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Employment Testing Under Title VII of the Civil Rights Act of 1964

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STUDENT COMMENT

EMPLOYMENT TESTING UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Discrimination in employment is probably the most decisive factor in perpetuating the disadvantaged social and economic position of a significant number of blacks in the United States.[1] The ultimate effects of discriminatory hiring practices are too pervasive to measure.[2] The denial of worthwhile employment not only deprives the black American of economic power, but may also dissipate the incentive to obtain a better education.[3] Although Congress, in 1964, legislated against all manifest forms of bias or prejudice in employment, far greater numbers of blacks remain unemployed than whites.[4] The statutory prohibitions against blatant discrimination did not eliminate more subtle discriminatory practices. Discriminatory hiring or promotion policies of an employer may be superficially formulated to apply equally to all groups and yet achieve the same result as overt discrimination.[5] This type of discrimination often results from the use of employment criteria which, because of inherent cultural and societal bias, are more difficult for blacks and other minority groups to satisfy.[6]

This comment will examine the effectiveness of present statutory provisions against discriminatory employment practices in the area of employment testing. It will be concluded that continued judicial sanction of the type of standardized general intelligence tests that were recently approved in *Griggs v. Duke Power Co.*[7] will result in significant inhibition of true equality in employment.

I. Statutory Prohibition Against Discrimination

Congress, recognizing the need for preventing all forms of employment discrimination, enacted Title VII of the Civil Rights Act of 1964.[8] The scope of Title VII is defined in Section 703(a) as follows:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any indi-

[1] See Berg, Equal Employment Opportunity Under The Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62 (1965); Rosen, The Law and Racial Discrimination In Employment, 53 Calif. L. Rev. 729 (1965).

[2] See National Advisory Commission on Civil Disorders 413 (Bantam ed. 1968).

[3] Berg, supra note 1, at 62.

[4] See Time, April 6, 1970 at 94.

[5] See National Advisory Commission on Civil Disorders, supra note 2, at 416-17.

[6] Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1600 (1969).

[7] 420 F.2d 1225 (4th Cir. 1970).

[8] 42 U.S.C. §§ 2000e–2000e-15 (1964).

> vidual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) 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, color, religion, sex, or national origin.[9]

Enforcement of these prohibitions against discrimination is provided through both public and private relief sections in Title VII.[10] The individual employee may, under Section 706(g),[11] institute a civil action against an employer for violations of the Act seeking relief in terms of an injunction against discriminatory practices, reinstatement, and payment of back wages. Section 707(a)[12] grants to the Attorney General the power to restrain an employer by an injunction if it can be shown that the activities to be restrained constitute a "pattern" of discrimination.

The basic purpose of Title VII is, therefore, the equalization of employment opportunities through the elimination of certain discriminatory criteria. This broad purpose, however, is subject to several limitations. The scope of Title VII is limited by the general requirements that an employer, to come within the Act, must employ twenty-five or more employees and be engaged in activity affecting interstate commerce.[13] Further, an employer may discriminate on the basis of sex, religion or national origin if such discrimination can be shown to be a "bona fide" requirement of his business.[14] The coverage of Title VII is also narrowed through Section 703(h) which excludes employment testing from the general prohibitions of the Act in the following manner:

> Notwithstanding any other provision of this subchapter, 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, color, religion, sex or national origin.[15]

The exception granted in Section 703(h) does not, of course, alter the

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9 42 U.S.C. § 2000e-2 (1964).

10 For a full discussion of enforcement under Title VII, see Walker, Title VII: Complaint and Enforcement Procedures and Relief and Remedies, 7 B.C. Ind. and Com. L. Rev. 495 (1966).

11 42 U.S.C. § 2000e-5(g) (1964).

12 42 U.S.C. § 2000e-6(a) (1964).

13 42 U.S.C. § 2000e(a)-(i) (1964).

14 42 U.S.C. § 2000e-2(e) (1964).

15 42 U.S.C. § 2000e-2(h) (1964).

fundamental importance of Title VII as the core of presently available statutory attempts to eliminate discrimination in employment. However, the importance of this section becomes apparent from an examination of the effect of certain forms of employment testing currently in use.

II. Discriminatory Effects Of Employment Testing

In modern industry, employers place great reliance upon the ability of testing devices to evaluate job applicants.[16] Despite the risk that some talented individuals will not score well, many employers favor testing because it may be more reliable than subjective methods of hiring, such as interviewing.[17] Employers contend that standardized general intelligence tests are necessary to select the most intelligent applicants in order to maintain a high caliber work force.[18] However, critics of the use of standardized testing argue that such testing reflects an applicant's background rather than his employment abilities.[19] Studies indicate that members of minority groups consistently perform poorly on general tests since they do not have the educational and cultural opportunities available to whites.[20]

The inequalities inherent in standardized tests in general have been recognized among students who are separated on a track system[21] based upon standardized tests. In *Hobson v. Hansen*,[22] the District Court for the District of Columbia held that such an educational system resulted in unlawful discrimination and noted that in considering standardized testing:

> A crucial assumption . . . is that the individual is fairly comparable with the norming group in terms of environmental background and psychological make-up; to the extent the individual is not comparable, the test score may reflect those differences rather than innate differences.[23]

The court indicated that standard aptitude tests most accurately measure real ability when given to white students with a middle class background.[24] However, when such tests are given to members of disadvantaged minority groups it is impossible to tell whether a low score points to a lack of ability or to a lack of educational opportunity.[25]

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16 Cooper and Sobol, supra note 6, at 1637.

17 Id. at 1638. See also Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Colum. L. Rev. 691, 696 (1968).

18 Cooper and Sobol, supra note 6, at 1643.

19 See J. Kirkpatrick, R. Ewen, R. Barrett, & R. Katzell, Testing and Fair Employment 5 (1968); J. Coleman, Equality of Educational Opportunity 219-20 (1966).

20 Cooper and Sobol, supra note 6, at 1640.

21 The track system as used in some educational systems is a form of ability grouping in which students are divided into separate sections ranging from "basic" for slow students to "honors" for gifted students.

22 269 F. Supp. 401 (D.D.C. 1967).

23 Id. at 484.

24 Id. at 485.

25 Id.

While inherent background distinctions cannot be overcome completely by any type of standardized testing, the possible discrimatory effects in employment testing could be diminished through validation of test results as compared with job performance.[26] Thus, the testing program itself should be studied to determine its relevance as a measurement of employment skills actually required of the prospective employee. However, the likelihood of a strong correlation between standardized tests and job performance is remote, largely because many of the tests currently in use were devised more than twenty-five years ago.[27]

An example of the present day use of standardized general ability tests in employment is found in *Griggs v. Duke Power Co.*[28] In *Griggs*, thirteen black employees of defendant Duke's electric power station brought a class action on behalf of themselves and all blacks who might thereafter be employed or seek employment at the defendant company. The plaintiffs sought an injunction against certain employment practices alleged to be discriminatory and in violation of Title VII.[29] The complainants alleged that blacks had been traditionally hired into lower paying jobs—those in the labor department—and denied the right to advance because of their race.[30] In 1955, Duke adopted a new policy with regard to hiring and promotion. The hiring of all new employees into the labor department was conditioned upon having the equivalent of a high school education. Promotion from labor into higher paying inside departments was also conditioned upon meeting this requirement. In 1965, the company offered the alternative of testing as a basis for promotion to those employees hired prior to that year who did not have a high school education or its equivalent.

The plaintiffs first alleged that these new testing requirements, operating upon a pattern of job assignments which had been established under the prior discriminatory practices, permitted past inequities to continue since white employees without a high school education could maintain their jobs in higher paying departments, whereas no black employees could be transferred into those departments without meeting the new standards.[31] Secondly, the plaintiffs contended that the company's use of general intelligence tests to determine

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[26] See note 17, supra, at 697.

[27] See Cooper and Sobol, supra note 6, at 1643 n.23.

[28] Supra note 7.

[29] 420 F.2d at 1229.

[30] Id. Duke Power Company divides its employees into five departments. While the three inside departments—operations, maintenance and testing—are similar as to skill and wage rates, the maximum wage in the unskilled labor department is less than half of the maximum for employees in the so-called "inside departments." Coal handling is one level above the labor department and is also considered an outside department though wage rates are comparable to those of the three inner departments. At the time this action was instituted, no black employee had ever been hired into any but the labor department which was, in fact, an all black department.

[31] Id. at 1230.

eligibility for departmental transfer was in itself a discriminatory practice.[32] The district court denied the plaintiff's request for injunctive relief,[33] holding that continued effects of past discrimination did not constitute a present violation of Title VII, and that the company's testing requirements were properly within the exception provided by Section 703(h). On appeal, the court held that Title VII did apply to present effects of past discrimination, and reversed the district court's denial of relief to those plaintiffs who had been hired prior to the company's adoption of testing requirements.[34] The court of appeals, however, upheld the district court's finding that the tests themselves were not discriminatory, and affirmed denial of injunctive relief to those plaintiffs who had been hired after the company adopted testing standards.[35]

The deleterious effects of present discrimination caused by patterns established prior to the passage of the Civil Rights Act of 1964 are as opposed to the spirit and intended scope of the Act as are discriminatory practices originating after passage of the Act.[36] Therefore, the interpretation of Title VII in *Griggs* as applying to continuing discrimination resulting from past acts is both statutorily correct and essential to any meaningful elimination of discrimination in employment. However, the *Griggs* decision substantially limits the effectiveness of Title VII by approving employment testing upon a showing merely that the tests were created by a qualified expert,[37] and that there was no specific discriminatory intent in the use of the tests.[38] A declaration of such minimal standards as providing adequate safeguards against discrimination must be questioned in reference to the intent required by the enforcement sections of Title VII. Moreover, the approval in *Griggs* of standardized general intelligence tests, with no requirement that they be related to any specific employment skills, raises serious questions as to the scope of the exception granted to employment testing by section 703(h).

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[32] Id. at 1231.

[33] 292 F. Supp. 243, 251-52 (M.D.N.C. 1968).

[34] 420 F.2d at 1237.

[35] Id.

[36] See Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968).

[37] 420 F.2d at 1233.

[38] Id. at 1232. The majority held that the defendant had established a legitimate intent by showing three things: First, his business was becoming more complex and greater flexibility was required among his employees. The implication is that persons with the intelligence of a high school graduate are better able to absorb new techniques which the employer will soon be using. Second, the company's expert witness, a psychologist, testified that high school graduates or persons with an equivalent knowledge could perform any of the jobs presently performed in the plant. This seems to be a maximum standard since there are employees in the inner departments who have successfully mastered their jobs although they do not have a high school education. Third, the company had a policy of training their own supervisors by promotion through the ranks, and thus felt that all line employees should be qualified for promotion to supervisor. 420 F.2d at 1232-233.

III. The Standard Of Intent In Title VII Actions

To establish a violation of Title VII, it is necessary to prove that an unlawful employment practice was intentionally committed. This element of intention is specifically required by section 706(g) which provides for relief if a complainant can show that "the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice."[39] Since standardized employment tests are generally applied to all employees, unlike other practices applied more selectively, a critical factor in actions challenging testing practices is the degree of intent required to be proven.

Interpretation of the intention requirement has led to a divergence of opinion as to the type of intent that is required by the enforcement sections of Title VII. The commentators are divided as to whether a subjective, deliberate intent[40] or an objective standard of awareness of actual discrimination[41] must be shown. The latter interpretation of an objective standard is consistent with the legislative history surrounding the passage of section 706(g).[42] During debate upon the language of section 706(g), it was proposed that discrimination be held actionable only if unequal practices were "willfully" engaged in for racial reasons.[43] While the addition of this narrow standard was rejected, the characterization of intention as merely the conscious commission of an act which results in discrimination was also rejected as being too broad.[44] As a compromise, the term "intentionally" was inserted in section 706(g) in its present form. In an attempt to clarify this language, it was stated that the "requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate [Title VII] . . . . It means simply that the respondent must have intended to discriminate."[45] While this language singularly fails in its attempt to "clarify" Section 706(g), it does at least indicate that Congress intended a middle ground between a broadly objective test of mere consciousness in acting, and the narrow test of a specific purpose to discriminate as the standard to be applied in the enforcement of Title VII.

This failure of Congress to define clearly the type of intention required by Section 706(g) makes it necessary to examine the under-

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39 42 U.S.C. § 2000e-5(g) (1964). A similar intent requirement is found in § 707(a) authorizing the Attorney General to bring suit if "a pattern or practice of resistance to the full enjoyment of any of the rights . . ." secured by Title VII is found to have been carried out and "intended to deny the full exercise of the rights herein described." 42 U.S.C. § 2000e-6(a) (1964).

40 See Bonfield, The Substance of American Fair Employment Practices Legislation I: Employers, 61 Nw. U.L. Rev. 956 (1967).

41 See Blumrosen, Seniority and Equal Employment Opportunity: A Glimmer of Hope, 23 Rutgers L. Rev. 268, 281 (1969).

42 For a full discussion of the legislative history of Title VII in general, see Vaas, Title VII: Legislative History, 7 B.C. Ind. and Com. L. Rev. 431 (1966).

43 Berg, supra note 1, at 71.

44 110 Cong. Rec. 12723-2724 (1964) (remarks of Senator Humphrey).

45 Id.

lying policies of Title VII in general. The goal of Title VII, set out in the introductory provisions in Section 703(a), is the elimination of discrimination in employment on the grounds of race, color, sex or national origin. Such discrimination is declared unlawful by section 703(a) with no mention of a requirement of intention. This purposely broad scope of Section 703(a) must be considered when evaluating other sections of the Act which were designed to provide enforcement against the practices outlined in Section 703(a). Logic requires that the enforcement provisions of Title VII be construed so as to include the range of abuses declared illegal by Section 703(a). Interpreted in this context, the requirement of intent prescribed in Section 706(g) should not be so narrowly construed as to negate the broad design of Title VII. Adoption of an objective standard of intent in section 706(g) would both fulfill the statutory promise of effective enforcement and also provide safeguards against punishment of completely inadvertent practices that result in discrimination.

The applicability of an objective standard in defining the intent requirements of the enforcement provisions of Title VII was demonstrated in *Local 189, United Papermakers and Paperworkers v. United States.*[46] In *Local 189*, the United States brought an action under Title VII attacking an allegedly discriminatory job seniority system. The defendant employer argued that whatever the actual effects of the seniority system were, the practice was not subject to attack under Title VII because it was not carried out with the specific intent to discriminate. The court rejected this contention and held that section 706(g) "requires only that the defendant meant to do what he did, that is, his employment practice was not accidental."[47] In addition, the court interpreted section 707(a) as being fulfilled since "the requisite intent may be inferred from that fact that the defendants persisted in the conduct after its racial implications had become known to them."[48]

The majority in *Griggs* refused to apply such an objective standard of intent in determining whether testing practices were in violation of Title VII. Rather, the *Griggs* court indicated that in order to enjoin a discriminatory practice it must be shown that it was carried out with a *specific* intent to discriminate.[49] Such a test is inconsistent with the overall goal of Title VII since it limits the enforcement provisions of Title VII to an area narrower than the range of discriminatory practices that were intended to be abolished. Moreover, as applied to the particular practice of employment testing, such a standard of intent raises problems of proof too burdensome for effective enforcement.

The objective standard of intent applied in *Local 189* has been expressed as being analogous to the standard of intent required in

[46] 416 F.2d 980 (5th Cir. 1969).
[47] Id. at 996.
[48] Id. at 997.
[49] 420 F.2d at 1232.

civil tort actions.[50] Since section 706(g) itself is designed to provide redress for employees from damages caused by unlawful employment practices, it is reasonable to characterize actions under that section as a form of tort. This analysis would allow for the requisite intent to be imputed to an employer who persists in employment practices that foreseeably result in discrimination.[51] The use of such an objective standard, paralleling that applied in common law intentional tort, would not require a narrow finding of a specific purpose to discriminate, yet would avoid punishment for inadvertent discrimination.

A similar standard of intent has been adopted by the Supreme Court in cases alleging discriminatory union membership practices under the National Labor Relations Act.[52] In *Radio Officers v. Labor Board*,[53] the Court described the standard to be applied as follows:

> This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement.[54]

While the decision in *Radio Officers* applies to a statutory framework other than Title VII, the rationale of holding employers responsible for reasonably foreseeable acts is applicable to actions under Title VII. Moreover, adoption of a similar standard of intent under Title VII is reinforced by the declared policy of effectively eliminating discrimination in employment. Adoption of a standard of proof similar to that used in civil tort actions, and found workable in *Radio Officers*, thus appears to be superior to the overly narrow holding in *Griggs*.

IV. Job-Relatedness As A Requirement Of Section 703(h)

Application of Section 703(h) requires a determination of the type of employment testing that was intended to be excluded from the anti-discrimination coverage of Title VII in general. Two views have emerged as possible inerpretations of the meaning of the "professionally developed ability test" as used in section 703(h). The first urges that an employer is permitted to use any general intelligence test that has been prepared by a qualified tester.[55] The second view

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50 See Blumrosen, supra note 41 at 280; Jenkins, Study of Federal Effort to End Job Bias: A History, A Status Report, and A Prognosis, 14 How. L.J. 259, 310-11 (1968).

51 See Jenkins, supra note 50, at 310.

52 29 U.S.C. § 151 et seq. (1964).

53 347 U.S. 17 (1953).

54 347 U.S. at 45. For other examples of the use of this standard of foreseeability under the NLRA, see NLRB v. Erie Resister Corp., 373 U.S. 221, 27 (1962); Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 667, 675 (1961).

55 See 420 F.2d at 1234.

holds that a test to come within section 703(h) must bear some relationship to an actual skill or ability that the prospective employee must possess.[56]

This confusion over the question of whether or not section 703(h) requires that testing be job-related is due in part to the legislative history of the drafting of the section. While much of that history is ambiguous, it is clear that the holding in *Myart v. Motorola, Inc.*[57] prompted the enactment of section 703(h). In *Myart*, a black job applicant was required to take an intelligence test as part of the hiring process. The black applicant contended that his subsequent rejection was due to the allegedly discriminatory effect of the test. A complaint was filed challenging this rejection before the Illinois Fair Employment Practices Committee. A hearing was held and the examiner concluded that the hiring practice in question was unlawful. This decision was interpreted as holding that *all* tests that were in fact discriminatory because of an unequal background of the applicants, regardless of the employer's intent, were unlawful employment practices.

The blanket rejection in *Myart* of all tests that in fact discriminate raised the question among the drafters of Title VII whether such an extreme result was possible under the Act as it was then proposed. Examination of the intended effects of Title VII resulted in statements by the proponents of the Act rejecting the rationale of the *Myart* decision:

> There is no requirement in Title 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. . . .[58]

Amidst this general concern that Title VII not result in holdings similar to *Myart*, Section 703(h) was introduced specifically to protect an employer's right to "give general ability and intelligence tests to determine trainability of prospective employees."[59] This expression of general intention was followed by a more detailed statement that section 703(h) was designed to protect the employer's right "to determine the professional competence or ability or trainability or suitability of a person *to do a job*."[60] (Emphasis added.) The use of language referring to testing as a measurement of suitability *for a job* indicates that section 703(h) was meant to protect only those tests that in fact were related to the intended performance of the applicant.

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[56] EEOC Guideline, CCH Empl. Prac. Guide ¶ 16,094 at 7319, cited in 420 F.2d at 1240.

[57] The findings of the *Myart* hearing are presented in full in 110 Cong. Rec. 5662-664 (1964).

[58] 110 Cong. Rec. 7213 (1964) (remarks of Senators Clark and Case).

[59] 110 Cong. Rec. 13492 (1964) (remarks of Senator Tower).

[60] Id.

Only a few cases have discussed the issue of employment testing and job-relatedness under section 703(h). In *Dobbins v. Local 212*,[61] a black union member challenged the union's referral system as being discriminatory in violation of Title VII. The court held the referral system to be unlawful, and included in its decision a discussion of the union's use of testing as a method of selecting members.[62] The testing practice was declared unlawful since the tests used by the union were not related to the actual qualifications of the trade.[63] The court then described a lawful testing practice as the "actual ability to work on the job in the trade for the average contractor operating in the trade."[64]

While *Local 212* was not an action specifically involving section 703(h), there has been judicial application of a similar requirement of job-relatedness under that section. In *United States v. H. K. Porter Company, Inc.*,[65] the Attorney General brought an action under Section 707(a)[66] alleging that the defendant company's seniority system was unlawful because it carried forward the discriminatory effects of unequal hiring practices used prior to the passage of Title VII. The court rejected this contention and found that no unlawful discrimination existed since the black employees had not taken advantage of opportunities to transfer into jobs previously held by whites alone.[67] While the opinion focused primarily upon the issue of the seniority system, the court discussed the testing system which the defendant company had adopted. The court upheld the validity of the testing requirements because they were job-related, stating that "the aptitudes which are measured by a test should be relevant to the aptitudes which are involved in the performance of jobs."[68]

The majority in *Griggs* refused to apply a requirement of job-relatedness in determining whether standardized ability tests were unlawfully discriminatory. After examining the legislative history of section 703(h), the court decided that the section exempted any test created by a qualified expert regardless of whether or not the test measured a particular employment skill or ability.[69] The establishment of such minimal criteria for acceptance of a testing practice presents a situation that could easily lead to "wholesale evasion"[70] of Title VII. A more reasonable interpretation would recognize that the exemption offered by section 703(h) should be limited to tests which are related to a specific employment skill or ability. Such a requirement is supported by the common sense argument that employers should be in-

61 292 F. Supp. 413 (S.D. Ohio 1968).
62 Id. at 430.
63 Id. at 434.
64 Id.
65 296 F. Supp. 40 (N.D. Ala. 1968).
66 42 U.S.C. § 2000e-6(a) (1964).
67 296 F. Supp. at 64-66.
68 Id. at 78.
69 420 F.2d at 1235.
70 420 F.2d at 1246 (dissenting opinion).

terested in measuring skills that would in fact be used by the employee. Moreover, this requirement would not undermine the basic protection intended in the enactment of Section 703(h) since intent to discriminate would still have to be shown to establish a violation of Title VII. Thus, the blanket rejection of all tests that in fact discriminate, as was held in the *Myart* decision, would be avoided. Tests which are related to job performance, and are not intended or used for the purpose of discrimination, would be protected under section 703(h) regardless of discriminatory effects because of differing backgrounds of test applicants. This result complies with the legislative intention to guard against punishment for inadvertent discrimination, yet allows for effective enforcement of the promise of equal employment opportunity in Title VII.

V. Administration of Title VII

The opinion in *Griggs* raises serious questions concerning the effective administration of Title VII. In upholding the validity of the testing practices in issue, the *Griggs* court explicitly refused to apply the guidelines of the agency created to administer the Act, the Equal Employment Opportunity Commission (EEOC). The EEOC is authorized to administer the provisions of Title VII, to examine unlawful practices, and to act on complaints as mediator and counsel.[71] The Commission was originally designed to be the enforcement agent of Title VII, with the power to issue cease and desist orders.[72] However, this power was removed prior to House enactment, and the EEOC was limited to the role of prosecuting in the courts.[73] In the Senate as well, this power of prosecution was taken away, and the Commission assumed the even more limited role of mediator.[74] Thus, when a complaint of employment discrimination is received by the Commission,[75] the EEOC can only offer informal assistance, such as conciliation or intervention on the complainant's behalf, in an attempt to effect a voluntary compliance from the employer.[76] If these informal methods are not sufficient to obtain compliance, the Commission must notify the complainant of his right to bring a civil action in a federal district court.[77] In federal court the issues are tried de novo, and if the plaintiff establishes that he has been an object of discrimination he is entitled to equitable relief.

The *Griggs* court interpreted this statutory role of the EEOC as merely advisory, with the decisions of the Commission having no

[71] 42 U.S.C. 2000e-5(a) (1964).

[72] H.R. Rep. No. 405, 88th Cong., 1st Sess. 8 (1964).

[73] See Comment, Enforcement Of Fair Employment Under the Civil Rights Act of 1964, 32 U. Chi. L. Rev. 430, 434-35 (1965).

[74] Id.

[75] Complainants must use available procedures under state anti-discrimination laws before filing a charge with the Commission, but they are not required to exhaust such procedures. 42 U.S.C. § 2000e-5(b) (1964).

[76] 42 U.S.C. § 2000e-5(a) (1964).

[77] 42 U.S.C. § 2000e-5(e)-(f) (1964).

binding force upon the courts.[78] The EEOC had issued a guideline categorizing the type of employment test which meets the requirements of section 703(h) as one which fairly measures the knowledge or 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 applicants' ability to perform a particular job or class of jobs.[79]

Despite the direct applicability of this EEOC guideline in *Griggs*, it appears settled, as a matter of administrative law, that the court was not bound to follow the guideline. The statutory grant which created the EEOC endowed that Commission with interpretative rather than legislative powers.[80] While both interpretative and legislative powers are often executed by administrative agencies, the courts recognize a clear distinction between the two types of power. An agency is recognized as having legislative power when its rulings are, by statute, deemed to have the force of law.[81] Courts may examine such legislative rulings as to their reasonableness, but they may not substitute an independent judicial judgment concerning the content of the ruling. However, the courts are permitted the discretion of adopting or rejecting an interpretative rule.[82] Such interpretative rules have the force of law only through judicial enforcement of the rule itself.

Notwithstanding this lack of a statutory duty to accept relevant EEOC rulings, the dissent in *Griggs* argued for acceptance of the pertinent guideline on the grounds that the court *should* place great weight upon the guidelines of agencies directly concerned with a statute in issue.[83] A series of Supreme Court decisions has followed a similar line of reasoning. In *United States v. American Trucking Association, Inc.*,[84] the Court considered the issue of the interpretation of the scope of the Federal Motor Carriers Act,[85] and followed a relevant ruling of the Interstate Commerce Commission.[86] The Court noted that such agency interpretations were entitled to great weight when the issue involved contemporaneous construction of a statute by the agency empowered to administer the statute in question.[87] This rationale supporting the acceptance of agency rulings was also expressed in *Skidmore v. Swift and Co.*[88] In *Skidmore*, the employees brought an action under the Fair Labor Standards Act[89] to recover a disputed amount of overtime pay. The Court adopted a relevant interpretation issued by the Administrator of the Act, and stated that such rulings,

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78 420 F.2d at 1234.
79 EEOC Guideline, supra note 56.
80 42 U.S.C. § 2000e-4 (1964).
81 1 K. Davis, Administrative Law § 5.03 at 299 (1958).
82 Id. at 300.
83 420 F.2d at 1240 (dissenting opinion).
84 310 U.S. 534 (1940).
85 49 U.S.C. § 302 et seq. (1964).
86 310 U.S. at 553.
87 Id. at 549.
88 323 U.S. 134 (1944).
89 29 U.S.C. § 203 et seq. (1964).

while not controlling, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[90]

This judicial policy of adopting rulings of agencies concerned with the administration of a disputed statute has been followed in cases involving Title VII. In *Weeks v. Southern Bell Telephone Co.*,[91] a female employee brought an action under Title VII alleging that she had been unlawfully discriminated against because of her sex when the defendant employer refused to accept her request for transfer to a job normally held only by males. The employer answered the charge by claiming that the alleged discrimination fell within the exemption granted by section 703(e)[92] as a bona fide occupational qualification. The EEOC had published guidelines which directly contradicted the employer's claim.[93] The *Weeks* court noted that EEOC guidelines were entitled to great weight and ruled against the employer.[94] Similar judicial reliance upon EEOC guidelines is found in *Local 189, United Papermakers and Paperworkers v. United States*.[95] In *Local 189*, the court declared a contested seniority system an unlawful practice under Title VII. In reaching its decision, the court followed relevant EEOC rulings and expressly disapproved of the rejection of these guidelines in the factual situation presented in *Griggs*.[96]

Despite the statutory limitation placed upon the EEOC, it is submitted that the *Griggs* court should have accorded more weight to the relevant EEOC guideline. While Title VII clearly does not *compel* judicial acceptance of EEOC rulings, courts should, as a matter of sound discretion, require substantial evidence to the contrary before disregarding a ruling directly in point. In *Griggs*, the guideline was squarely on the issue of standardized tests; as the dissent indicated, the reasonableness of the ruling was evident.[97] By disregarding this ruling, the majority in *Griggs* ignored the substantial expertise developed by the Commission that would be particularly helpful in cases involving a technical matter such as employment testing.

Conclusion

Fulfillment of the promise of equality in employment opportunity requires the elimination of discriminatory employment practices whether they be overt or subtle. Standardized general ability tests, in their usual application to all job candidates regardless of race, appear to be equitable and non-discriminatory. However, the preponderance of the evidence indicates that members of minority groups consistently

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90 323 U.S. at 140.
91 408 F.2d 228 (5th Cir. 1969).
92 42 U.S.C. § 2000e-2(e) (1964).
93 408 F.2d at 230.
94 Id. at 235.
95 Supra note 46.
96 416 F.2d at 994.
97 420 F.2d at 1240 (dissenting opinion).

perform poorly upon such tests because of educational and societal biases inherent in the standardized tests presently in use. Yet, it is unreasonable and inequitable to require individual employers to stop using all testing criteria which unavoidably reflect the results of years of social deprivation upon some test applicants. Therefore, Congress, in enacting Title VII, added Section 703(h) to protect the right of employers to use legitimate employment testing notwithstanding its ultimate discriminatory effects. Additional protection was provided in the enforcement sections of Title VII which require that there be proof of intent to discriminate in an action against an employer. However, the interpretation of these provisions in *Griggs v. Duke Power Co.* as protecting any general ability test developed by an expert, regardless of relevance to a particular working skill, and as requiring proof of a specific intent to discriminate before enforcement is possible, severely limits the intended effectiveness of Title VII. A more reasonable interpretation of these provisions concludes that the protection afforded testing practices was meant to apply only to tests which fairly measure an actual employment skill or ability. Further, it is consistent with the underlying purposes of Title VII that acts of discrimination should be prohibited upon proof of reasonable foreseeability of a discriminatory effect. Under this interpretation, an employer would be allowed to utilize tests which are fairly job-related notwithstanding the inevitable discriminatory effects because of inherent cultural bias. Also, no action would be taken against an employer for a testing practice which unforeseeably results in discrimination. Thus, the dual requirements of job-relatedness and a standard of foreseeability would comply with the statutory design of Title VII to respect an employer's legitimate need to choose applicants most qualified for employment, while guaranteeing members of minority groups the right to be employed free from discriminatory testing practices that are unrelated to actual job qualifications.

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