion [Emphasis supplied].

174. Georgia Power, note 5 *supra* at 916-17.

175. *Id.*

176. The full cite to this guideline is 29 C.F.R. 1607.5 (b) (5) (1973).

177. *Id.*

178. Georgia Power, note 5 *supra* at 914 n. 8.

Despite this report's conclusion as to differential validity (which conclusion the Court of Appeals quotes in a footnote), and despite the potential expense to which employers would be put by requiring such differential validation, the Court mechanically declares "Certainly the safest validation method is that which conforms with the EEOC guidelines."¹⁷⁹

The Court of Appeals in *Georgia Power* does concede that the EEOC guidelines ". . . must not be interpreted or applied so rigidly as to cease functioning as a guide and [thus] become an absolute mandate or proscription."¹⁸⁰ However, this caveat stands in stark contrast to the extreme deference shown to the guidelines by the Court, both in its analysis of the Hite study and in its ultimate holding. Again, after observing that Hite's use of concurrent validation had deprived him of an opportunity to evaluate the performance of many applicants who failed to become part of the current workforce, the Court of Appeals takes Dr. Hite to task for not "attempting to supply this deficiency through ad hoc evaluation of probationary employees or the use of validity studies from other organizations with comparable jobs, as permitted by Sec. 1606.7 [*sic*: the correct cite is 1607.7]."¹⁸¹ The Court does not even mention the potential expense which might be involved for many employers in hiring probationary employees. Further, the Court doesn't even consider the possibility that such a practice might defeat the very business necessity which may have prompted an employer to adopt a particular employment test in the first place: *e.g.*, the need to insure that an employee is capable of recognizing the potential danger the performance of his job may hold for fellow employees.

As to the requirement of EEOC Guideline 1607.7, allowing for the use of validity studies from other organizations with comparable jobs, the Fifth Circuit Court of Appeals has failed to recognize the very real contradiction between the guidelines on testing and the Standards for Educational and Psychological Tests and Manuals,¹⁸² which Standards are expressly approved by the EEOC

179. *Id.* at 914.

180. *Id.* at 915.

181. *Id.* at 916.

182. Prepared by a joint committee of the American Psychological Association, American Educational Research Association and National Council on Measurement in Education in 1966. A copy of the Standards is on file in the Marquette Law Review Office, 1103 West Wisconsin Avenue, Milwaukee, Wisconsin 53233.

Guidelines on Employee Selection Procedures.¹⁸³ The Standards strongly suggest that “‘validity is specific’ and must always be interpreted for a particular setting in which ‘the test user himself must evaluate and integrate all of the data available to him.’”¹⁸⁴ It is not that the use of validity studies from other organizations with comparable jobs is bad,¹⁸⁵ it is just that the Court of Appeals in *Georgia Power* fails to examine this apparent inconsistency between the guidelines and the Standards upon which those guidelines so heavily rely, and to judicially assess the potential implications of this unexplained inconsistency.¹⁸⁶

After undertaking their extensive, albeit unnecessary,¹⁸⁷ evaluation of Dr. Hite’s study in terms of the EEOC guidelines, the three presiding Judges of the United States Court of Appeals for the Fifth Circuit reached the conclusion that:

This *requirement* to treat the guidelines as expressing Congressional intent obviously was intended as an answer to the question at issue in *Griggs*—when can tests, which are shown to have discriminatory results, be used? We view the *reference* by the *Griggs* court to EEOC guidelines as an adjunct to the ultimate conclusion that such tests must be demonstrated to be job related. We do not read *Griggs* as requiring compliance by every employer with each technical form of validation procedure set out in 29 C.F.R., Part 1607. Nevertheless, these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability. Their guidance value is such that we hold they should be followed absent a showing that some cogent reason exists for noncompliance [Emphasis supplied].¹⁸⁸

183. 29 C.F.R. § 1607.5 (a) (1973).

184. The comment following STANDARD C4.2 of the STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS AND MANUALS, note 182 *supra*, provides that:

One manual for an aptitude battery presents a great variety of test-criterion correlations. It states that even though the large amount of test-criterion data presented may be confusing to the user, it is nevertheless necessary since ‘validity is specific’ and must always be interpreted for a particular setting in which ‘the test user himself must evaluate and integrate all of the data available to him.’

185. Indeed, this is one of the strong points of the testing guidelines. See suggestion No. 4 at 550-51 *infra*.

186. Of course, it is altogether possible that the Court never saw these Standards (there is no indication in the Court’s opinion), since the Standards are not widely available. See discussion at 545-46 *infra*.

187. Unnecessary because of the Court’s conclusion that Hite’s Study was irrelevant to the actual testing practices of Georgia Power. See discussion at 540 *supra*.

188. *Georgia Power*, note 5 *supra* at 913. To fully understand the Fifth Circuit’s decision in *Georgia Power*, one must recall the holding of an earlier case decided in the Fifth

It is certainly true that the Court of Appeals in *Georgia Power* does not denominate the EEOC testing guidelines substantive law. Moreover, the Court of Appeals clearly recognizes that the Supreme Court only made a *reference* to the EEOC guidelines, which reference was incidental to the High Court's primary holding that employment *practices* which have an adverse effect on minority groups must be job-related.¹⁸⁹

However, both by the great deference with which it treats the guidelines on testing in analyzing the Hite study and by its requirement that the guidelines be followed absent some cogent reason for noncompliance, the Court of Appeals in *Georgia Power* has given the EEOC guidelines on testing unprecedented substantive weight. It may now be expected that the EEOC, given its new enforcement powers and demonstrated zeal,¹⁹⁰ will make life quite unpleasant for employers, especially in light of the Fifth Circuit's failure to recognize the possibility that, depending upon the degree¹⁹¹ of demonstrated discrimination, all employers should not be held to the same standard of compliance. Most of all, however, the Fifth Circuit should be faulted for not examining the degree to which the guidelines really do "provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability."¹⁹² It is not enough to declare that the guidelines *undeniably* provide such a valid framework.

Finally, it is unfortunate that the Court of Appeals does not qualify its criticism of the Hite study with some recognition of the wisdom of retaining an industrial psychologist. One is left with the unfortunate, though perhaps justified, feeling that nothing will help

Circuit. *United States v. Jacksonville Terminal Company*, 451 F.2d 418 (5th Cir. 1971).

Griggs demands more substantial proof, most often positive empirical evidence, of the relationship between test scores and job performance. . . . Certainly the safest validation method is that which conforms with the *EEOC Guidelines* 'expressing the will of Congress.' See [Griggs] [Emphasis supplied] . . .

Jacksonville terminal at 456.

It is apparent that the Fifth Circuit has seized on the Supreme Court's remark that the EEOC guidelines "express the will of Congress" as the basis for concluding that each of the detailed and technical requirements that the guidelines set out for validation should be ignored by the employer only at his peril: "Certainly the safest validation method is that which conforms with the EEOC guidelines." Therefore, even before *Georgia Power*, the Fifth Circuit had interpreted Griggs as imparting substantive weight to the EEOC guidelines on employment testing.

189. See discussion at 529-32 *supra*.

190. E.g., Blumrosen, note 12 *supra*, *passim*.

191. See notes 128-30 *supra* and accompanying text.

192. *Georgia Power*, note 5 *supra* at 913.

an employer comply with the guidelines on testing, not even an industrial psychologist.

III. WHAT THE PRACTITIONER CAN DO TO INSURE THAT HIS EMPLOYER-CLIENTS COMPLY WITH THE EEOC GUIDELINES ON TESTING

For the practitioner who is considering advising his clients himself in this area, the following suggestion is in order: *don't*. Unless the practitioner is an industrial psychologist, he will probably find the EEOC guidelines on testing and closely related Standards for Educational and Psychological Tests and Manuals nearly incomprehensible. For example, EEOC Guideline 1607.5(a) specifies that:

For the purpose of satisfying the requirements of this part [*i.e.*, the part setting forth the minimum standards for validation], empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in 'Standards for Educational and Psychological Tests and Manuals' published by the American Psychological Association . . .¹⁹³

When one turns to the A.P.A. Standards, however, he finds the following caveat:

These standards are intended to guide test development and reporting. A great deal of the information to be reported about tests is technical, and therefore the wording of the standards is of necessity technical. They should be meaningful to readers who have training approximately equivalent to a level between the master's degree and the doctorate in education or psychology at a superior institution of higher learning.¹⁹⁴

They aren't kidding! The difficulty of understanding the guidelines and related Standards has not been underplayed in the least.¹⁹⁵ Of course, this is one very good reason for objecting to the EEOC guidelines on testing as presently drafted, which problem will receive attention in the last section of this article. For the present, however, the concern is with keeping the employer-client out of difficulty, given the guidelines as they *presently* stand.

193. 29 C.F.R. § 1607.5 (a) (1973).

194. STANDARDS, note 182 *supra* at p. 5.

195. *Cf.* authorities collected at note 17 *supra*.

In view of the fact that an employer can be found in violation of Title VII irrespective of his good faith efforts to comply with the requirements of the law,¹⁹⁶ it is tempting to suggest that the employer should do nothing at all. That is, the employer should wait for the EEOC to come forward and tell him what is necessary to be found in compliance with the law. This approach may not be as unwise as it might appear on first blush. Before the EEOC can sue an employer,¹⁹⁷ it must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."¹⁹⁸

If the practitioner is unwilling to wait to find out if a particular testing procedure is in compliance with the guidelines, he may seek technical assistance pursuant to Title 42 U.S.C. Sec. 2000e-4 (g) (3), which provision provides that the Commission shall have power to "furnish to persons subject to this [Title] such technical assistance as they may request to further their compliance with this [Title] or an order issued thereunder; . . ." Any resulting, written guidance provided an employer by the EEOC can be used as an affirmative defense in *any* action commenced against the employer, if "he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . ."¹⁹⁹

If the practitioner fails to receive satisfactory guidance from the EEOC,²⁰⁰ it would still be wise for him to avoid rendering advice to a client himself. The implications of *Georgia Power* notwithstanding, the practitioner should seek the assistance of an in-

196. Note 23 *supra* and accompanying textual quote.

197. The EEOC's failure to sue does not preclude the possibility of private suit. *See* note 150 *supra*.

198. Title 42 U.S.C. § 2000e-5 (b) (1972).

199. Title 42 U.S.C. § 2000e-12 (b) (1964).

200. This would appear to be an increasingly significant possibility in view of the EEOC's increased responsibilities under the 1972 amendments to Title VII. In this regard, *see* Minority Report of criticism of H.R. 1746, note 11 *supra* at 2167-72. According to the BNA commentary, note 8 *supra* at 3:

The broadening of its jurisdiction and enforcement powers poses many problems for the Equal Employment Opportunity Commission. In the current fiscal year, the Commission already has had a case intake of about 33,000. It was 22,000 in the 1971 fiscal year. The Commission is about 22 months behind in its processing of cases.

With the Commission's new enforcement powers, these problems will be compounded. It will be necessary to hire and train new attorneys to handle the litigation in the federal courts. And it will be necessary to have competent and trained investigators to prepare cases for trial in the courts.

dustrial psychologist. Of course, for the practitioner with smaller clients,²⁰¹ it simply may not be feasible to retain an industrial psychologist. In this event, the practitioner will have to educate himself in the ways of validation, *a la* the EEOC guidelines, if his clients are to receive any advice at all.

There have been a number of rather successful attempts to explain the various theories of validation, and the commentaries containing these successful attempts should be consulted by the practitioner.²⁰² Unfortunately, however, the practitioner will probably find that these commentaries help little in understanding and applying the EEOC guidelines on testing.²⁰³ It may be possible to understand the guidelines better by studying the Standards for Educational and Psychological Tests and Manuals, which are referred to in EEOC Guideline 1607.5 (a). However, the practitioner will probably find that these Standards are not all that easy to understand.²⁰⁴ Further, the requirements of the Standards often conflict with those of the EEOC guidelines.²⁰⁵

While it may seem safest to advise a client simply to discontinue an objectionable testing practice, or, perhaps, to discontinue objective testing altogether, the practitioner is reminded that it is

201. After the 1972 amendments to Title VII, employers with as few as fifteen employees are affected by the Act. *See* note 14 *supra*.

202. 1972 COLUM. L. REV., note 17 *supra* at 913-14; 84 HARV. L. REV., note 19 *supra* at 1119-23; Bernhardt, note 134 *supra* at 902-06.

203. Consider the following excerpt from 84 HARV. L. REV., note 19 *supra* at 1121-22, which provides one of the clearer expositions of the fundamental aspects of the validation concept.

Since the utility of tests often is not self-evident, professional psychologists point out that a test should be 'validated,' to insure that a high statistical correlation exists between test results and performance on the job in question. That is to say, the employer must make sure that the test is a good predictor of productivity. There is a hierarchy of validation techniques according to rigor of methodology and accuracy of result. Two main categories of validation are common: 'empirical' and 'rational.' Psychologists generally prefer empirical validation studies, and among these the ideal approach is that of 'predictive,' or 'classical,' validation. Predictive validation involves first a professional assessment of what a job requires, a thoroughgoing 'job analysis.' The diverse factors considered include character, personality, and ability. The next step relates the results of the test to actual criteria of successful job performance. The employer would administer the test to 100 applicants, hire them all regardless of test scores and without further screening. They then would be given equally cogent instruction and equally congenial supervision. If after some period of time the test scores correlate significantly with job performance, the test has been 'validated.'

Cf. discussion *infra* at 549-50.

204. *See* note 194 *supra* and accompanying textual quote.

205. *See* notes 184-86 *supra* and accompanying text.

not at all clear whether or not this course of action would prove satisfactory to the EEOC.²⁰⁶

IV. WHAT TO DO WHEN THE TIME COMES FOR A SHOWDOWN

The practitioner's employer-client may have grown rather fond of his testing mechanism. Moreover, he may be of the opinion that, while it may have an adverse impact on minority groups, his testing mechanism does a better job of measuring the man for the job than any economically feasible alternative. If the EEOC disagrees, or if any member of a minority group disagrees, the client better be prepared to demonstrate that his testing mechanism is "valid." It has been said that a "test is valid to the extent that those who perform well on the test tend to perform better on the job."²⁰⁷ In other words, the employer-client must demonstrate that the test is job-related.

The employer-client has no choice: he *must* establish that his testing mechanism bears "a manifest relationship to the employment in question," if that mechanism has an adverse impact on minority groups.²⁰⁸ The United States Supreme Court has so decreed and this article does not pretend to counsel otherwise. Indeed, it is perfectly just that an employer be required to come forward with proof that an employment test, which has an adverse impact on minority groups, is being used for some legitimate, nondiscriminatory purpose.

However, the employer has a *right*, by Federal Statute as interpreted by the United States Supreme Court, to use objective tests which have an adverse effect on a minority group if he can establish a business necessity for those tests, that is, if he can establish that they "are demonstrably a reasonable measure of job performance."²⁰⁹ No federal agency is vested with the power to short-circuit a Congressional or Supreme Court mandate, not even the EEOC. Therefore, to the extent that the EEOC's Guidelines on Employee Selection Procedures tend to frustrate the employer's right to use objective tests, pursuant to the Congressional mandate contained in Section 703(h) of Title VII of the Civil Rights Act of 1964, as interpreted in *Griggs v. Duke Power Co.*, the basic thrust of the practitioner's defense strategy becomes clear.

206. Notes 30 and 31 *supra*.

207. 1972 COLUM. L. REV., note 17 *supra* at 913. Cf. note 203 *supra*.

208. *Griggs*, note 3 *supra* at 432.

209. *Id.* at 436.

In all probability, a practitioner will begin planning his defense of an employer-client's testing procedures in earnest rather late in the day. Therefore, the practitioner will probably have the benefit of a detailed explanation from the EEOC (which should be furnished during the mandatory conciliation conference) as to the reasons why the agency finds the employer's testing procedures objectionable.

As has been suggested,²¹⁰ since the employer can be found in violation of Title VII irrespective of his good faith efforts at compliance, an employer may simply want to "sit tight" and wait for the EEOC to tell him what must be done to put his testing practices in compliance with the EEOC guidelines. Then, if the EEOC makes unreasonable demands on the employer, the practitioner can begin to ready a defense. This approach may be especially appealing to the small or medium size employer, since he may avoid the trouble and expense of validation altogether.²¹¹ In order to avoid some sort of punitive reaction in the courts,²¹² this approach should be taken only if the practitioner is quite certain that the employer's testing procedures aren't patently questionable; *i.e.*, the practitioner should have some good reasons for concluding that the employer's testing mechanism: (1) does reasonably relate to job performance; and (2) does not flagrantly discriminate against a minority group.

If the practitioner honestly feels that the employer's testing procedures may be of a questionable nature, or if the practitioner represents a large, high-profile employer, it would seem unwise to await a challenge from the EEOC before undertaking an examination of the employer's testing procedures. As in any other area, the best defense is preparation.

For the small or medium sized employer, the practitioner will probably have to bear the responsibility for attempting to validate a questionable testing procedure. The practitioner who represents a large employer-client should seek to retain an industrial psychologist. Since it is felt that a practitioner with large clients should not even attempt to validate testing procedures himself,²¹³ the

210. See discussion at 544-45 *supra*.

211. With the greatly increased enforcement powers of the EEOC (*cf.* note 200 *supra*), it will in all likelihood become most difficult for the EEOC to police all employers in the nation. Of course, there will always be the problem of private complainants.

212. See the powers conferred on federal courts at Title 42 U.S.C. § 2000e-5 (g) (1972).

213. For one thing, there is just too much at stake. For another, the larger the employer, the more detailed the statistical analyses and the more complicated the graphical presenta-

suggestions which follow are primarily directed at the practitioner with small or medium size employer-clients.

A. Laying the Groundwork of a Defense—Making the Effort to Validate

The employer should make the effort to validate according to the requirements of the EEOC guidelines on testing. To ignore the guidelines would be to invite difficulty. Further, not *all* the guidelines on testing are difficult to understand or apply.

If the practitioner is of the opinion that the employer-client's testing procedures have a substantial adverse impact on a minority group,²¹⁴ the time has come to validate those procedures by demonstrating that those who perform well on the employer's tests tend to perform better on the job.²¹⁵

The precise validation efforts necessary will depend on the type of testing procedures used by, and the general circumstances of, the employer. However, there are some general suggestions which may prove useful in undertaking a validation effort.

1. Be certain that there is no reasonable alternative to the suspect testing procedures.²¹⁶ If the practitioner can find a reasonable alternative to a testing procedure, which alternative has less of an adverse impact on minority groups, the employer would do well to save himself the trouble and expense of validation and adopt the alternative.

2. Make the effort to become as familiar as possible with the EEOC guidelines on testing *and* the Standards for Educational and Psychological Tests and Manuals. This will not be easy, but the practitioner should try.

3. Do not overlook complying with the easy, commonsense requirements of the guidelines and Standards. For example, EEOC Guideline 1607.5(b)(2) requires that:

tions, as a matter of course. It must be stressed again, however, that hiring an industrial psychologist is not necessarily the whole answer. *See* discussion at 543 *supra*; *cf.* 29 C.F.R. § 1607.8 (b) (1972).

214. *See* Porter, note 130 *supra* and accompanying text.

215. Note 207 *supra*.

216. 29 C.F.R. § 1607.3 (1973); *Cf.* notes 133-36 *supra* and accompanying text. Be careful of alternatives which may result in the discontinuation of objective testing in effect. *See* note 30 *supra* and textual comment. Also, there may be a temptation to employ a quota system. This temptation should be resisted because of the colorblind provision of Title VII, 42 U.S.C. § 2000e-2 (j) (1970); *Cf.* 84 HARV. L. REV., note 19 *supra* at 1114-18. *But see* *United States v. Wood, Wire & Metal Lath. Inc.*, 471 F.2d 408, 413 (2d Cir. 1973).

Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores . . .

4. In representing the smaller client, don't forget that EEOC Guideline 1607.7 is a safety valve device for the smaller employer. This guideline provides that:

In cases where the validity of a test cannot be determined pursuant to Sec. 1607.4 and Sec. 1607.5 (*e.g.*, the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) the studies pertain to jobs which are comparable (*i.e.*, have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. *Any person citing evidence from other validity studies as evidence of test validity for his own must substantiate in detail . . . comparability and must demonstrate the absence of contextual or sample differences* cited in paragraphs (a) or (b) of this section [Emphasis supplied].

The words which have been italicized in the above Guideline demonstrate that the small employer who seeks to use validity studies conducted in other organizations will have to come forward with a good deal more than his opinion that the jobs which are the subject of these studies are comparable to the jobs in his company.

5. The practitioner should not feel that just because his test is professionally developed or approved he does not have to validate. The guidelines on testing specifically provide that "Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity."²¹⁷

6. The Standards suggest that validity studies should be, from time to time, updated.²¹⁸ It cannot be said with any certainty how often, but every time a new job is added or the requirements of a job change, it would seem that a new validity study would be in order (naturally, this could prove to be a little expensive).²¹⁹

7. As to the more technical requirements of the EEOC guide-

217. 29 C.F.R. § 1607.8 (a) (1972).

218. STANDARDS, note 182 *supra* at STANDARD C6.71.

219. *Id.* at STANDARD C6.7.

lines and the Standards, without acquiring a rather extensive knowledge of industrial psychology (which would probably prove somewhat hard on the client's pocketbook),²²⁰ it is difficult to see how the practitioner will be able to comply with the requirement that "The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria . . . ,"²²¹ or how the practitioner will be able to correctly apply concepts such as "validity coefficients" or "reliability coefficients."²²²

Not only are these concepts difficult to understand, they are also difficult and expensive to apply.²²³ It is at this point, where the employer (it no longer matters whether large or small) concludes that the trouble and expense of validation in accordance with the EEOC guidelines on testing is not worth it but is nevertheless reluctant to give up what he sees as a valid testing device, that a showdown with the EEOC may become inevitable.

B. Protecting the Client's Testing Program from Unreasonable Guidelines.

If the EEOC (or a private litigant) forces the issue with regard to what appears to be the unreasonable requirements of a particular testing guideline, the first step in preparing a defense will involve demonstrating the guidelines' general vulnerability to attack. The foregoing analyses of the legislative history underlying Section 703(h) of Title VII of the Civil Rights Act of 1964,²²⁴ *Griggs v. Duke Power Co.*²²⁵ and *United States v. Georgia Power Company*,²²⁶ should greatly aid the practitioner in establishing that the technical requirements of the EEOC Guidelines on Employee Selection Procedures are hardly inviolate. In this regard, the practitioner will want to stress that part of the holding in *Georgia Power* to the effect that the guidelines on testing are not to be

220. There may very well be those attorneys who will specialize in this area of the law. Of course, this won't solve the problem of expensive validation procedures. Further, this fact won't have much significance to the practitioner with small clients who could not afford to hire a specialist in any event.

The practitioner with small employers should not forget the possibility of seeking technical assistance from the EEOC. See discussion at 544-46 *supra*.

221. 29 C.F.R. § 1607.6 (1972).

222. STANDARDS, note 182 *supra* at parts C & D.

223. See notes 17-19 and 171 *supra*.

224. See discussion at 520-23 *supra*.

225. See discussion at 526-35 *supra*.

226. See discussion at 536-43 *supra*.

treated as an absolute mandate or proscription.²²⁷ At the same time, he must emphasize the fact that the absence of any analysis of the guidelines' content in *Griggs*²²⁸ strongly militates against reading the Fifth Circuit's requirement that the guidelines "should be followed absent a showing that some cogent reason exists for noncompliance"²²⁹ as giving rise to a strong presumption in favor of the adequacy, necessity or legitimacy of the guidelines.

The next step in preparing the employer-client's defense will involve developing a challenge directed at the adequacy or necessity of the guidelines which the employer finds objectionable. Examples of some challenges which might be directed at certain of the guidelines have already been given earlier in this article.²³⁰ Actually, any particular challenge will almost certainly be generated by economic considerations,²³¹ and thus the specifics of any such challenge will depend on the specific problems which an employer-client has encountered in attempting to comply with a certain testing guideline.

There are, however, some general considerations which should not be overlooked in preparing such a challenge. Even the EEOC, in at least one decision, has recognized that:

This is not to say that there is no limit to the expense that Title VII requires an employer to incur in seeking reasonable alternatives to present employment criteria which operate to exclude minority groups. *Obviously, however, the level of reasonable expense would increase in direct proportion to the extent of the impact* (here five times as great on Negroes as on Caucasians) *and the number of jobs involved* (here 321 positions at the facility along) [Emphasis supplied].²³²

The italicized words from the above EEOC decision²³³ provide the basis for arguing that the stringency of the guidelines should be moderated in direct proportion to the extent that a testing procedure actually excludes or adversely affects minority groups. It would seem fair to argue that the further a client's case is from the

227. Note 180 *supra*.

228. See discussion at 530-31 *supra*.

229. Note 188 *supra* and accompanying textual quote.

230. See discussion at 540-43 above.

231. E.g., the cost of updating test validation efforts every time the requirements of a particular job are changed. See notes 218-19 *supra*.

232. Note 58 *supra* at 4590.

233. Recall that good faith reliance on a ruling or other written interpretation of the EEOC may constitute an affirmative defense. See notes 78-79 *supra*.

fact situations found in *Griggs* and *Georgia Power*²³⁴ the weaker the guidelines' mandate should become. That is to say, while the *intent* to discriminate in the use of a testing procedure is now irrelevant under *Griggs*,²³⁵ the *extent* to which the client's procedure adversely affects a minority group is still a highly apposite consideration.

Another consideration which should not be underplayed in preparing a challenge to the adequacy or necessity of a guideline centers about the fact that "At its best testing is not a highly developed science, and it rarely reaches its best."²³⁶ If the practitioner has had to undertake validation studies himself, his ability to turn this fact to his client's favor will depend on the extent to which the practitioner has been able to familiarize himself with the science of industrial psychology. If the practitioner is fortunate enough to have the services of an industrial psychologist in preparing the client's defense, the practitioner should press the psychologist to research viable alternatives to the requirements of the EEOC guidelines. Test validation is hardly an exact or well-developed science.²³⁷ Less expensive and less complicated alternatives to the guidelines should be strongly urged on the court, even though arguably less accurate than the more stringent guidelines.

Certainly, the greater the discriminatory impact of a testing procedure, the higher the degree of accuracy which should be demanded of a validation study. Two points should be made, however: (1) the converse should hold true (*i.e.*, the lighter the discriminatory impact of a testing procedure, the lower the degree of accuracy which should be demanded of a validation study); and (2) the fact that the EEOC testing guidelines are expensive and difficult to implement does not make them, *ipso facto*, accurate validation devices.

The final step in preparing an employer-client's defense will involve developing a challenge directed at the basic legitimacy of the EEOC guidelines. The present article was written as a negative response to the growing tendency to accord the EEOC Guidelines on Employee Selection Procedures the judicial respect usually reserved for regularly adopted, substantive mandates. In point of

234. See notes 95 & 162 *supra* and accompanying textual comments.

235. Notes 137-38 *supra*.

236. 1972 COLUM. L. REV., note 17 *supra* at 900; *cf.* 49 CHI.-KENT L. REV. at 83 & 84.

237. Barrett, *Gray Areas in Black and White Testing*, 46 HARV. BUS. REV. 92 (1968).

fact, Congress has clearly specified that the EEOC "shall have authority from time to time to issue, amend, or rescind suitable procedural regulations."²³⁸ This congressional limitation on the rule-making power of the EEOC was in effect at the time the guidelines were first adopted. Further, the 1972 amendments to Title VII did not alter this Congressional limitation on the agency's power.

If the EEOC guidelines on testing are now to be treated as having substantive weight, then two things should happen: (1) Congress should amend Title VII so as to provide the EEOC with substantive rule-making authority; and (2) the agency should be required to withdraw its testing guidelines pending the proper adoption thereof. Of course, the practitioner can do very little to bring about a Congressional amendment to Title VII. However, irrespective of whether or not Congress acts, if the guidelines on testing are to be treated as *de facto* substantive rules, then the practitioner should strenuously urge the court to compel the EEOC to withdraw its testing guidelines due to the EEOC's failure to adopt those guidelines, *ab initio*, in accordance with Title 5 U.S.C. Sec. 553.

As Professor Blumrosen candidly admits,²³⁹ no hearing or public participation in the guideline-making process occurred when the guidelines were originally formulated by the EEOC. As long as these guidelines remain mere interpretative rules, general statements of policy, or rules of the agency,²⁴⁰ then there is no violation of the Administrative Procedure Act.²⁴¹ However, the EEOC guidelines on testing are increasingly taking on the color of substantive mandates. This tendency will undoubtedly become more pronounced as the EEOC begins to fully exercise its new enforcement powers.²⁴²

238. Title 42 U.S.C. § 2000e-12 (a) (1964).

239. Note 75 *supra* and accompanying textual quote. See note 247 *infra*.

240. Even if merely "guidelines," the language of the Supreme Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) should be kept in mind.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

241. Title 5 U.S.C. § 553 (b) (3) (A) (1967).

242. See discussion at 556-57 *infra*.

The United States Supreme Court has held that the rule-making provisions of the Administrative Procedure Act are designed to assure fairness and mature consideration of agency regulations that are of general application.²⁴³ Further, the Supreme Court has held that the rule-making provisions of the Administrative Procedure Act may not be avoided by an agency, even though a particular regulation is the product of an adjudicatory proceeding.²⁴⁴ Finally, at least one federal court has held that when a proposed administrative agency regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or the products of that industry, then the provisions of the Administrative Procedure Act, 5 U.S.C. Sec. 553, should be complied with.²⁴⁵

As Professor Blumrosen admits, instead of giving public notice of the EEOC's intentions and then allowing interested persons an opportunity to participate in the rule-making process through submission of written data, views or arguments, as required by the Administrative Procedure Act where substantive rules are concerned,²⁴⁶ the EEOC held no hearings and allowed for no public participation in the guideline-making process.²⁴⁷ According to Pro-

243. *N.L.R.B. v. Wyman-Gordan Co.*, 394 U.S. 759 (1969).

244. *Id.*

245. *Pharmaceutical Mfrs. Ass'n v. Finch*, 307 F. Supp. 858 (Del. 1970).

246. Title 5 U.S.C. § 553 (c).

247. Note 75 *supra* and accompanying textual quote.

As this article was going to press, the EEOC was apparently beginning to take some limited steps to conform its guidelines on testing to the requirements of the Administrative Procedure Act for *substantive* administrative rules. While they have not withdrawn their Guidelines on Employee Selection Procedures set forth in Part 1607 of 29 C.F.R., nevertheless, the EEOC has solicited comments on their testing guidelines from psychologists, federal contractors and minority group organizations. CCH Empl. Prac. Guide ¶ 5186 (EEOC Oct. 4, 1973). There is, however, no indication that the EEOC has solicited comments from employers subject to the guidelines on testing or that the EEOC intends to hold any substantial public hearings on the guidelines. Further, there is no guarantee that the EEOC will radically alter their present guidelines on testing or that they will be receptive to suggestions from all psychologists or from the employers who must conform with the guidelines.

Since there is no indication to be found anywhere as to the nature of any proposed changes in the guidelines, as a result of the comments presently being solicited [the guidelines reproduced at CCH Empl. Prac. Guide ¶ 5186 (Oct. 4, 1973), which guidelines are to be the basis of the solicited comments, are really no different from the present guidelines found at 29 C.F.R. 1607], a series of phone calls were made in early 1974 to officials of the EEOC in Washington, D.C. Those officials indicated that any revisions in the guidelines would be a long time in coming.

It must also be noted that, even assuming the EEOC does take some limited steps in the direction of conforming their guidelines to the requirements of the Administra-

fessor Blumrosen, the EEOC only "encouraged discussions with the [agency] Offices of Research and Compliance and the involvement of outside specialists in the testing field, and sought the opinion of the EEOC's General Counsel."²⁴⁸ What outside specialists were approached? How thorough was the consideration given to each of the many different and conflicting theories of test validation? Where is the input from the regulated employers?²⁴⁹ The adverse affect that an inadequate validation scheme might have on the very *right* of an employer to use employment tests can easily be appreciated. Therefore, if the EEOC testing guidelines are to have any substantive weight they should be, at minimum, adopted in accordance with the Administrative Procedure Act's requirement that a prerequisite to the adoption of a substantive agency rule is the holding of public hearings.

V. EPILOGUE: WHATEVER HAPPENED TO THAT "POOR ENFEEBLED THING"?

Yes, things certainly have changed since the Equal Employment Opportunity Commission first came into existence back in 1964. No one can seriously argue that the EEOC should be without at least some enforcement powers. Economic discrimination is wrong and must be eliminated as quickly as possible. As both the 1972 amendments to Title VII and the overall judicial reaction to the EEOC demonstrate, however, there is no reason to fear that the EEOC will be deprived of the necessary enforcement machinery. Moreover, the demonstrated zeal of the EEOC should dispel any doubts as to the willingness of the agency vigorously to seek the eradication of employment discrimination. In fact, the EEOC is carrying out its enforcement efforts with the vigor of the righteously indignant.²⁵⁰ Unfortunately, the righteously indignant, while pursuing an obvious good, sometimes fail to distinguish between what is wrong and what only appears to be wrong.

One sometimes gets the impression that the EEOC is of the opinion that if, in destroying employment discrimination, it must

tive Procedure Act [and any revisions based on the limited solicitation of comments contained in CCH Empl. Prac. Guide ¶ 5186 (Oct. 4, 1973) would constitute only a limited compliance with the requirements of the Administrative Procedure Act], there still remains the fact that the EEOC has never been vested by the Congress with substantive rule making power in the first place.

248. Note 70 *supra*.

249. See note 247 *supra*.

250. See Blumrosen, note 12 *supra*, *passim*.

destroy the employer's right to use employment tests, then so be it. If this is, indeed, the attitude of the EEOC, and the extreme stringency of the EEOC testing guidelines almost forces the conclusion that this *is* the agency's attitude, then the EEOC clearly stands in violation of the law. The Congress, in Section 703(h) of Title VII, has clearly given the employer the right to use employment tests (which may, unfortunately but necessarily, have a differential impact on a minority group), providing only that the employer can demonstrate that the tests are clearly job-related. The United States Supreme Court, in *Griggs v. Duke Power Company*, did not, in fact or in effect, abrogate Section 703(h). Employment tests, even if they have an unfortunate albeit unavoidable discriminatory impact, are fully consonant with Title VII of the Civil Rights Act of 1964, as amended, because, as the Supreme Court said in *Griggs*, "*the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color* [Emphasis supplied]."²⁵¹ All that needs to be shown, relative to such employment tests, is that they "measure the person for the job and not the person in the abstract,"²⁵² *i.e.*, the tests must be job-related.

The 1972 amendments to Title VII have equipped the EEOC with some very real enforcement powers.²⁵³ The EEOC has grown quite powerful, indeed. However, when the judges in *Georgia Power* accepted the contention of the plaintiffs²⁵⁴ that, because of the EEOC's greater expertise in the area of testing, the EEOC guidelines should be the applicable standard for validation, absent some cogent reason to the contrary, the Fifth Circuit became the latest contributor to the false impression so many have of the testing guidelines as substantive law. It is time to put the ill-conceived and unrealistically demanding testing requirements of the EEOC Guidelines on Employee Selection Procedures in proper perspective.

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251. *Griggs*, note 3 *supra* at 434.

252. *Id.* at 436.

253. See discussion at 533-36 *supra*.

254. 1972 COLUM. L. REV., note 17 *supra* at 920.

