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Constitutional Law - Equal Protection - Employment Tests

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CONSTITUTIONAL LAW—EQUAL PROTECTION—EMPLOYMENT TESTS

In 1955, the Duke Power Company realized that their operations were becoming more complex and their employees were unable to grasp new situations, due primarily to new technological advances. They proceeded thereby, to institute the requirement that an employee, either black or white, had to have a high school education or its equivalent[1] in order to transfer from the Labor Department[2] into Operations, Maintenance, Coal Handling, or Laboratory and Testing. This policy was subsequently amended by providing that anyone who had been employed prior to September 1, 1965 that did not meet the previous qualifications could become eligible for promotion or transfer by passing a general intelligence test[3] and a general mechanical test.[4] Consequently, Willie S. Griggs and twelve other black employees brought a class action under Title VII of the 1964 Civil Rights Act[5] to enjoin Duke Power Company from discriminating against them.

The district court[6] found that prior to the passage of the 1964 Civil Rights Act, Duke Power Company had openly discriminated on the basis of race in their hiring practices; however, the court also found that these practices had ceased subsequent to July 2, 1965 and consequently there

1. Such as a Certificate of Completion of General Education Development (GED) tests, high school level.

2. At the time of this action, all of the black employees at the Dan River Station had been relegated to the Labor Department; the least desirable and lowest paid station at the plant.

3. The 12 minute Wonderlic Test.

4. The 30 minute Bennett Mechanical AA Test; only three or four of the fourteen black workers could satisfy these tests—the fourth black worker, Willie Boyd, had achieved a diploma by passing an equivalency examination.

5. 42 U.S.C. § 2000e-2(a)(2) (1964) provides that: "It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . ."

Section 2000e-2(h) provides: "Notwithstanding any other provision of this (title), it shall not 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. . . ."

6. Griggs v. Duke Power Co., 292 F. Supp. 243 (D.C. N.C. 1968).

was no affirmative relief available. Judge Gordon, speaking for the court, felt that Title VII was only to be applied prospectively and could not erase the inequities of prior discrimination. The court of appeals[7] stated that a subjective and not an objective test of the employer's intent should be used to determine whether the adoption of hiring criteria had a discriminatory purpose. The appellate court thereby sustained the district court, but reversed in part, holding that previous discrimination resulting from prior practices was insulated from remedial action. The Supreme Court, in a unanimous decision, ruled that any employment test "must measure the person for the job and not the person in the abstract." *Griggs v. Duke Power Company,* 401 U.S. 424, 436 (1971).

This decision is significant because it is the culmination of a series of cases and administrative decisions which have attempted to interpret Section 703 (h) of Title VII of the Civil Rights Act of 1964. The purpose of this case note is to explore the history of tests and diploma requirements that have to be job-related and to postulate on the future trend which might result from this landmark decision.

At the onset, employment discrimination is much harder to handle than other forms of discrimination.[8] It has been acknowledged that employment tests pervade our lives.[9] They are employed as the first hurdle

7. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970).

8. A basic education is considered to be the birthright of every American and the denial of such has always aroused opposition. *See* Brown v. Board of Education, 349 U.S. 294 (1955); Brown v. Board of Education, 347 U.S. 483 (1954); Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372 (N.D. Ala. 1958); Briggs v. Elliot, 132 F. Supp. 776 (E.D. S.C. 1955). *See also* VOSE, CAUCASIANS ONLY, THE SUPREME COURT, THE NAACP AND THE RESTRICTIVE COVENANT, (1967). This attitude and concern, however, has not been reflected in America's views toward employment discrimination. In order to bring minority groups equal economic opportunity, all forms of discrimination must be met head on.

From the birth of the black baby through his total maturation, he is met with overt and covert forms of discrimination that shape his basic philosophies and attitudes. *See* for an excellent account of the discriminatory practices that effect black children, PETTIGREW, A PROFILE ON THE NEGRO AMERICAN (1964); WRIGHT, BLACK BOY (1945).

To begin with, the inferior education that the minority group child receives in many communities effectively eliminates him from high-level employment. When disenfranchised, he is robbed of his chance to improve himself through the ballot box. The Federal Voting Rights Act of 1965 promised to improve the blackman's position at the ballot box, however the improvement has been seen minimally. *See generally* Gomillion v. Lightfoot, 364 U.S. 339 (1960); TAPER, GOMILLION v. LIGHTFOOT, APARTHEID IN ALABAMA (1962). Housing discrimination too has its effects; when the black man is not permitted to live near his choice of work, or is cloistered into "ghettoes" where the schools are inferior, the total picture is made bleaker and the effects of employment discrimination are felt more strongly.

9. For an excellent account of seniority and testing violations under Title VII,

in being considered for a job, in that the applicant must obtain a minimum score before he is given any consideration. Consequently, discrimination in this initial phase of employment precludes the individual from advancing toward his personal goals.

Because of the wide variety of employment tests, *i.e.*, I.Q. to mechanical aptitude, and the equally wide variety of skills that are required in order to achieve successful results, the member of a minority group is handicapped from the beginning.[10] The evidence indicates that on the majority of these tests, performance of minority group members is substantially poorer than that of the majority. With this disadvantage at the inception, the outlook for the individual member of a minority group is limited to the lowest paid jobs in society. In rebuttal, employers seek to justify the use of these tests because they supposedly delineate those persons qualified to fill vacancies. This presents an obvious contradiction but yet an obvious quandry for the employer legitimately seeking to fill a position.

What is not considered, however, is that "[c]ontrary to popular belief, the likelihood that scores on any particular aptitude test will correlate significantly with performance on any particular job is very slim indeed."[11] The tests are often administered by employers without any evaluation of their particular needs, while the information that is supposed to be ferreted out is not adjusted to the applicant population.

The 1964 Civil Rights Act was the initial attempt by Congress to alleviate the problems that those in the minority faced in the employment area.[12] Paralleling the Civil Rights Act was President Johnson's Executive Order No. 11246[13] which forbids employment discrimination by government contractors and requires the implementation by "affirmative ac-

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see Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969) [hereinafter cited as Cooper & Sobol].

10. *See*, Bannister, Slater & Radzan, *The Use of Cognitive Tests in Nursing Candidate Selection*, 36 OCCUPATIONAL PSYCHOLOGY 75 (1962); Kirkwood, *Selection Techniques and the Law: To Test or not to Test?*, 44 PERSONNEL 18 (1967).

11. Cooper & Sobol at 1643.

12. Thirty-five states had statutes prohibiting racial discrimination in employment by the time the *Civil Rights Act of 1964* went into effect. *See* Purdy, *Title VII: Relationship and Effect on State Action*, 7 B.C. IND. & COM. L. REV. 525, 527 (1966). The states not having such laws were Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas and Virginia. The definitions of discriminatory practices, of course, differed; and as with Title VII, voluntary compliance and agency hearings were the usual practice.

13. Exec. Order No. 11,246, 3 C.F.R. 339 (Comp. 1964-65).

tion programs" to assure the attainment of equal employment. Title VII was the first comprehensive "equal employment opportunities" law ever passed by Congress. There were still, however, a penumbra of problems that remained unsolved. The problem of determining whether employment discrimination had occurred, and the obstacles of collecting sufficient factual data to prove the charge, was far more subtle and complex than in the areas of other forms of racial discrimination. In the area of employment testing practices alone, there is the problem of proving that although the testing practices are overtly fair and impartial, their *effect* on minority groups will bring the practices under Title VII.[14]

The first frontal attack on discriminatory employment practices was in the area of "neutral" employment standards. In *Asbestos Workers Local 53 v. Vogler,*[15] the union practice of limiting induction of apprentices to relatives of existing members was found invalid under Title VII because it perpetuated past discrimination. Another case, *Johnson v. Ritz Associates, Inc.,*[16] involved a New York hotel's refusal to hire desk clerks without experience. This practice was found to be violative of the New York law[17] because of former business practices. Had this practice been allowed to continue, the effect would be to eliminate members of minority groups from consideration for the positions. These two cases have had far reaching effect, not only in gaining access for minority group members to these jobs but also as a basis to challenge other discriminatory practices:

> [C]ases, such as these may have far broader implications, suggesting application of fair employment laws to challenge many other seemingly neutral employment practices that adversely affect minority group job opportunities.[18]

A look into the legislative history of the Civil Rights Act of 1964 gives a good indication of exactly what the Congress envisioned when it passed the legislation. The test clause in Section 703(h), introduced by Senator John Tower, provides that an employer should be free

> 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. . . .[19]

This clause was inserted as a direct response to a decision[20] by a hearing

14. Cooper & Sobol at 1637.

15. 407 F.2d 1047 (5th Cir. 1969).

16. Case No. C12,750-66 (New York State Commission for Human Rights, undated).

17. N.Y. EXEC. LAW § 296-ia(a) (McKinney Supp. 1968).

18. Cooper & Sobol at 1601.

19. 42 U.S.C. § 2000e-2(h) (1964). *See also* 110 CONG. REC. 13504 (1964).

20. Myart v. Motorola, a text of the examiner's opinion may be found at 110 CONG. REC. 9030-33 (1964); 110 CONG. REC. 9024 (1964) which quotes an editorial of the Chicago Tribune, March 7, 1964.

examiner under the Illinois Fair Employment Practices Act.[21] This case went so far as to say that any test which had an adverse effect on blacks would be invalid. The salient point of the case was that the examiner failed to take under consideration the *business needs of the employer.*[22]

The opponents of the Tower Amendment, however, felt that the original wording of the Bill protected employers from actions such as those taken by the hearing examiner in *Myart v. Motorola.*[23] Instead the opponents favored the position advanced by Senators Clark and Case. These men had presented an interpretive memorandum previous to Tower's amendment which stated:

> There is no requirement in title (sic) VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.[24]

In subsequent comments by Senator Case, this memorandum was severely constrained[25] and as a result it does not allow a *carte blanche* authorization to the use of unrestricted tests.

Senator Tower's amendment was eventually rejected by the Senate[26] and subsequently, he introduced the much weaker version which had previously been cleared with the proponents of the bill.[27]

The legislative history of the Act leads one to believe that the test clause of Section 703(h) was designed to give a clarifying effect.[28]

Moreover, since the original and presumably more permissive, form of the test

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21. ILL. REV. STAT. ch. 48, § 855 (1969).

22. As a consequence, Senator Tower introduced his amendment which he felt "would not legalize discriminatory tests." 110 CONG. REC. 13504 (1964). He only sought to protect testing procedures that were "designed to determine or predict whether (an) individual is suitable or trainable with respect to his employment in the particular job or enterprise involved." 110 CONG. REC. 13492 (1964).

23. Myart v. Motorola, *supra* note 20.

24. 110 CONG. REC. 7213 (1964).

25. 110 CONG. REC. 13504 (1964).

26. 110 CONG. REC. 13503-04 (1964).

27. Speaking on the new version, which eventually became incorporated as part of § 703(h), Senator Humphrey stated: "Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title." 110 CONG. REC. 13274 (1964).

28. Petitioners Brief to the Supreme Court at 50. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Cooper & Sobol at 1653.

clause included a business needs requirement for tests, it seems likely that the requirement was also implied in the less permissive version that was enacted.[29]

Section 703(h) has subsequently been extensively interpreted by the Equal Employment Opportunity Commission (hereinafter referred to as EEOC).[30]

The EEOC has interpreted Section 703(h) uniformly since its inception. It has insisted on "job-relatedness" as the fair measure of all tests and educational standards. The test must

fairly measure the knowledge or particular skills required by the particular job or class of jobs which the applicant seeks or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.[31]

This same stand is also taken by the EEOC regarding educational requirements.[32] Even more currently, this problem has been elaborated by new *EEOC Guidelines on Employee Selection Procedures.*[33] These predures were issued specifically to cover intelligence and aptitude tests. In order to qualify, employers must have

data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job or jobs for which Guidelines are being evaluated.[34]

It would be utter foolishness if it were otherwise. Employers could use any test that they wished as long as it had been professionally developed; e.*g.*, requiring a ditch digger to take a typing test.

In determining the type and amount of study necessary as a prerequisite to the use of a test to determine "job-relatedness," it has been stated that:

Some adequate measure of validity is absolutely necessary before the value of a test can really be known and before the scores on tests can be said to have any meaning

29. Cooper & Sobol at 1653. *See also* Senator Humphrey's letter to the American Psychological Association, quoted in THE INDUSTRIAL PSYCHOLOGIST, Aug., 1965, at 6.

30. The congressional response was probably directed toward insuring that tests with differential racial impact are not rendered illegitimate per se, but that when validated and suited to a particular job, or set of jobs, they are an appropriate basis for job selection. However a second interpretation may be that Congress wanted to grant employers a virtual carte blanche in using pre-employment general intelligence tests and this was aimed at keeping the Employment Commission from regulating the employer's use of general intelligence tests.

31. EEOC GUIDELINES ON EMPLOYMENT TESTING PROCEDURES (1966).

32. EEOC Decision, December, 1966.

33. 35 Fed. Reg. 12333 (1970).

34. 35 Fed. Reg. 12333 at § 1667.4(c) (1970).

as predicators of job success. . . . The use of unverified tests, whether through innocence or intent, cannot be condoned. . . . Tests must always be selected for the particular purpose for which they are used; even in similar situations, the same test may not be appropriate . . . . It is of utmost importance that any tests that are used, for employment purposes or otherwise, be validated. . . . It is only when a test has been demonstrated to have an acceptable degree of validity that it can be used safely with reasonable assurance that it will serve its intended purpose.[35]

Re-enforcing this EEOC decision, is a virtually identical requirement imposed by the Office of Federal Contract Compliance (OFCC).[36] Carrying these ideas to their fruition, job-relatedness standards have also been adopted by several states.[37]

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35. EEOC GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, 35 Fed. Reg. 12333 at §§ 1607.4, 1607.5, 1607.7; OFCC, Validation of Tests by Contractors and Subcontractors subject to the Provisions of Executive Order 11246, 33 Fed. Reg. 14392, §§ 2, 3, 5 (1968). "Some adequate measure of validity is absolutely necessary before the value of a test can really be known and before the scores on the test can be said to have any meaning as predictors of job success. . . . The use of unverified tests, whether through innocence or intent, cannot be condoned. . . . For example, if a test is known to measure some psychological ability, such as ability to work with mechanical relations, and certain mechanical performances are required in the performance of the job, the test still cannot be considered valid until the scores have been checked against some index of job success." GHISELLI & BROWN, PERSONNEL AND INDUSTRIAL PSYCHOLOGY 187-88 (1955). "Tests must always be selected for the particular purpose for which they are to be used; even in similar situations, the same test may not be appropriate. . . . Tests which select supervisors well in one plant prove valueless in another. No list of recommended tests can eliminate the necessity for carefully choosing tests to suit each situation. . . . No matter how complete the test author's research, the person who is developing a selection or classification program must, in the end, confirm for himself the validity of the test in his particular situation. . . . In most predictive uses of tests, the published validity coefficient is no more than a hint as to whether the test is relevant to the tester's decision. He must validate the test in his own school or factory. . . ." 1 CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 86, 105, 119 (2d ed. 1960). "It is of utmost importance that any tests that are used, for employment purposes or otherwise be validated. . . . It is only when a test has been demonstrated to have an acceptable degree of validity that it can be used safely with reasonable assurance that it will serve its intended purpose. "The point to be emphasized throughout this discussion is that no one—whether he is an employment manager, a psychologist, or anyone else—can predict with certainty which tests will be desirable tests for placement on any particular job." TIFFIN & MCCORMICK, INDUSTRIAL PSYCHOLOGY 119, 124 (5th ed. 1965). *See generally,* FREEMAN, THEORY AND PRACTICE OF PSYCHOLOGICAL TESTING 88 (3rd ed. 1962); GHISELLI & BROWN, *supra,* at 210; LAWSHE & BALMA, PRINCIPLES OF PERSONNEL TESTING (2d ed. 1966); RUCH, PSYCHOLOGY AND LIFE 67, 456-57 (5th ed. 1958); SIEGEL, INDUSTRIAL PSYCHOLOGY 122 (1962); THORNDIKE, PERSONNEL SELECTION TESTS AND MEASUREMENT TECHNIQUES 5-6 (1949).

36. *See,* OFCC, Validation of Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246, 33 Fed. Reg. 14392, § 2b (1968).

37. *California Fair Employment Practices Equal Good Employment Practices,* CCH EMPLOYMENT PRACTICES GUIDE, ¶ 20,861 (19—); *Colorado Civil Rights Commission Policy Statement on the Use of Psychological Tests,* CCH EMPLOYMENT

The EEOC has also been extremely active in determining whether or not the testing procedures that have been employed are job-related. Many different factors are taken into account depending on the particular situation, and consequently, each situation must be judged on its individual merits.[38]

One criteria that is used is the extent to which the specific requirement is adverse to minority applicants. A requirement which does not result in a greater preference for whites over blacks need be subjected to little, if any, examination under the fair employment laws.[39] In other words, the conclusion has been reached that testing procedures do violate fair employment laws in situations where one minority group is adversely affected, even without regard to the motives of the employer in using the particular standards. All of this interpretation is notwithstanding the fact that neither Title VII or Executive Order 11246 employs the requirement that the employer specifically intended to injure a certain "group" by using the procedures.

The first case to deal squarely with the testing criteria used by employers was *Myart v. Motorola.*[40] Plaintiff, Leon Myart, had applied for a job with the Motorola Company. He was given a battery of tests consisting of a five minute verbal test, a mathematical ability exam and a short interview. He was informed that he would be notified later of the results, but was never contacted. Myart then filed with the Illinois Fair Employment Practices Commission stating that the sole reason for Motorola not hiring him was his race and not his achievement on the examinations. The hearing examiner found in Myart's favor, concluding that he had achieved a passing score, and subsequently ordered Motorola to stop using their tests. "In the light of current circumstances, . . . this test does not lend itself to equal opportunity to qualify for the hitherto culturally deprived and disadvantaged groups."[41] Congress' response to

PRACTICES GUIDE, ¶ 21,060 (19—); *Pennsylvania Human Relations Commission, Affirmative Action Guidelines for Employment Testing,* CCH EMPLOYMENT PRACTICES GUIDE, ¶ 27,295 (19—).

38. *See* EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (August 1, 1970). EEOC Decision No. 70-501, Case YAT9-633 (January 29, 1970), in CCH EMPLOYMENT PRACTICES GUIDE, ¶ 6112 (covering several aptitude tests including Bennett test used by Duke); EEOC Decision No. 70-552 (February 19, 1970), in CCH EMPLOYMENT PRACTICE GUIDE, ¶ 6139 (covering the Wonderlic and Bennett tests used by Duke). *See also,* Hobson v. Hansen, 269 F. Supp. 401, 484, 485 (D.D.C. 1967).

39. *See,* Parkam v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).

40. *Supra* note 20.

41. 110 Cong. Rec. 9032 (1964).

this decision was drastic and the reaction almost doomed Section 703(h) of the Act.[42]

The first decision indorsing the EEOC position with regard to the testing provisions of Section 703(h) was *United States v. H. K. Porter Company.*[43] In this case, defendant company employed the tests of the United States Employment Service (General Aptitude Test Battery—GATB).[44] This battery of tests was used to measure the applicant's "general intelligence" and "manual dexterity." In sustaining the challenge to the aforementioned examinations, the court found that the tests given bore only a superficial relationship to the position for which the applicant applied. Stating the EEOC principles that were to echo in future decisions, the court said that they agreed in principle "with the proposition that the aptitudes which are measured by a test should be relevant to the aptitudes which are involved in the performance of jobs . . . ."[45] Although the court's endorsement of job-relatedness may have served a useful judicial building block in the eventual ratification of the EEOC Guidelines, it falls far short of demanding the rigorous procedures that the Guidelines require.[46] Overall, *Porter* states that if the application of a test has a substantial, differential impact on members of minority groups, the employer must examine and present *some evidence* that the test is related to the job to be performed.

Following the *Porter* decision was *Dobbins v. Electrical Workers Local 212.*[47] Plaintiff, an electrician, challenged the tests administered by the union local. It was shown that although forty-four presently employed electricians had taken the test, only three had passed.[48] The union's own expert testified that the examination was "unfair" and a "mistake." In

42. *See* text *supra.*

43. 296 F. Supp. 40 (N.D. Ala. 1968).

44. The GATB is a lengthy battery of twelve tests requiring two and one half hours to administer. Nine aptitudes are measured.

45. *Supra* note 43, at 78.

46. The court did not hold validation necessary to prove job-relation, but merely assumed for the sake of argument that some form of validation is necessary. In the GUIDELINES, the requirement of validation compels the selector to have empirical data demonstrating that the test is predictive of the applicant's performance on criteria of satisfactory work behavior. The relevant criteria for each job must be carefully described, and the test must be shown to have a statistically significant relationship to one of the criteria. Then the court indicated that if some validation is necessary, it will be satisfied by a validation process that is more rule of thumb than systematic. No data was presented, nor were any statistically significant studies conducted.

47. 292 F. Supp. 413 (S.D. Ohio 1968).

48. *Id.* at 433.

finding for Dobbins, the court held the examination unlawful, and even though objectively fair and objectively graded, to be unnecessarily difficult. "[T]he fair test of an individual's qualifications to work . . . is the actual ability to work on the job in the trade for the average (employee) operating in the trade."[49] In this same decision, however, the court found that the tests administered by the apprenticeship committee of the union were legal because they were "reasonably related to the proper attitude," and "properly selected" by an expert consultant.[50] However, the court never made clear how its decision that the examinations were "properly selected" was determined; there is the inference that it is less than what is required under the validation process of the EEOC Guidelines.

Further clarification of these issues emerged in *Colbert v. H. K. Corporation.*[51] Plaintiff, a secretary, challenged two tests that were administered by the employer. The first test, which was of stenographic skills, was judicially approved since it was convincingly similar to the work required to be performed on the job. The second test was considered to be of the type of a general intelligence examination. The court here stated, citing the *Porter* decision, that a general job-relatedness standard was to govern. The test administered here was also used for higher, related jobs; and since the employer was small, and since the court found the psychologists themselves in disagreement concerning the proper standards of validation, they allowed the use of the examinations *without* empirical study. This case was distinguished from *Porter* because the test there had no overt relation to the job to be performed, *i.e.*, manual labor to general intelligence. In the case at hand, the position tested for was that of a secretary and it was deemed reasonable to expect a certain level of achievement in verbal skills and general intelligence of the applicant.

A more recent decision which adds to those of *Dobbins* and *Porter* is *Arrington v. Massachusetts Bay Transportation Authority*,[52] where the court found that if the use of standardized tests produced "defacto racial pattern of classification adversely affecting . . . minority groups,"[53] they were in violation of 42 U. S. C. §§ 1981 and 1983. Plaintiffs here represented a class of black and Spanish-speaking persons who had applied for positions with the Massachusetts Bay Transportation Authority (MBTA). In reliance upon the tests, the MBTA offered seventy-five percent of the

49. *Id.* at 434.
50. *Id.* at 439.
51. CCH EMPLOYMENT PRACTICE GUIDE, ¶ 9.514 (N.D. Ga. 1970).
52. 306 F. Supp. 1355 (D. Mass. 1969).
53. *Id.* at 1358.

white applicants tested a chance at the first two-thirds of the open positions; while they only offered twenty percent to members of minority groups. In holding the hiring practices unlawful, the district court said that the tests would be viable if the use of the tests to determine eligibility was founded on "a relationship between the aptitudes tested and the demands of the work to be performed."[54] It is not clear how the required connection can be demonstrated, however the court implied that a process more rigorous than casual observation is necessary. Taken with the *Porter* decision, *Arrington* suggests that the line of substantiality of differential impact necessary to invoke relief lies somewhat between ten and twenty-five percent.

In *Penn v. Stumpf*,[55] plaintiff, an adult black male, applied to the Oakland Civil Service Board of Commissioners to become a police officer. After being administered the written examination he was informed that he received a failing score, and consequently was not permitted to continue on to the oral examination. This cause of action was instituted, alleging that the sole reason for plaintiff's failing the examination was the discriminatory nature of the test. The district court, in expanding the *Arrington* decision, stated that while a "significant statistical discrepancy (in hiring practices and test results) is not in itself dispositive, it is at least some indication that discriminatory forces, albeit subtle ones, may be afoot."[56] The court went on to declare that a test which had not been professionally developed or otherwise validated and which had an adverse impact on members of minority groups was violative under Title VII.

The most explicit endorsement of the EEOC Guidelines was handed

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54. *Id.* at 1358.

55. 308 F. Supp. 1238 (N.D. Cal. 1970). *See also* Carter v. Gallagher, 3 EPD ¶ 8205 (D. Minn. 1971) (striking down the tests used by the Minneapolis Fire Department); Western Additions Community Org. v. Alioto, No. 70-1335 (N.D. Cal. 1971) (striking down the tests of the San Francisco Fire Department); Armstead v. Starkville Municipal Separate School District, 325 F. Supp. 560 (N.D. Miss. 1971), and Baker v. Columbus Municipal Separate School Dist., — F. Supp. — (W.D. Miss. June 23, 1971) (striking down the tests of the Mississippi School Districts).

56. 308 F. Supp. 1238, 1243. *See also* Jones v. Lee Way Motor Freight Inc., 431 F.2d 245 (10th Cir. 1970) the Circuit Court of Appeals stated that "In racial discrimination cases, statistics often demonstrate more than the testimony of many witnesses, and they should be given proper effect by the courts." *Id.* at 247. *See also* Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 426 (8th Cir. 1970); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970); United States v. International Bhd. of Elec. Wrkrs., 428 F.2d 144, 151 (6th Cir. 1970); United States v. United Assoc. of Plumbers Local No. 73, 314 F. Supp. 160, 161 (S.D. Ind. 1969); Dobbins v. Local 212 International Bhd. of Elec. Wrkrs., 292 F. Supp. 413, 417 (S.D. Ohio 1968).

down in *Hicks v. Crown Zellerbach.*[57] Plaintiff, a black employee, showed that 37.8% of the whites versus only 9.8% of the blacks were passing the Wonderlic Test employed by the defendant corporation.[58] In considering the different and emphatic discrepancies achieved and in the absence of a study employed to determine if, in fact, the examinations were predictive of future results in employment, the court found them to be illegal. "Title VII does not permit an employer to engage in unsubstantiated speculation at the expense of the black workers."[59] Validation of employment tests would require professional expertise in determining the job-relatedness and consequently, the EEOC determinations would be given "great deference" as an indication of the point at which job-relatedness had been shown.[60]

Further defining that the employers do not satisfy their burden of proving a business necessity simply by showing that a particular business practice serves legitimate management functions, the court stated in *United States v. Bethlehem Steel,* that:

> If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effect, then the present policy may not be continued.[61]

In other words, the employer must show not only that the employment practice in question promotes a legitimate business objective, but also that there is no less discriminatory alternative practice available by which to achieve that business objective.[62]

Another outgrowth of the *Arrington* decision is *Chance v. Board of Commissioners.*[63] Here the court held that a series of examinations used by the New York Board of Education to qualify and select public school principals discriminated against black and Puerto Rican applicants and were in violation of the 14th amendment.[64] It then held that the data

57. 319 F. Supp. 314 (E.D. La. 1970).

58. The Bennett Mechanical Test was also administered and a greater disparity resulted—64% over 15.4%.

59. 310 F. Supp. 536, 538 (E.D. La. 1971).

60. *See,* Udall v. Tallman, 380 U.S. 1, 16 (1964); "Particularly is (great deference) . . . due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parks work effectively and smoothly while they are untried and new'. . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."

61. — F.2d —, — (2d Cir. June 21, 1971).

62. *See* Robinson v. Lorillard Corp., 3 EPD ¶ 8, 267 (4th Cir. 1971) at ¶ 6901.

63. — F. Supp. — (S.D. N.Y. July 14, 1971).

64. The pass-fail statistics reveal a 31.4% pass rate for blacks and Puerto Ricans compared to a 44.3% pass rate for white candidates.

introduced by plaintiffs displayed "a defacto" effect of discriminating significantly and substantially against members of minority groups.[65] The court then issued a preliminary injunction restraining the Board from conducting further examinations of the type found to be unconstitutional.[66]

Certain principles emerge, then, from this line of decisions. All of the foregoing cases call for some showing of job-relatedness, but the proof required has been diverse; no unvarying standard of empirical validation has been required. The size of the company, substantiality of the disparate effect, and the frequency of progression to higher, related jobs must all be taken into account in determining whether a reasonable showing of business purpose has been demonstrated to override the adverse affect of the tests administered on minority groups.

The Supreme Court decision in *Griggs v. Duke Power Company,*[67] gave a definitive declaration that the use of unvalidated tests can result in unlawful racial discrimination. In stating the objectives of Congress when enacting Title VII, Chief Justice Burger declared that

> it (Title VII) was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices.[68]

Overall, the Supreme Court has explicitly stated that it will take an *effect oriented* approach to cases of employment discrimination. It is of no consequence what the overt manifestations of the employer might be or the widespread acceptance of the particular examination. Of consequence will be the *effect* that these policies and procedures may have on minority groups.

The immediate result of the *Griggs* decision is that *any* criteria for se-

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65. *See* note 63.

66. The court stated that when such a discriminatory impact against a minority exists: "[A] strong showing must be made by the Board that the examinations are required to measure abilities essential to performance of the supervisory positions for which they are given." — F. Supp. —, — (S.D. N.Y. July 14, 1971).

67. *Supra* note 6.

68. 401 U.S. 424 (1971). Mr. Chief Justice Burger ends his opinion with the following paragraph: "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract." *Id.* at 436.

lecting employees which works unfairly against *any* group must be based on a business need.[69] When the rejection percentage for one class is higher than that for another, the employer is now required to show that his sifting and winnowing devices accurately project whether the job applicant has the ability to perform on the job, *i.e.*, serve a business need.

The new questions that this decision has evinced are numerous, and consequently it will take more litigation to resolve them. The most crucial question left unanswered regards "the exceptions to be allowed for discriminatory practices that are demonstrated to be necessary to the safe and efficient conduct of an employer's business."[70] What kind of business need must be shown in order to be exempted from Title VII? The degree of "job-relatedness" is omitted; must there be a 100% correlation or is 51% sufficient?

The EEOC, whose Guidelines were adopted in *Griggs*, takes a rather restrictive attitude towards the exemptions permitted under a "good faith job qualification necessary to the normal operation for the business." Judging the Court on its past performance, it is easily inferrable that the EEOC's view will again prevail.

Since any employment test is subject to the scrutiny of the courts, the logical extension of the *Griggs* decision may very well be in the area of college and law school admission tests. It is not stretching the definition of "employment test" to include these tests because there is a definite correlation between a person's performance and the school that subsequently admits him. From there it is only a small jump to his eventual earning capacity.

Already litigation has begun involving the Federal Service Entrance Examination (FSEE). In *Douglas v. Hampton,*[71] a class action by black plaintiffs[72] filed against the Commissioners of the United States Civil Service Commission alleges that the reason plaintiffs failed the examination was due to its *inherent* discriminatory bias towards members of minority groups. Plaintiffs contend that the cultural differences experienced by members of their class places them at a severe disadvantage in achieving scores of the FSEE that are comparable to those obtained by white applicants. The consequences of this action, if successful, are quite obvious;

69. *Id.* at 431.

70. This effectively rules out general testing devices, diplomas, and degrees as fixed measures of capabilities.

71. CCH EMPLOYMENT PRACTICE GUIDE, ¶ 5,158,8 (1971).

72. District Court for the District of Columbia—Civil Action No. 313-71, filed August, 1971.

the federal government will be left with thousands of jobs to fill, and an invalid method of recruitment.

In its total effect, the Supreme Court, in *Griggs v. Duke Power Company*, has placed a severe limitation on employers, labor unions and employment agencies in exercising their independent choices as to future "employees."[73] The ramifications of *Griggs* are innumerable and conclusive determinations in this area of the law will have to await further decisions by the courts.

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73. Representative defendants took the FSEE in order to qualify for federal employment positions and general service (GS) ratings, but failed to achieve passing grades.