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Civil Rights Act and Professionally Developed Ability Tests

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RECENT DECISIONS

Civil Rights Act and Professionally Developed Ability Tests—*Griggs v. Duke Power Co.*

With the shift in America from a mercantile to a highly industrialized society,¹ the right to use his labor and skill has become a person's most valuable asset.² The common law did little to preserve this asset, since an employer had the absolute right to discharge his employee at will.³ While the fifth and fourteenth amendments to the Constitution provided some relief in federal⁴ and state⁵ discriminatory practices, they offered little hope for those deprived of employment opportunities by the discriminatory acts of private individuals.⁶ Nor did federal legislation, such as the National Labor Relations Act,⁷ the Railway Labor

¹ Affeldt, *Title VII in the Federal Courts—Private or Public Law*, 14 VILL. L. REV. 664 (1969) [hereinafter cited as Affeldt]. It concludes that Title VII recognizes this change from a mercantile society based upon real property and contract to an industrial society based upon intangible property and status. *Id.* at 665.

² Affeldt, *Group Sanctions and Sections 8(b)(7) and 8(b)(4): An Integrated Approach to Labor Law*, 54 GEO. L.J. 55, 70 (1965):

For the vast majority of men their most valuable property is not their TV set, their home, or their car, but their job, their profession, their franchise, their contracts. The right to use their labor and skill has become their most valuable property right.

See also F. TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951).

³ Affeldt, *supra* note 1, at 667. Since employers were considered to be private individuals, they were free to discriminate against, and generally deal with, workers as they chose. See *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

⁴ It is the declared policy of the federal government that equal opportunity be afforded to all qualified persons for employment in the federal government. This policy excludes discrimination against any employee in the federal government because of race, religion, or national origin. See Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963 compilation), *superseded by* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 compilation).

⁵ The equal protection clause of the fourteenth amendment makes unlawful a distinction on grounds of race or color in awarding state employment. See *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945); *Reynolds v. Board of Public Instruction*, 148 F.2d 754 (5th Cir.), *cert. denied*, 326 U.S. 746 (1945).

⁶ The fourteenth amendment places restraint only upon the actions of the state and does not affect the rights of one citizen as against another. See, e.g., *Hodges v. United States*, 203 U.S. 1 (1906); *Civil Rights Cases*, 109 U.S. 3 (1883).

⁷ 29 U.S.C. §§ 151-68 (1964). The only type of discharge prohibited by the NLRA

Act,⁸ or the Labor Management Relations Act,⁹ do much to protect job status. Even the Civil Rights Acts of 1870 and 1871 fell far short of remedying discriminatory practices by private employers.¹⁰

Beginning with New York in 1945, the states took the initiative in enacting fair employment laws aimed at discrimination in private employment.¹¹ Congress thereafter sought to provide a more comprehensive one actuated by anti-union reasons. Since the burden of proof is on the NLRB, little protection is given to employees because of the difficulty of demonstrating that the employer's real intent is to discharge because of union reasons. See generally Christensen and Svano, *Motive and Intent in the Commission of the Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); Comment, *Discrimination and the NLRB: The Scope of Board Power under Sections 8(a)(3) and 8(b)(2)*, 32 U. CHI. L. REV. 124 (1964).

⁸ 45 U.S.C. §§ 151-88 (1964). Neither the Railway Labor Act nor the Labor Management Relations Act (Taft-Hartley Act) expressly prohibit employer discrimination based on race or color. 2 T. EMERSON AND D. HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1440 (2d ed. 1958).

⁹ 29 U.S.C. §§ 141-87 (1964). Under the Labor Management Relations Act, it is an unfair labor practice for an employer to attempt to arouse racial discrimination to discourage union membership. See *Bibb Mfg. Co.*, 82 N.L.R.B. 338 (1949); *Rapid Roller Co.*, 33 N.L.R.B. 557 (1941); *Planters Mfg. Co.*, 10 N.L.R.B. 735 (1938). But cf. *Sharney Hosiery Mills, Inc.*, 120 N.L.R.B. No. 102 (1958).

¹⁰ These statutes confer equal rights upon all persons within the jurisdiction of the United States. See 42 U.S.C. § 1981 (1964) and 42 U.S.C. § 1982 (1964). However, these provisions are little used because of the restrictive interpretation placed upon them by the Supreme Court. See *Civil Rights Cases*, 109 U.S. 3, 27 (1883). These provisions stood the test of constitutionality because of the references to state action in two statutes which create criminal and civil liability for the deprivation of federal rights under color of state law. See 18 U.S.C. § 242 (1964) and 42 U.S.C. § 1983 (1964). These latter provisions are not, however, applicable to private individuals. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Nevertheless, a private individual may be subject to criminal and civil liability for conspiring to deprive or interfere with a citizen's civil rights. See 18 U.S.C. § 241 (1964) and 42 U.S.C. § 1985(3) (1964). In the former, however, because only state and not federal rights are involved, it has been held that one's right to perform a contract of employment without interference by a private person is not protected. See *Hodges v. United States*, 203 U.S. 1 (1906). The latter statute has been held to apply only where the object of the conspiracy is to deprive the victim of equality under the law. See, e.g., *Spampinato v. M. Breger & Co.*, 270 F.2d 46 (2d Cir. 1959), cert. denied, 361 U.S. 944 (1960).

¹¹ For a discussion of state fair employment laws, see Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729, 775 (1965); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 720 (1968); Annot., 44 A.L.R.2d 1138 (1955). For a critical analysis of state fair employment laws, see Bonfield, *An Institutional Analysis of the Agencies Administering Fair Employment Practices Law*, 42 N.Y.U.L. REV. 823 (1967); Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22 (1964).

hensive attack on job discrimination by the enactment of Title VII of the Civil Rights Act of 1964.¹² To this end an Equal Employment Opportunity Commission (EEOC) was created¹³ to investigate charges of discrimination in employment and to seek conciliation and abandonment of the discriminatory practices by negotiation with the enterprise concerned.¹⁴ Should this fail, the aggrieved party could seek injunctive relief in the courts.¹⁵

As with all statutes, the success or failure of Title VII will not depend upon its language, but rather upon the interpretation of that language by the federal courts.¹⁶ A crucial test arose when the Fourth Circuit undertook in *Griggs v. Duke Power Co.*¹⁷ to interpret the "testing" provision of Section 703(h) of Title VII.¹⁸ Several Negro employees brought a class action challenging the validity of the company's promotion and transfer system¹⁹ which utilized both general intelligence and mechanical ability tests.²⁰ It was found that six of the

¹² 42 U.S.C. § 2000e-2(a) (1964):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse or hire or to discharge any individual, or to otherwise 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

(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.

¹³ 42 U.S.C. § 2000e-4 (1964).

¹⁴ 42 U.S.C. § 2000e-5(a) (1964).

¹⁵ 42 U.S.C. § 2000e-5(e) (1964).

¹⁶ Affeldt, *supra* note 1, at 665.

¹⁷ 420 F.2d 1225 (4th Cir. 1970).

¹⁸ 42 U.S.C. § 2000e-2(h) (1964).

. . . nor shall it be an unlawful employment practice for an employer to give and 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.

¹⁹ Duke's work force is divided into five departments with job classification within each, constituting lines of progression for advancement purposes, i.e., when a vacancy occurs, the senior man directly below is promoted if qualified for the job. In 1955 Duke initiated a policy of requiring a high school education or its equivalent for employment, except in the Labor and Coal Handling Departments, the lowest on the scale. In 1965 Duke amended its policy to allow promotion from the Labor and Coal Handling Departments for those employees who could pass the Wonderlic general intelligence test and the Bennett Mechanical AA general mechanical test with scores equivalent to those achieved by an average high school graduate.

²⁰ Because Negroes had been hired into only the Labor Department prior to the

Negro employees, those hired prior to the institution of the company's test requirement, had become isolated in the lowest classed department by previous discriminatory practices.²¹ As to these six, the test requirements were deemed discriminatory.²² However, as to those hired after the advent of the test requirement, the tests were held to be valid.²³ The court stressed that the tests served a genuine business purpose²⁴ and that there was no intent to discriminate,²⁵ thus fulfilling the mandate of the statute, and that there was no necessity that the tests be job-related.²⁶

Of all the types of discrimination which the Civil Rights Act prohibits, the most difficult to detect and enforce is discrimination in employment.²⁷ It is relatively easy for an employer or labor union under a guise of neutrality to set up artificial devices within which discrimination can flourish.²⁸ To remedy this and to prevent a freezing of

Civil Rights Act, the plaintiffs contended that the tests continued the effects of Duke's past racial discrimination. See generally Cooper and Sobel, *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 and Sobel].

²¹ The court found, on the other hand, that "many white employees who likewise did not have a high school education or its equivalent had already been hired into the better departments and were free to remain there and be promoted into better, higher paying positions." *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1230-31 (4th Cir. 1970).

²² *Id.* at 1231.

²³ *Id.* at 1232.

²⁴ In a dissent by Judge Sobeloff this business purpose was disclaimed due to the imbalance in the application of the standards. The company claimed that because of increasing complexity in the business, employees, in the advanced departments were sometimes unable to advance because of low intelligence levels. Duke claimed to have adopted its testing requirements to ameliorate this situation and to upgrade its work force. However, the restriction was only placed on transfer from the two lower departments. In other words, one without a high school education who was already in one of the higher departments could transfer into another department without any restrictions. *Id.* at 1237.

²⁵ *But see* Parham v. Southwestern Bell Tel. Co., 60 CCH Lab. Cas. ¶9297, at 6742 (E.D. Ark. July 8, 1969). The court states, ". . . an employer cannot discharge his statutory obligation by announcing non-discriminatory policies or by disclaiming intent to discriminate." *Id.* at 6744.

²⁶ This position put the Fourth Circuit into conflict with the Fifth Circuit, the latter declaring that job-relatedness was essential. See *Papermakers Local 189 v. United States*, 416 F.2d 980, 994 (5th Cir. 1969) (dictum).

²⁷ Affeldt, *supra* note 1, at 665.

²⁸ See generally *Papermakers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969); *Dobbins v. Electrical Workers Local 212*, 292 F.Supp. 413 (S.D. Ohio 1968).

Negroes in prior discriminatory patterns,²⁹ the courts have held that the present and continuing effects of past discrimination fall within the Act's prohibition.³⁰ Such holdings do not alter the prospective character of the Civil Rights Act,³¹ because it is not the past discrimination itself which is attacked but the on-going effects of it.³² Also, freezing in prior discriminatory patterns has been struck down by the courts in the areas of education³³ and voting rights³⁴ and recently in employment practices, such as seniority systems,³⁵ employee referral systems,³⁶ and union membership requirements,³⁷ where such practices have perpetuated the effects of past discrimination.

Seeking to prevent the perpetuation of past discrimination in edu-

²⁹ See *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968). Judge Butzner stated, "It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Id.* at 516.

³⁰ See *Papermakers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969); *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969); *Asbestos Workers Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States v. Hayes Int'l Corp.*, 38 U.S.L.W. 2149 (5th Cir. Sept. 19, 1969); *United States v. Electrical Workers Local 38*, 59 CCH Lab. Cas. ¶9226, at 6916 (N.D. Ohio March 13, 1969); *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968); *Dobbins v. Electrical Workers Local 212*, 282 F. Supp. 413 (S.D. Ohio 1968); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

³¹ See, e.g., *Asbestos Workers Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Dobbins v. Electrical Workers Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968).

³² See, e.g., *Papermakers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969); *Asbestos Workers Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

³³ See, e.g., *Goss v. Board of Education*, 373 U.S. 683 (1963). The Court struck down a transfer provision which would allow students to continue the segregation in schools which had previously been prohibited. See *Brown v. Board of Education*, 349 U.S. 294 (1955).

³⁴ See, e.g., *Louisiana v. United States*, 380 U.S. 145 (1965). The Court states, "... the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 154.

³⁵ See *Papermakers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969); *United States v. Electrical Workers Local 38*, 59 CCH Lab. Cas. ¶9226, at 6916 (N.D. Ohio March 13, 1969); *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

³⁶ See *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969); *Dobbins v. Electrical Workers Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968).

³⁷ See *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969); *Asbestos Workers Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969).

ation³⁸ and cultural opportunities,³⁹ the EEOC declared that tests used to determine employment or promotion must be job-related to be valid.⁴⁰ A similar position was taken by the Office of Federal Contract Compliance (OFCC).⁴¹ While such administrative interpretations are not binding on the courts,⁴² it is generally held that an interpretation given by the agency established to administer a statute is entitled to great weight in a court's decision.⁴³ The test is one of reasonableness of the interpretation,⁴⁴ and where such requirement is met, the con-

³⁸ See NATIONAL ADVISORY COMM'N ON DISORDERS, REPORT, at 203-77 (Bantam ed. 1968); U.S. DEP'T OF LABOR, THE NEGROES IN THE UNITED STATES: THEIR ECONOMIC AND SOCIAL SITUATION 43-45 (1966).

³⁹ See NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT, at 203-77 (Bantam ed. 1968); U.S. DEP'T OF LABOR, THE NEGROES IN THE UNITED STATES: THEIR ECONOMIC AND SOCIAL SITUATION 43-45 (1966). See also Cooper and Sobel, *supra* note 20, at 1600, where it points out that any employment decisions affected by these patterns will have an adverse impact on job opportunities for blacks.

⁴⁰ See EEOC, *Guidelines on Employment Testing Procedures*, CCH EMPL. PRAC. GUIDE ¶ 16,904, at 7319 (Sept. 21, 1966):

The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skill 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.

⁴¹ See 33 Fed. Reg. 14392 (1968) which implements Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 compilation). It requires each contractor regularly using tests "to have available for inspection, within a reasonable time, evidence that the tests are valid for their intended purposes."

⁴² See *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Great Northern Ry. v. United States*, 315 U.S. 262, 276 (1942).

⁴³ This principle has been applied to a variety of administrative interpretations. See *Leary v. United States*, 395 U.S. 6, 25 (1969) (IRS); *Thorpe v. Housing Authority*, 393 U.S. 268, 276 (1969); *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Dev. Co. v. International Bhd. of Elec. Workers*, 367 U.S. 396, 408 (1961); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (OPA); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Billings v. Truesdell*, 321 U.S. 542, 552-53 (1944) (Selective Serv. Bd.); *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) (ICC); *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 315 (1933) (Tariff Comm'n); *Kern River Co. v. United States*, 257 U.S. 147 (1921) (Dep't of Interior); *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921) (Land Dep't); *Grand Trunk W. Ry. v. United States*, 252 U.S. 112 (1920) (Postmaster Gen.).

⁴⁴ See *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S.

struction of the statute will be upheld even though the court might have reached a different conclusion if the question had first arisen in a judicial proceeding.⁴⁵ Several courts have declared that an EEOC interpretation of the Civil Rights Act is entitled to similar consideration.⁴⁶

The EEOC has utilized its interpretation in several instances as a guideline for determining whether a violation of Title VII has occurred.⁴⁷ There is a growing trend in the federal courts to adopt the EEOC's position on job-relatedness.⁴⁸

The EEOC's interpretation is reasonable and should have been followed by the Fourth Circuit. It is well established by statistical data

261, 272 (1968); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931); *Universal Battery Co. v. United States*, 281 U.S. 580 (1930); *Brewster v. Gage*, 280 U.S. 327, 336 (1930); *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921); *Manufacturers Ry. v. United States*, 246 U.S. 457, 481 (1918); *Pennsylvania Co. v. United States*, 236 U.S. 351 (1915).

⁴⁵ See *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *NLRB v. Nevada Consol. Copper Corp.*, 316 U.S. 105 (1942); *Gray v. Powell*, 314 U.S. 402, 412 (1941); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Swayne v. Hoyt*, *LTD v. United States*, 300 U.S. 297, 304 (1937).

⁴⁶ See *Georgia Power Co. v. EEOC*, 412 F.2d 462 (5th Cir. 1969); *Philips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969); *Miller v. International Paper Co.*, 408 F.2d 283, 287 n.18 (5th Cir. 1969); *Weeks v. Southern Bell Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Bowaters S. Paper Corp. v. EEOC*, 304 F. Supp. 33, 40 (E.D. Tenn. 1969); *Cox v. United States Gypsum Co.*, 284 F. Supp. 74 (N.D. Ind. 1968); *International Chem. Workers Union v. Planters Mfg. Co.*, 259 F. Supp. 365 (ND. Miss. 1966).

⁴⁷ See Decision of EEOC, CCH EMPL. PRAC. GUIDE ¶ 6112, at 4203 (Jan. 29, 1970); Decision of EEOC, CCH EMPL. PRAC. GUIDE ¶ 8088, at 6144 (June 30, 1969); Decision of EEOC, CCH EMPL. PRAC. GUIDE ¶ 8516, at 6378 (June 18, 1969); Decision of EEOC, cited in CCH EMPL. PRAC. GUIDE ¶ 1209.20, at 613 (Dec. 6, 1966); Decision of EEOC, cited in CCH EMPL. PRAC. GUIDE ¶ 1209.25, at 613 (Dec. 2, 1966).

⁴⁸ See *Papermakers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969); *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969); *Penn v. Stumpf*, 62 CCH Cas. ¶ 9404, at 6587 (N.D. Calif. Feb. 3, 1970); *Arrington v. Massachusetts Bay Transp. Authority*, 61 CCH Lab. Cas. ¶ 9375, at 6995-10 (D. Mass. Dec. 22, 1969); *Parham v. Southwestern Bell Tel. Co.*, 60 CCH Lab. Cas. ¶ 9297, at 6742 (E.D. Ark. July 8, 1969); *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968); *Dobbins v. Electrical Workers Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968). The court in *Griggs* recognized the last two cases but only distinguished the *Dobbins* case. Furthermore, the basis for the distinction was not one which has been considered controlling in cases dealing with the testing issue. No reference was made to the other cases which have adopted the EEOC position. See *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970).

that Negroes do significantly poorer on standardized intelligence and ability tests,⁴⁹ due, for the most part, to the patterns of racial discrimination in education and cultural opportunities existing prior to the Civil Rights Act.⁵⁰ These differences should not be utilized as a test for employment when they are irrelevant to the issue of adequate job performance.⁵¹ This is not to suggest that employers are required to hire Negro applicants who are incapable of doing the job.⁵² If a test measures qualifications essential for the job, the fact that it tends to exclude more Negroes than whites does not make it discriminatory.⁵³

The Fourth Circuit's finding that tests are valid if they serve a genuine business purpose is without precedent,⁵⁴ and the court's sole

⁴⁹ See Cooper and Sobel, *supra* note 20, at 1598; Kovarsky, *Testing and the Civil Rights Act*, 15 How. L.J. 227 (1969); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 701 (1968). In regards to the Wonderlic and Bennett tests used by Duke Power Co., it has been found that 58% of whites could pass the tests, as compared with only 6% of the blacks. See Decision of EEOC, cited in CCH EMPL. PRAC. GUIDE ¶ 1209.25, at 613 (Dec. 2, 1966).

⁵⁰ "The general patterns of racial discrimination, lesser educational and cultural opportunities for black people, and cultural separatism that have marked our society for generations have impeded blacks in attaining the background necessary for success on existing standardized tests." Cooper and Sobel, *supra* note 20, at 1640. It is generally true that standardized ability tests measure the accumulation of acquired knowledge to predict future ability. See *Hobson v. Hansen*, 269 F. Supp. 401, 481 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

⁵¹ See generally *Parham v. Southwestern Bell Tel. Co.*, 60 CCH Lab. Cas. ¶ 9297, at 6742 (E.D. Ark. July 8, 1969). The court argues, ". . . an employer cannot deliberately set standards which, for whatever cause, Negroes as a class cannot meet if such standards have no rational relationship to a legitimate business interest of the employer." *Id.* at 6744.

⁵² On the contrary, the Act may even prohibit "discrimination in reverse." The Civil Rights Act does not confer any preferential rights to be employed or retained in employment on Negroes. Nor does it impose any obligation on the employer to hire unqualified or unneeded employees. See *Parham v. Southwestern Bell Tel. Co.*, 60 CCH Lab. Cas. 9297, at 6742, 6744 (E.D. Ark. July 8, 1969).

⁵³ See, e.g., *Arrington v. Massachusetts Bay Transp. Authority*, 61 CCH Lab. Cas. ¶ 9375, at 6995-10, 6995-12 (D. Mass. Dec. 22, 1969), *Parham v. Southwestern Bell Tel. Co.*, 60 CCH Lab. Cas. ¶ 9297, at 6742 (E.D. Ark. July 8, 1969).

⁵⁴ The court cited no authority for this principle, but rather lifted the term "genuine business needs" from the appellant's brief and formulated their rule. The pertinent portion is as follows:

An employer is, of course, permitted to set educational or test requirements that fulfill genuine business needs. For example, an employer may require a fair typing test of applicants for secretarial positions. It may well be that, because of long-standing inequality in educational and cultural opportunities available to Negroes, proportionately fewer Negro applicants than white can pass such a test. But where business needs can be shown, as it can where typing ability is necessary for performance as a secretary, the fact that the test tends to exclude

reason for refusing to follow the EEOC's position was a misinterpretation of the legislative history behind the "testing" provision of Section 703(h).⁵⁵ The EEOC has not only made a reasonable interpretation of the statute,⁵⁶ but it has also sought to aid employers in validating their

more Negroes than whites does not make it discriminatory. Griggs v. Duke Power Co., 420 F.2d at 1232.

The substance of the entire paragraph indicates support of the job-related requirement for testing, especially by the use of the example of a typing test. Thus, it is apparent that the term "business needs" was meant to incorporate this requirement. However, the emphasis placed by the court indicates that it either overlooked the qualification or it lifted the term out of context and disregarded the rest.

⁵⁵ The court in *Griggs* based its interpretations on remarks made by the sponsor of the amendment which in modified form became the testing provision of Section 703(h) and on an interpretative memorandum prepared by Senators Joseph Clark and Clifford Case.

Senator John Tower introduced his amendment because of concern over an FEPC case in Illinois which went to the extreme of suggesting that standardized tests on which whites perform better than Negroes could never be used. See *Myatt v. Motorola*, 110 CONG. REC. 5662-64 (1964). The original text of the amendment contained language that specifically indicated an intent by its sponsor that the tests were to be related to the particular job in order to be valid. See 110 CONG. REC. 13492 (1964).

The Clark-Case interpretative memorandum appears to fortify the court's conclusion in *Griggs*. It was stated:

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, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance. 110 CONG. REC. 7213 (1964).

However, read in the light of the *Motorola* decision the memorandum can be reasonably interpreted as saying that nothing prevents employers from requiring that applicants be fit for the job. In fact, Senator Case expressed the fear that the provision would be interpreted as the court in *Griggs* did. See 110 CONG. REC. 13504 (1964) (Remarks of Senator Case):

If this amendment were enacted, it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute.

Senators Hubert Humphrey and Case opposed the amendment as being redundant. Both Senators felt that a *Motorola* decision was prevented without the amendment, and accordingly the amendment was defeated. See 110 CONG. REC. 13503-05 (1964). Later, the provision in its present, modified form was offered with a tightening of language to remove the fears of misinterpretation. It was passed. See 110 CONG. REC. 13724 (1964). The job-relatedness feature of the original bill was never in dispute, and the modified version certainly does not embody a compromise on the point. See *Griggs v. Duke Power Co.*, 420 F.2d 1237, 1239 (4th Cir. 1970) (dissenting opinion).

⁵⁶ See *Griggs v. Duke Power Co.*, 420 F.2d 1237 (4th Cir. 1970) (dissenting opinion). Judge Sobeloff argues that just because a test is authored by a professional test

employment tests by issuing recommendations⁵⁷ based on studies by a team of highly qualified psychologists.⁵⁸ The Fourth Circuit's position is clearly out of line with the trend of the law on the issue of testing in employment and promotion.

R. W. D.

designer does not automatically merit the court's blessing. He uses the example that a professionally developed typing test could not be considered professionally developed to test teachers. Similarly, a college entrance examination would be grossly wide of the mark when used in hiring a machine operator. The EEOC's purpose is to end discrimination. The Fourth Circuit's ruling would allow such examples to become realities, and discrimination would flourish.

⁵⁷ See EEOC, *Guidelines on Employment Testing Procedures*, CCH EMPL. PRAC. GUIDE ¶ 16,904, at 7319 (Sept. 21, 1966). The Commission advocates the use of a total personnel assessment system which places emphasis on careful job analysis to define skill requirements, special efforts in recruiting minorities, screening and interviewing related to job requirements, tests selected on the basis of specific job-related criteria, comparison of test performance versus job performance, retesting, and validation of tests for minorities.

⁵⁸ See Report by Panel of Psychologists, CCH EMPL. PRAC. GUIDE ¶ 16,904, at 7319 (Sept. 21, 1966).