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Civil Rights- Arrest Record as Basis for Job Denial Held Discriminatory

Civil Rights—ARREST RECORD AS BASIS FOR JOB DENIAL HELD DISCRIMINATORY—*Gregory v. Litton Systems, Inc.*

Title VII of the Civil Rights Act of 1964[1] provides that it is an unlawful employment practice to discriminate in hiring because of an individual's race, color, religion, sex or national origin. The purpose of this title is to eliminate discrimination in the labor market so as to afford persons with the ability to perform work and earn their livings the opportunity to do so without penalty because of one of these factors.[2]

Title VII has received its most difficult test in cases where employers have refused jobs to applicants on the basis of clearly stated, apparently neutral,[3] policy requirements which are not manifestly predicated upon one of the five categories enumerated in the statute,[4] but which are dependent upon requirements which the applicant is presently unable to fulfill because of pre-Act discrimination.[5] In this type of civil rights action the definition of discrimination is especially crucial, yet the term is not defined anywhere in the Title.[6] Traditionally the definition has required

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[1] 42 U.S.C. § 2000e-2(a) (1964):

> 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 individual, 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.

[2] *See generally* U.S. CODE CONG. & ADMIN. NEWS 2355 (1964); Affeldt, *Title VII in the Federal Courts—Private or Public Law*, 14 VILL. L. REV. 664 (1969), which states:

> It [Title VII] is the most important title in the Act because by protecting job status it protects a basic value which is the key to all other political and civil rights.

Id.

[3] *See generally* 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 (1969) [hereinafter cited as Cooper and Sobol].

[4] 42 U.S.C. § 2000e-2(a) (1964).

[5] *See, e.g.*, Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *cert. granted*, 399 U.S. 926 (1970) *commented on in* 5 U. RICH. L. REV. 157 (1970). United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). *See also* 110 CONG. REC. 7212 (1964) (Clark-Case Interpretative Memorandum).

[6] 42 U.S.C. §§ 2000e-1 to -15 (1964).

an intention[7] to exclude persons from employment because of their race.[8]

One line of cases, however, has diluted the intention element where the present unequal impact on Negroes is a continuation of the employer's own past racially discriminatory practices. These courts have looked to the defendant's past conduct as evidence of present discrimination and have held that the employer has a duty to mitigate the present effects of his own acts.[9]

The District Court in *Gregory* v. *Litton Systems, Inc.*[10] took this proposition one step further by adopting a definition of discrimination which does not require proof of an intention to discriminate so long as a disproportionate effect upon Negroes is foreseeable.[11] In addition the court applied this definition to a situation wherein the plaintiff's present inability to fulfill the requirement was not a result or continuation of any prior discriminatory practice of the defendant.

The plaintiff, a Negro, applied to the defendant for employment as a sheet metal mechanic. The defendant offered him the job and he accepted. However, the defendant had a policy which required newly-hired employees to complete a "Preliminary Security Information"[12] sheet. If this

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[7] *See, e.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969); 110 CONG. REC. 14270 (1964) (remarks of Sen. Humphrey). *But see* Clark v. American Marine Corp., 304 F. Supp. 603, 607 (E.D. La. 1969); Affeldt, *Title VII in the Federal Courts—Private or Public Law*, 15 VILL. L. REV. 1, 2 (1969) [hereinafter cited as Affeldt].

[8] *See, e.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970) (religion); Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969), *cert. granted*, 397 U.S. 960 (1970) (sex); Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781 (E.D. La. 1967) (sex); M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 71 (1966). *See also* Note, *An Additional Job Qualification, Other Than One of the Categories in Title VII of the Civil Rights Act of* 1964, *Results in a Holding of Nondiscrimination on the Part of the Employer*, 7 HOUSTON L. REV. 494 (1970).

[9] *See, e.g.*, United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970); Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969). *See also* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

[10] 316 F. Supp. 401 (C.D. Cal. 1970).

[11] The court stated that if the discrimination were accidental or inadvertent, there would be no violation. *Id.* at 403.

However, since the discrimination must be because of race it is difficult to visualize how it could ever be accidental. *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1277 (1967).

[12] National security regulations were not involved so as to bring the case under 42 U.S.C. § 2000e-2(g) (1964).

sheet revealed that the employee had been arrested "a number of times,"[13] the offer of employment would be withdrawn. The plaintiff had a record of fourteen arrests for other than minor traffic violations, but had no convictions.[14] When the defendant learned this, it withdrew the offer of employment pursuant to its policy. The policy was enforced without reference to race, and the offer was withdrawn solely because of the arrest record.[15]

Despite the equal application and the neutral appearance of the defendant's policy, the court held that it violated Title VII. The court reasoned that since Negroes are arrested more frequently than whites,[16] the policy had the foreseeable effect of denying jobs to disproportionate numbers of Negroes.[17] The court found, as a matter of fact, that a record of arrests without convictions is irrelevant[18] to job efficiency and that therefore, it did

[13] The court noted, but made no point of the fact that "a number of times" had not been defined by the defendant. The court also noted that several hundred persons with arrest records were employed by the defendant. These people, however, did not fall within the category of having been arrested a "number of times." No breakdown was made by the court of the proportional make-up of the defendant's business, nor was there evidence or indication that whites with more arrests were hired. Such data has been used to evidence the existence of discriminatory patterns. *See, e.g.,* United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); United States v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1969); Parham v. Southwestern Bell Tel. Co., 3 EPD, *cited in* CCH EMPL. PRAC. GUIDE ¶ 8021, at 6046 (E.D. Ark. 1970); Decision of EEOC, *cited in* CCH EMPL. PRAC. GUIDE ¶ 6102, at 4151 (Jan. 19, 1970).

[14] Thirteen of the arrests occurred prior to 1959. The court did not state the nature of the charges upon which the plaintiff was arrested.

[15] *But see* 42 U.S.C. § 2000e-5(g) (1964), which provides, in part:

> No order of the court shall require the admission or reinstatement of any individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged *for any reason other than discrimination on account of race.* . . . (emphasis added). *See also* 42 U.S.C. §§ 2000e-2(a), -2(h) (1964).

[16] The court found that although Negroes comprise only 11% of the total population they suffer 27% of the total arrests and 44% of the "suspicion arrests." The court did not elaborate on the causes of these disproportionate numbers of arrests. *See generally* REPORT OF THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 74 (1967); Cooper and Sobol, *supra* note 3, at 1600.

[17] There is a comparable approach in state action cases. *See, e.g.,* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Brown v. Post, 279 F. Supp. 60 (W.D. La. 1968). *See also* Gaston County v. United States, 395 U.S. 285 (1969); Louisiana v. United States, 380 U.S. 145 (1965).

[18] *See* Jenkins, *Study of Federal Effort to End Job Bias: A History, a Status Report, and A Prognosis,* 14 How. L.J. 259, 294 (1968). The author comments on

not justify the disproportionate exclusion of Negroes.[19] This follows the test announced by the Fifth Circuit[20] which requires a showing that the policy is compelled by safety or efficiency considerations. No discriminatory motive[21] on the part of the employer was discussed. In fact, the court held that good faith in formulating the policy was no defense.[22]

The cases cited by the court in *Gregory* support the proposition that the present discriminatory effects of past discrimination by the defendant constitute a present violation of Title VII.[23] They are distinguishable, however, from *Gregory* in that the disproportionate effects in each was a perpetuation of the employer's own past discriminatory acts.[24] The test formu-

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some of the situations where arrests may be relevant as a factor in the decisional process.

[19] The court enjoined the defendant from obtaining or using information concerning arrest without conviction. Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 404 (C. D. Cal. 1970).

[20] Once a case for discrimination has been shown, if the policy does not have a legitimate business necessity which overrides the discrimination, a remedy is afforded. *See, e.g.*, Culpeper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970); 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). *But see* Griggs v. Duke Power Co., 420 F.2d 1225, 1235 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970) (genuine business purpose test).

[21] *See, e.g.*, Broussard v. Schlumberger Well Services, 315 F. Supp. 506 (S.D. Tex. 1970); Marquez v. Omaha Dist. Sales Office, 313 F. Supp. 1404 (D. Neb. 1970). *See also* Decision of EEOC, *cited in* CCH EMPL. PRAC. GUIDE ¶ 8516, at 6378 (June 18, 1969) (reason for refusal so groundless that it warranted the inference that is was racially motivated).

[22] *See, e.g.*, United States v. Electrical Workers Local 38, 428 F.2d 144 (6th Cir. 1970); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969). *But cf.* Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969). *See also* 42 U.S.C. § 2000e-12(b) (1) (1964) (good faith reliance on a written opinion of the EEOC is a valid defense).

[23] *See* United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969). *See also* Gaston County v. United States, 395 U.S. 285 (1969) (past discrimination in voting qualification tests).

[24] *See* United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969). The court held that the defendant's present policies had the effect of perpetuating his past practices and that he had a duty to mitigate these present effects. From this past discrimination, the Court inferred present discrimination. *Id.* at 127.

The decision in Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969) is also based upon the defendant's past record. Crown's plant based promotions on a seniority system which had been operated in a discriminatory manner prior to 1964. After 1964 the system was operated in a nondiscriminatory manner, but promotions were still being based in part upon seniority which Negroes had been prevented from obtaining under the old system. The court stated that even if

lated in *Gregory* requires that the plaintiff merely show a disproportionate exclusion of Negroes caused by any factor unequal between the races.[25] This test looks to effect rather than reason for the effect.[26]

Though the disproportionate exclusion of minority groups may be evidence of an intention to discriminate against them,[27] it should not be the sole test of a Title VII violation.[28] The court in *Gregory* inferred an intention to discriminate from the fact that the effect of Litton's policy on Negroes was foreseeable.[29] Certainly the imposition of the hiring policy was intentional and certainly the defendant intended to exclude those persons who had "a number of arrests." However, it does not necessarily follow that the defendant intended to exclude persons because of their race merely because a proportionately higher number of Negroes were excluded by the policy. Where the exclusion is a continuation of a prior policy of discrimination by the defendant it can be inferred that the discrimination

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the defendant did not now intend to discriminate, the earlier system of discrimination was designed for that purpose and Crown could not continue to perpetuate its effects. *Id.* at 986.

The court recognized that the employer has a need for qualified personnel, but held:

> When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, nonracial business purpose. *Id.* at 989.

[25] *See* Affeldt, *supra* note 7, at 3. *But see* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *rev'g*, 300 F. Supp. 709 (W.D. Mich. 1969). The District Court found that the defendant's policy, though not specifically based upon religion, had the effect of penalizing the plaintiff. The Sixth Circuit reversed on several grounds, one being that the plaintiff had not shown by a preponderance of the evidence that he was discharged because of his religion. *See also* Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276 (E.D. La. 1969); Decision of EEOC, *cited in* CCH EMPL. PRAC. GUIDE ¶ 6164, at 4275 (Sept. 28, 1970).

[26] *See* Cooper and Sobol, *supra* note 3, at 1671. *But see* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT, 71 (1966).

[27] *See, e.g.*, Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 127 (8th Cir. 1969); Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D.N.C. 1969). *See also* 110 CONG. REC. 14270 (1964) (remarks of Sen Humphrey).

[28] *See, e.g.*, U.S. CODE CONG. & ADMIN. NEWS 2516 (1964). *See also* 42 U.S.C. § 2000e-2(j) (1964).

[29] *See* Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969). The court stated:

> The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them. *Id.* at 997.

This must be viewed in light of the court's earlier statement that the defendant had a duty to undo the present effects of his past discrimination. *Id.* at 988.

has not ceased, and the defendant should not be able to escape liability solely because his present policy appears neutral. However, the decision in *Gregory* disregards the employer's state of mind.

Proponents of the effect test look to the language of the statute which states that there is a violation if the employer does any act which would ". . . in any way . . . tend to deprive . . . or otherwise adversely affect . . ." a person's employment status or opportunity.[30] They conclude that this language manifests an intention to define discrimination in its broadest terms.[31] It is submitted that this language, however, describes how much adversity will suffice as an infringement upon the protected rights. It does not alter the requirement that the tendency to deprive or adversely affect be on account of race.[32]

Of course, too strict an adherence to the language "because of race" would render the act ineffectual, and such a strict application is not consonant with Congressional intent.[33] An amendment which would have restricted violations to incidents where the applicant was denied the job solely because of race was defeated by Congress.[34] However, this does not manifest an intention to disregard the requirement that race be a reason for the adverse impact, since the statute unequivocally requires it.[35]

Such apparently neutral requirements as college degrees,[36] high school diplomas,[37] experience,[38] and seniority[39] have been found to discriminate because of race. But in each case there was evidence of prior discrimination or other factors from which to infer a discriminatory motive.

The effect test coupled with the business necessity test places too much weight upon proportional differences. Congress did not intend such an emphasis upon statistics because of their propensity toward quotas.[40] This

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[30] 42 U.S.C. § 2000e-2(a) (2) (1964).

[31] *See* Affeldt, *supra* note 7, at 9; Cooper and Sobol, *supra* note 3, at 1612.

[32] *See* 42 U.S.C. § 2000e-2(a) (1964).

[33] *See* 110 CONG. REC. 13837 (1964) (remarks of Sen. Case).

[34] *See* 110 CONG. REC. 13838 (1964).

[35] *See* 42 U.S.C. § 2000e-2(a), -5(g), -6 (1964).

[36] *See, e.g.*, Decision of EEOC, *cited in* CCH EMPL. PRAC. GUIDE ¶ 6102, at 4151 (Jan. 19, 1970).

[37] *See, e.g.*, Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir.), *cert. granted*, 399 U.S. 926 (1970), *commented on in* 5 U. RICH. L. REV. 157 (1970).

[38] *See, e.g.*, United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

[39] *See, e.g.*, Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[40] *See* U.S. CODE CONG. & ADMIN. NEWS 2516 (1964).

approach also restricts the policies over which the employer has control to those which he can prove in courts are necessary to his business.[41] This construction goes beyond the scope of the title in that it imposes a duty on the employer not to disproportionately exclude Negroes, whereas the clear language of the Act only imposes a duty not to intentionally exclude persons because of their race.[42]

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[41] *See* Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 34 U. CHI. L. REV. 817, 834 (1967). *See also* 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey).

[42] *See, e.g.*, 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey).