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Civil Rights--Employment Testing and Job Performance

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CASE COMMENTS

CIVIL RIGHTS—EMPLOYMENT TESTING AND JOB PERFORMANCE

Black employees brought a class action challenging the validity of the Duke Power Company's use of general intelligence and ability tests. The tests were given to determine the promotion eligibility of those employees without a high school education.[1] These employees alleged racial discrimination[2] in the use of these tests for promotion from the laborer classification. Plaintiffs asserted the 1964 Civil Rights Act required that such tests must satisfy the concept of job relatedness.[3] *Held,* relief granted in part, denied in part. In regard to plaintiffs hired prior to the adoption of the promotion policy, the educational requirement could not preclude promotion.[4] Employees hired after the adoption of the educational standard were subjected to its requirements. *Griggs v. Duke Power Co.,* 420 F.2d 1225 (4th Cir. 1970), rev'd, 39 U.S.L.W. 4317 (U.S. March 8, 1971).[5]

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[1] In 1955, the defendant company instituted a new hiring and promotion policy which established the requirement of a high school education or its equivalent. The "equivalent" was determined by the use of standardized tests; specifically, the Wonderlic General Intelligence Test and the Bennett Mechanical AA Test. It was undisputed that these tests were the equivalent of a high school education. Griggs v. Duke Power Co., 420 F.2d 1225, 1228-1229 (4th Cir. 1970).

[2] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1964).

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability tests 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. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29.

[3] Section 1607.4 of the revised *Guidelines on Employment Testing* states a test is job-related if its contents measure job performance potential.

[4] *Quarles v. Philip Morris, Inc.,* 279 F. Supp. 505 (E.D. Va. 1968), was one of the first cases to challenge the legality of promotion requirements under Title VII. The court held "that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Id.* at 516.

[5] *See* note 37 *infra.*

Although the *Griggs* majority and dissenting opinions agreed that the 1964 Civil Rights Act relieved the present effects of past discrimination, the opinions differed over the proper margin of business purpose necessary to justify the utilization of the challenged promotion requirement. The majority ruled the proper margin was satisfied with the demonstration of a legitimate business purpose while the dissent urged the standard of job relatedness. The court's disagreement was predicated on the proper interpretation of section 703(h) of the 1964 Civil Rights Act.[6] Both opinions attributed Congress' adoption of this Section as a reaction to a hearing examiner's finding for the Illinois Fair Employment Practice Commission.[7] Both stated this commission had concluded a pre-employment general intelligence test given to a black applicant denied equal employment opportunity because blacks were a "culturally deprived" group.[8] The commission's decision was generally assumed to mean that such tests were barred even if business need required their use.[9] Although both opinions implied section 703(h) was formulated to preclude Equal Employment Opportunity Commission (EEOC)[10] rulings in accord with this commission decision, review of the section's legislative history produced different interpretations.[11] The dissent supported the EEOC concept of 703(h)—that testing should be job related.[12] The majority concluded its investigation of legislative history precluded the adoption of the EEOC position; rather, section 703(h) was added to sanction the validity of nondiscriminatory professionally developed ability tests.[13] However, the court emphasized that this holding was not to be interpreted as an approval of any educational or testing standard—such a standard's validity under the 1964 Civil Rights Act must be determined by the presence of a genuine business purpose.[14] In *Griggs,* this purpose was established by Duke's expert testimony, which concluded a high school education was necessary to perform duties in the skilled classifica-

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[6] *See* note 2 *supra.*

[7] Griggs v. Duke Power Co., 420 F.2d 1225, 1234, 1242 (4th Cir. 1970). The citation for the commission's finding is Myart v. Motorola, Inc., 110 Cong. Rec. 5662-64 (1964), rev'd, Motorola, Inc. v. Ill. Fair Employment Practices Comm'n., 34 Ill.2d 266, 215 N.E.2d 286 (1966).

[8] Griggs v. Duke Power Co., 420 F.2d 1225, 1234 (4th Cir. 1970).

[9] *Id.* at 1242 (dissenting opinion).

[10] The E.E.O.C. is charged with administering and implementing Title VII of the Civil Rights Act of 1964.

[11] Griggs v. Duke Power Co., 420 F.2d 1225, 1234, 1242 (4th Cir. 1970).

[12] *Id.* at 1243.

[13] *Id.* at 1234.

[14] *Id.* at 1235.

tions.[15] However, the dissent condemned the utilization of the "genuine business purpose" standard as vulnerable to discriminatory application:

> For them [the majority], the crucial inquiry is not whether the Company can establish business need, but whether it had a bad motive or has designed its tests with the conscious purpose to discriminate against blacks. Thus the majority stresses that the standards were adopted in 1955 when overt discrimination was the general rule, and hence the new policy was obviously not meant to accomplish that end. But this is no answer.
>
> A man who is turned down for a job does not care whether it was because the employer did not like his skin color or because, although the employer professed impartiality, procedures were used which had the effect of discriminating against the applicant's race. Likewise irrelevant to Title VII is the state of mind of an employer whose policy, in practice, effects discrimination. The law will not tolerate unnecessarily harsh treatment of Negroes even though an employer does not plan this result. The use of criteria that are not backed by valid and corrobrated business needs cannot be allowed, regardless of subjective intent.[16]

Stressing the necessity of job relatedness, the *Griggs* dissent stated the tests should appraise those necessary job skills which an employee would be expected to perform.[17] The dissent urged that the critical inquiry in testing was business necessity. "There can be no legitimate business purpose apart from business need; and where no business need is shown, claims to business purpose evaporate."[18]

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[15] The dissent found this statement "unsubstantiated". "The testimony does establish that the tests are the equivalent or a suitable substitute for a high school education, but there is an utter failure to establish that they sufficiently measure the capacity of the employee to perform any of the jobs in the inside departments." *Id.* at 1245.

[16] *Id.* at 1246. The dissent noted that Duke was inconsistent in the application of this requirement because it was not invoked in the promotion of those already situated in the inside departments. *Id.*

[17] *Id.* at 1240. The company did not conduct any studies to determine whether the challenged requirements measured an employee's ability to perform jobs in the inside departments. *Id.* at 1231.

[18] *Id.* at 1246.

In *Arrington v. Massachusetts Bay Transp. Authority,*[19] plaintiffs charged that defendant's practice of offering employment to individuals according to test performance violated both the Civil Rights Acts of 1870 and 1872.[20] In *Arrington,* the court held the practice of offering employment in order of performance on general aptitude tests was discriminatory in the absence of evidence demonstrating the relevance of these tests to job tasks. The court stated:

> [u]sing an aptitude test to determine eligibility for employment or the order of hiring is certainly justified if there is a relationship between the aptitude tests and the demands of the work to be done. . . . However, if there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the tests in determining who or when one gets hired makes little business sense.[21]

But a hiring practice related to ability to perform is not itself unfair even if it means disadvantaged minorities are affected adversely.[22]

In rejecting the EEOC job relatedness guideline,[23] the majority cited *International Chem. Workers v. Planters Mfg Co.,*[24] which held EEOC interpretations are not conclusive on the courts. From this premise the court reasoned the rejection of the EEOC interpretations was necessitated when those guidelines were contrary to "compelling legislative history." "We cannot agree with plaintiff's contention that such an interpretation by EEOC should be upheld where, as here, it is clearly contrary to compelling legislative history and, as will be shown, the legislative history of § 703(h) will not support the view that a 'professionally developed ability test *must* be job related'."[25] With this language, the *Griggs* majority may have enun-

[19] 306 F. Supp. 1355 (D. Mass. 1969). *See also* Penn v. Stump, 308 F. Supp. 1238 (N.D. Cal. 1970).

[20] Civil Rights Act of 1870, 42 U.S.C. § 1981 (1870); Civil Rights Act of 1872, 42 U.S.C. § 1983 (1872).

[21] Arrington v. Massachusetts, Bay Transp. Authority, 306 F. Supp. 1355, 1358 (D. Mass. 1969).

[22] United States v. H. K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968).

[23] *Contra,* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968). In these cases the courts have adopted EEOC guidelines. The Guidelines referred to by the court in *Griggs* can be found in CCH Empl. Prac. Guide, para. 16, 904 at 7319. The Guidelines were revised in July, 1970.

[24] 259 F. Supp. 365, 366 (N.D. Miss. 1966).

[25] Griggs v. Duke Power Co., 420 F.2d 1225, 1234 (4th Cir. 1970).

ciated a new test for determining the acceptance of administrative agency interpretations. Yet, if administrative interpretations must be "clearly contrary to compelling legislative history" before adoption may be denied, then perhaps this test was not satisfied since the decision itself formulated two reasonable alternative constructions of section 703(h).

Generally, administrative agency interpretations are not binding on courts; nevertheless, they are accorded great weight.[26] The United States Supreme Court stated in *Udall v. Tallman*[27] that it shows great deference to the interpretation given the statute by the agency charged with its administration.[28] In *Udall* the Supreme Court stated that when the construction of an administrative regulation is involved rather than a statute, deference is even more appropriate.[29] The court in *Griggs* was concerned not with an administrative interpretation of a regulation but with the agency's interpretation of the statute. In *Griggs* the dissent urged it was settled doctrine that the commission's interpretation be accepted.[30]

The dissent in *Griggs* also felt the majority opinion placed the Fourth Circuit in conflict with the Fifth Circuit.[31] In a Fifth Circuit case, *Local 189, United Papermak. & Paperwork. v. United States,*[32] plaintiffs brought suit against employer and union to set aside job-seniority in any form as discriminatory. The court held the present seniority system should be replaced by a system whereby no em-

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[26] *See, e.g.,* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969); Cox v. United States Gypsum Co., 284 F. Supp. 74, 78 (N.D. Inc. 1968).

[27] 380 U.S. 1 (1965).

[28] *Id.* at 16. *See also,* Unemployment Comm'n v. Aragon, 329 U.S. 143, 153 (1946); Universal Battery Co. v. United States, 281 U.S. 580, 583 (1930).

[29] 380 U.S. 1, 16 (1965).

[30] 420 F.2d at 1240-41. The dissent cited the following to support this position:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' Unemployment Compensation Commission of Territory of Alaska v. Aragon, 329 U.S. 143, 153 (1946) . . . . Particularly is this respect 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 parts work efficiently and smoothly while they are yet untried and new'. Power Reactor Development Co. v. Electricians, 367 U.S. 396, 408 (1961).

[31] 420 F.2d at 1237.

[32] 416 F.2d 980 (5th Cir. 1969).

ployee could have a right to a job he could not perform properly.[33]

The primary consideration in *Griggs* was "the use of allegedly objective employment criteria resulting in denial to Negroes of jobs for which they are potentially qualified."[34]

"The depressed employment position of black Americans is the master problem in the battle against discrimination and poverty."[35] A practice of testing in which blacks demonstrate a constant deficiency in performance invites the court to scrutinize the effects and purposes of the tests.[36] The *Griggs* decision reflects a reasonable difference of opinion regarding the margin of business purpose necessary to sanction the use of such tests.[37]

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[33] *Id.* at 981.

[34] Griggs v. Duke Power Co., 420 F.2d 1225, 1237 (4th Cir. 1970) (dissenting opinion).

[35] 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).

Commenting on the *Griggs* decision at the federal district court level [292 F. Supp. 243 (M.D. N.C. 1968)], Cooper and Sobol stated that the EEOC interpretation of the Act is entitled to great weight. "It was arrived at after consultation with a panel of testing experts and an evaluation of the implications of alternative interpretations. These are precisely the considerations which justify judicial deference to the interpretations of an administrative agency." *Id.* at 1654.

See generally Gould, *Seniority and the Black Worker: Reflections on Quarles and its Implications,* 47 TEXAS L. REV. 1039 (1969); Blumorsen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope,* 23 RUT. L. REV. 268 (1969); Kovarsky, *Some Social and Legal Aspects of Testing Under the Civil Rights Act,* 15 How. L.J. 227 (1969); Jenkins, *A Study of Federal Efforts to End Job Bias: A History, A Status Report, and A Prognosis,* 14 How. L.J. 259 (1968); Gould, *Employment Security, Seniority and Race: The Role of the Title VII of the Civil Rights Act of 1964* 13, How. L.J. 1 (1967); Note, *Civil Rights Racially Discriminatory Employment Practices Under Title VII,* 46 N.C. L. REV. 891 (1968); Note, *Title VII, Seniority Discrimination and the Incumbent Negro,* 80 HARV. L. REV. 1260 (1967).

[36] "The reason for this deficiency in performance has not been related to any lack of innate intelligence but rather primarily to the socio-economic realities of a history of economic, cultural, and educational deprivation to which the black race has been subject." Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355, 1358 (D. Mass. 1969).

[37] Subsequent to the writing of this comment, the United States Supreme Court rejected the "genuine business purpose" standard of the *Griggs* majority and held:

> (f)rom the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of 703(h) to require that employment tests be job-related comports with congressional intent . . . . What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance . . . . What Congress has commanded is that any tests used must measure the person for the job and not in the abstract.

Griggs v. Duke Power Co., 39 U.S.L.W. 4317, 4321, (U.S. March 8, 1971).