IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1405

WILLIE S. GRIGGS, *et al.*,

Petitioners,

v.

DUKE POWER COMPANY, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 9, 1970.

Opinions Below

The opinion of the Court of Appeals and accompanying dissent of Judge Sobeloff is reported at —— F.2d ——, 61 Lab. Cas. ¶9379. The opinion of the District Court for the Middle District of North Carolina is reported at 292 F. Supp. 243 (1968). All opinions are reprinted in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered January 9, 1970 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

Whether the intentional use of psychological tests and related formal educational requirements as employment criteria violates the race discrimination prohibition of Title VII, Civil Rights Act of 1964, where:

(1) the particular tests and standards used exclude Negroes at a high rate while having a relatively minor effect in excluding whites, *and*

(2) these tests and standards are not related to the employer's jobs.

Statutory Provisions Involved

United States Code, Title 42:

§2000e-2(a) [703(a) of Civil Rights Act of 1964]

(a) It shall be an unlawful employment practice for an employer—

(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.

§2000e-2(h) [§703(h) of Civil Rights Act of 1964]

(h) Notwithstanding any other provision of this title, 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 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. It shall not be unlawful employment practice under this title 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 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

§2000e-5(g) [§706(g) of Civil Rights Act of 1964]

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring

of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of on 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, color, religion, sex or national origin or in violation of section 704(a).

Statement of the Case

This is a class action under Title VII of the Civil Rights Act of 1964, brought by a group of Negro workers against their employer, the Duke Power Company. Petitioners challenge the company's promotional system on the ground that it effectively denies them as a class equal opportunity to jobs above the laborer category. The action was commenced following proceedings before the Equal Employment Opportunity Commission in which reasonable cause was found to believe that the company was engaged in gross practices of racial discrimination (R. 2b-4b).[1]

The Duke Power Company operates a generating plant at Draper, North Carolina, known as the Dan River Steam

[1] Record citations are to the printed record prepared for proceedings before the Fourth Circuit. Both that record and the original record are on file with the clerk of this Court.

Station, where petitioners are employed (R. 55a). The employees at this plant are divided into five departments: Operations, Maintenance, Laboratory & Test, Coal Handling, and Labor. Employees in the Coal Handling and Labor Departments work outside the plant (R. 55a-58a). Employees in all other departments work "inside" the plant and, for convenience, these other departments will be collectively referred to as the "inside" departments.[2]

Negroes have been employed at the plant for a number of years. There are now 14 Negroes out of 95 employees (R. 19b). But, as the District Court found, until

> "some time prior to July 2, 1965, Negroes were relegated to the labor department and prevented access to other departments by reason of their race" (R. 32a).

The Labor Department is the least desirable one in the plant and is the lowest paid. The maximum wage ever earned by a Negro in the Labor Department is $1.565 per hour (R. 72b). This maximum is less than the minimum ($1.705) paid to any white in the plant (R. 72b). It is drastically less than the maximum wage paid to whites in the Coal Handling and "inside" departments where top jobs pay from $3.18 to $3.65 per hour (R. 72b).

The first breach in the practice of relegating Negroes to the Labor Department did not occur until August 6, 1966, when a Negro was promoted to the Coal Handling Department (R. 72b). No Negro has yet been promoted to one of the more desirable "inside" jobs at the plant.

By the time of trial Duke had apparently dropped its formal policy of restricting all Negroes to the Labor Department. However, the effect of that policy has largely

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[2] There are also a few miscellaneous non-department jobs (R. 58a). All of these except the watchmen are located inside.

been preserved by a company policy precluding anyone from transferring to any job in the Coal Handling Department or in one of the "inside" departments unless he either (1) had a high school diploma or (2) achieved a particular score on each of two quickie "intelligence" tests— the 12 minute Wonderlic test and the 30 minute Bennett test (sometimes referred to as the "Mechanical AA" in the Record) (R. 20b-22b).[3] These requirements were adopted without study or evaluation. They applied even to several Negro laborers who have worked in the Coal Handling Department for many years and thereby gained experience and familiarity with the operations of the department (R. 106a, 124b). On the other hand, the requirements had no application whatsoever to anyone already in the Coal Handling Department or an "inside" department, either as a requirement for maintaining his present position or as a condition to further promotion within his departmental area (R. 102a).

The practical effect of this transfer requirement was to freeze all but two or three Negroes in Duke's low paying

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[3] These tests include questions such as:

"No. 11. ADOPT ADEPT—Do these words have
1. Similar meanings,
2. Contradictory,
3. Mean neither same nor opposite?"

"No. 19. REFLECT REFLEX—Do these words have
1. Similar meanings,
2. Contradictory,
3. Mean neither same nor opposite?"

"No. 24. The hours of daylight and darkness in SEPTEMBER are nearest equal to the hours of daylight in
1. June
2. March
3. May
4. November" (R. 101b-103b).

laborer jobs. On the other hand, employees in the "inside" departments, all of whom are white, were free to remain there and to receive promotions in the "inside" departments to the best paying jobs in the plant (from $3.18 to $3.56 per hour) without meeting either of these requirements (R. 72b, 102a). Within the past three years, for example, white employees with as little as seventh grade educations were promoted to jobs paying $3.49 per hour in "inside" departments (R. 83b, 127b). Likewise, employees in the Coal Handling Department, all of whom are white except for one Negro high school gradute transferred there in 1966, were free to remain on their jobs and be promoted to the top job in the department paying $3.41 per hour.[4]

The first of these transfer requirements (high school diploma) was in effect for a number of years prior to this action (R. 20b). The second (passing a test battery) was newly adopted in September, 1965, in response to a request from a number of white non-high school graduates in the Coal Handling Department who wanted an alternative chance for promtion to inside jobs (R. 85a-87a). Both were being challenged by appellants on the grounds that (1) they impose a special burden on Negro employees at Dan River not equally imposed upon white employees, and (2) even if equally imposed that they constitute discriminatory requirements for transfer which are not justified by the job needs of Duke.

[4] The only whites on whom the transfer requirements have any impact are those few who work outside the plant in the Coal Handling Department and the watchman job and wish to transfer inside. It was at the request of these employees that the test alternative was introduced. However, since the Coal Handling Department leads to a top pay rate of $3.41, the impact of transfer requirements on these employees is far less harsh than that on Negroes who are hopelessly frozen in low paid jobs. Moreover, only fifteen of eighty-one white employees are in these outside jobs (R. 73b).

The District Court ruled against petitioners on both counts. The Court of Appeals accepted petitioners claims in part, holding that the test and educational requirements were unlawful as applied to Negro workers hired prior to the date when the high school requirement was first imposed. However, the appellate court with Judge Sobeloff dissenting, denied all relief to Negro workers hired subsequent to that date on the ground that these newer workers were being treated equally with their white contemporaries.

Reasons for Granting Writ

The importance of this case was eloquently stated in Judge Sobeloff's dissent below:

> "The decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years.
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> * * *
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> "The case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified. . . . *On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.*" —— F.2d at ——, 61 Lab. Cas. ¶9379 at 6995-25. (Emphasis added.)

A writ of certiorari should be granted not only because of the overriding importance of this case, but also because the decision below is in direct conflict with the interpretation given Title VII in other circuits and with prior decisions of this Court on analogous questions.

I.

This Case Is of Overriding Importance. The Decision Below Is an Open Invitation to Racial Discrimination Through Use of Irrelevant Tests and Educational Standards Which Will Effectively Deny Employment Opportunity to Most Negroes Despite Their Job Qualifications.

Objective criteria, such as tests and educational requirements are well known to be potent tools for substantially reducing Negro job opportunities, often to the extent of wholly excluding Negroes. In one typical case, the Equal Employment Opportunity Commission found that use of a battery of tests, including the Wonderlic and Bennett tests used by Duke Power Company, resulted in 58% of whites passing the tests but only 6% of Negroes.[5] A flood of other studies confirm a gross racial disparity in test scores, particularly on the Wonderlic test which is closely related to academic and cultural background.[6] The same disparate effect also results in the South when a high school diploma requirement is imposed. As of the last census, only 12% of North Carolina Negro males had completed high school, as compared to 34% of North Carolina white males.[7]

Based on these facts, numerous courts and governmental equal employment agencies have recognized that any interpretation of equal employment law which would permit

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[5] Decision of EEOC, Dec. 2, 1966, reprinted in Brief for Appellants below, at 51-52.

[6] See J. Kirkpatrick, et al., Testing and Fair Employment 5 (1968); authorities collected in Cooper & Sobol, Seniority and Testing under Fair Employment Laws, 82 Harv. L. Rev. 1598, 1639-41 nn. 11, 13, 14, 15, 16, 17.

[7] U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Part 35, at Table 47 p. 167.

virtual unrestricted use of tests and educational standards would, in effect, license employers to give an employment preference to whites of as much as ten to one. These courts and agencies have therefore united in insisting on job-relatedness as the *sine qua non* of fair use of tests and educational standards. For example, the Equal Employment Opportunity Commission calls for tests to:

> "fairly measure the knowledge or skills required by the particular job or class of jobs which the applicant seeks." EEOC, Guidelines on Employment Testing Procedures (1966), reprinted at R. 129b, 130b.[8]

A requirement that tests and educational standards be job-related assures that employees will be hired on the basis of their ability to perform, which is fair. But a test or educational requirement that is not job-related assures only that hiring will be on the basis of educational and cultural background, which, at least in this society, is only thinly veiled racial discrimination. Other courts and agencies are overwhelmingly in accord with the EEOC.[9]

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[8] The EEOC takes a simlar position regarding education requirements. See EEOC Decision, Dec. 6, 1966, reprinted in Brief for Appellants below, at 53-55.

[9] U.S. Dept. of Labor, Validation of Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246, 33 Fed. Reg. 14392 (Sept. 24, 1968); *Arrington* v. *Massachusetts Bay Transportation Authority*, 61 Lab. Cas. 9375, at 6995-12 (D.C. Mass. Dec. 22, 1969); *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413, 433-34 (S. D. Ohio 1968); *United States* v. *H. K. Porter Co.*, 296 F. Supp. *40, 78 (N. D. Ala. 1968)* appeal noticed 5th Cir. No. 27703; California, Fair Employment Practices, Equal Good Employment Practices, in CCH Employment Practices Guide ¶20,861; Colorado Civil Rights Commission Policy Statement on the Use of Psychological Tests, in CCH Employment Practices Guide ¶21,060; Pennsylvania Human Relations Commission, Affirmative Action Guidelines for Employment Testing, in CCH Employment Practices Guide ¶27,295.

The decision below, however, rejected the job-relatedness standard. The Court of Appeals recognized that,

> "The [District Court] held that the tests given by Duke were not job-related. . . ." —— F.2d at ——; 61 Lab. Cas. ¶9379 at 6995-22.

But the court went on to hold that this lack of job-relatedness was of no moment under Title VII. Although the court did acknowledge that it was not holding that "any educational or testing requirement adopted by any employer is valid under the Civil Rights Act of 1964", it laid down no substitute standard or guidepost to replace the rejected job-relatedness standard, except to say that each case must be decided on its facts.

This ruling was contrary to established principles calling for judicial deference to the contemporaneous interpretation of the agency charged with enforcement of a complex law,[10] a principle that has particular applicability to the EEOC.[11]

Furthermore, the practical effect of this decision below will be to permit virtual unrestricted use of tests and educational requirements. The facts in this case are that the Duke Power Company offered no justification for imposing its test and educational requirements other than a blind hope, unsupported by any study, evaluation or analysis, that these requirements would help produce better employees. (R. 103a-104a). The evidence in the record of successful job performance by and the grant of recent high level promotions to numerous white employees not meeting these requirements refutes this notion. (e.g. R. 83b, 127b)

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[10] *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

[11] *Cox* v. *United States Gypsum Co.,* 284 F. Supp. 74, 78 (N.D. Ind. 1968) Aff'd as modified 409 F.2d 289 (7th Cir. 1969); *International Chem Workers* v. *Planters Mfg. Co.,* 259 F. Supp. 365, 366-367 (S. D. Miss. 1966).

Moreover, an extensive body of professional literature on test and educational requirements clearly establishes that such requirements are unsound and contrary to an employer's interest unless properly related to job needs.[12]

The tests used by Duke are the ones most frequently subjected to challenge under fair employment laws.[13] If Duke is permitted to use these test and educational requirements on this record, then virtually any employer will be able to impose such requirements at any time. Such tests are already in widespread use and this use appears to be growing as more employers come under fair employment scrutiny.[14] Moreover, the door will be open to other requirements having similar racial effect. For if the door is open to tests without any showing of job relatedness, then it will be difficult to close it to nepotic practices, hiring preferences to friends of existing employees, geographic hiring preferences to people from a particular community, and a myriad practices which are neutral on their face but which effectively discriminate against Negroes. Thus the Equal Employment Opportunity Act will be reduced to "hollow rhetoric."[15]

We believe that a job-relatedness standard is essential to the efficacy of Title VII and if the writ is granted, will urge this Court to adopt such a standard.

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[12] See authorities collected in Cooper and Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1958, 1642-49 nn. 24-39, 1670 n. 2 (1969).

[13] *Id.* at 1643 n. 21.

[14] *Id.* at 1637-38.

[15] Although the Court of Appeals attempted to justify its decision on the legislative history of Title VII, it is clear that nothing in the legislative history compels such a self destructive interpretation of the Act. For reasons set out in Judge Sobeloff's dissent, which we will develop more fully in a brief on the merits, a job-relatedness standard is far more consistent with the legislative history than the interpretation of the court below. See Cooper and Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1598, 1649-54 (1969).

II.

The Decision Below Is in Direct Conflict With the Interpretation Given Title VII of the Civil Rights Act of 1964 in Other Circuits.

The use of tests and educational requirements is but one example of the new breed of racial discrimination. While outright and open exclusion of Negroes is passe, the use of neutral, objective criteria which systematically reduce Negro job opportunity are producing much the same result. The result is sometimes desired and sometimes inadvertent, but its devastating effect on Negro employment is plain.[16]

The initial series of cases challenging an objective criterion that caused racial discrimination was directed to certain seniority rules. These rules preferred white workers over their black contemporaries on the basis of seniority acquired when the black workers had been subject to outright exclusion from desirable jobs. The courts were virtually unanimous in concluding that such seniority rules, even though adopted innocently for nonracial reasons, could not be sustained where they had the effect of barring black workers from jobs they were capable of performing. This Court has recently denied certiorari in the leading case on that issue. *United States* v. *Local 189,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* —— U.S. (1970); see *United States* v. *Hayes It'l. Corp.,* 415 F.2d 1038 (5th Cir. 1969); *United States* v. *Sheet Metal Workers, Local* 36, 416 F.2d 123 (8th Cir. 1969); *Dobbins* v. *Local 212,*

[16] Negro unemployment has consistently run at roughly double the white rate for the past two decades. While there was some improvement in the ratio in 1969, earlier figures for 1970 show a worsening again. For February, 1970 the Negro rate was 7% as compared to a white rate of 3.8%. N. Y. Times, March 7, 1970, at p. 1.

IBEW, 292 F. Supp. 413 (N.D. Ohio 1968); *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505 (E.D. Va. 1968). The Fifth Circuit has also applied the same principle to strike down nepotic practices in an all-white union. *Local 53, Heat & Frost Insulators Workers* v. *Vogler,* 407 F.2d 1047, 1054-55 (5th Cir. 1969).[17]

As Judge Sobeloff's dissenting opinion below explained, the teaching of these seniority and nepotism cases is that:

> "the statute interdicts practices that are fair in form, but discriminatory in substance . . . The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end." —— F.2d ——; 61 Lab. Cas. ¶9379 at 6995-26.

Judge Sobeloff went on to observe that this principle applies no less to discriminatory tests and educational requirements than to seniority and nepotism. Where such requirements are not job-related they are not justified by business necessity and must be struck down.[18]

The court below acknowledged the correctness of the numerous decisions on seniority and cited the leading case, *United States* v. *Local 189, supra,* with approval. However, in failing to recognize that its decision regarding tests and educational requirements was fundamentally inconsistent with the principle which that case established in the seniority context, the court below set up a conflict between circuits which this Court should resolve.

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[17] There is one District Court decision contra in the Fifth Circuit, *United States* v. *H. K. Porter Co.,* 296 F. Supp. 40 (N.D. Ala. 1968) appeal noticed 5th Cir. No. 27703. This decision preceded the Court of Appeals, *Local 189* and *Hayes It'l. Corp.* decisions, cited above, and is plainly overruled by them.

[18] See Cooper and Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1598, 1669-73 (1969).

Moreover, although no other Court of Appeals has dealt specifically with issues of testing and educational requirements, at least two District Courts in other circuits have done so, and have resolved the issue contrary to this case. Most explicit is *Arrington* v. *Massachusetts Bay Transportation Authority,* 61 Lab. Cas. ¶9375 (D. Mass. Dec. 22, 1968):

> "[I]f there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the test in determining who or when one gets hired makes little business sense. When its effect is to discriminate against disadvantaged minorities, in fact denying them equal opportunity for public employment, then it becomes unconstitutionally unreasonable and arbitrary." 61 Lab. Cas. at 6995-12.

This was, of course, a decision based on the Fourteenth Amendment. But the same view was adopted under Title VII in *United States* v. *H. K. Porter Co.,* 296 F. Supp. 40 (N.D. Ala. 1968) appeal noticed 5th Cir. no. 27703. There the court reasoned:

> "the court agrees in principle with the proposition that aptitudes which are measured by a test should be relevant to the aptitudes which are involved in the performance of jobs." 296 F. Supp. at 78 (dictum).

Other District Courts have also indicated adherence to a similar point of view. See *Dobbins* v. *Local 212, IBEW,* 292 F. Supp. 413, 433-34, 439 (S.D. Ohio 1968); *Penn* v. *Stumpf,* 62 Lab. Cas. ¶ 9404 (N.D. Calif. Feb. 3, 1970). *But cf. Parham* v. *Southwestern Bell Telephone Co.,* —— F. Supp. ——; 60 Lab. Cas. ¶ 9297 (W.D. Ark. 1969) appeal noticed 8th Cir. no. 19969.

III.

The Decision Below Is in Direct Conflict With Other Decisions of This Court on Analogous Questions.

This Court has long recognized that "sophisticated as well as simple minded modes of discrimination" are outlawed.[19] Under this concept, the Court has struck down a wide range of practices which are neutral in form but have a racially discriminatory effect. This has included use of grandfather clauses for voter registration,[20] the use of tuition grant arrangements which foster segregated schools,[21] and the use of a gerrymander which undercuts Negro voting power.[22] Most recently, the Court has applied this principle to bar use of literacy tests which have a racially discriminatory effect. In *Gaston County, North Carolina* v. *United States,* 395 U.S. 285 (1969), the appellant sought to impose a literacy test requirement for voter registration. Although the test was to be fairly and impartially administered and thus neutral on its face, the Court barred its use because of the racially discriminatory impact it would have on Negroes who suffered the burdens of educational discrimination. 395 U.S. at 296-297. Use of the literacy test would unnecessarily capitalize on the existing educational disparity between blacks and whites.

By the same token, use of test and educational requirements by Duke would unnecessarily capitalize on educational and cultural disparities between the races beyond

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[19] *Lane* v. *Wilson,* 307 U.S. 268, 275 (1938).

[20] *Guinn* v. *United States,* 238 U.S. 347 (1915).

[21] *Poindexter* v. *Louisiana Financial Assistance Comm'n,* 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam,* 389 U.S. 571 (1968).

[22] *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960).

the employer's demonstrated job needs. To permit such unnecessary test use would establish a principle under Title VII which is basically inconsistent with concepts evolved by this Court in all other areas of racial discrimination.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

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APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

M. D. NORTH CAROLINA

GREENSBORO DIVISION

Sept. 30, 1968

WILLIE S. GRIGGS, *et al.*,

Plaintiff,

VS.

DUKE POWER COMPANY,

Defendant.

JUDGMENT DISMISSING COMPLAINT

GORDON, District Judge.

Duke Power Company, the defendant in this action, is a corporation engaged in the generation, transmission, and distribution of electric power to the general public in North Carolina and South Carolina. The thirteen named plaintiffs are all Negroes and contend that the defendant has engaged in employment practices prohibited by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. at its Dan River Station located in Draper, North Carolina (recently consolidated with the Towns of Leaksville and Spray and named Eden) and ask that such discriminatory practices be enjoined.

Opinion of the District Court

An order was entered on June 19, 1967, allowing the action to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure. The class was defined as those Negroes presently employed, and who subsequently may be employed, at the Dan River Steam Station and all Negroes who may hereafter seek employment at the Station. The Court has found no reason to alter the June 19 Order.

The evidence in this case establishes that due to the requirements for initial employment, Negroes who may subsequently be employed by defendant would not be subject to the restrictions on promotions which the named plaintiffs contend are violative of the Act. A high school education and satisfactory test scores are required for initial employment in all departments except labor. Plaintiffs certainly cannot contend that employees without those requisites who are hired for the labor department subsequent to the implementation of the requisites should be allowed to transfer into other departments when they could not have been initially employed in those departments. This would be to deny the defendant the right to establish different standards for different types of employment. Further, the plaintiffs do not contend that the defendant's requirements for initial employment are discriminatory. Only fourteen Negroes are presently employed by the defendant, thirteen of whom are named plaintiffs.

The work force at Dan River is divided for operational purposes into the following departments: (1) Operations; (2) Maintainance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. The jobs of watchman, clerk, and storekeeper are in a miscellaneous category.

Within each department specialized job classifications exist.[1] These classifications constitute a line of progression for purposes of employee advancement. The term "line of progression" is then synonymous with "department."

Approximately ten years ago,[2] the defendant initiated a policy making a high school education or its equivalent a

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[1] Answer to Interrogatory No. 11:

Power Station Operators	Labor
Control Operator	Labor Foreman
Pump Operator	Auxiliary Serviceman
Utility Operator	Laborer (Semi-Skilled)
Learner	Laborer (Common)
Coal and Material Handling	**Miscellaneous**
Coal Handling Foreman	Watchman
Coal Equipment Operator	Clerk
Coal Handling Operator	Chief Clerk
Helper	Storekeeper
Learner	
Maintenance	**Supervisors**
Machinist	Superintendent
Electrician-Welder	Assistant Superintendent
Mechanic A	Plant Engineer
Mechanic B	Assistant Plant Engineer
Repairman	Chemist
Learner	Test Supervisor
	Maintenance Supervisor
Test and Laboratory	
Testman-Labman	Assistant Maintenance Supervisor
Lab and Test Technician	Shift Supervisor
Lab and Test Assistant	Junior Engineer

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[2] At the trial of this case, objections by defendant to evidence of activities prior to July 2, 1965, were sustained and the evidence recorded. Upon a study of briefs subsequently submitted by the parties, the Court has for purposes of this case only, considered the evidence as competent and relevant.

prerequisite for employment in all departments except the labor department. The effect of the policy was that no new employees would be hired without a high school education (except in the labor department) and no old employees without a high school education could transfer to a department other than the labor department. The high school requirement was made applicable on a departmental level only, and was not the basis for firing or demoting a person employed prior to its implementation.

In July of 1965 the defendant instituted a new policy for initial employment at the Dan River Station. A satisfactory score on the Revised Beta Test was the only requirement for initial employment in the labor department. In all other departments and classifications, applicants were required to have a high school education *and* make satisfactory scores on two tests, the E. F. Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test, Form AA. The company's promotional policy was unchanged and a high school education remained the only prerequisite to a departmental transfer.

In September, 1965, at the instigation of employees in the coal-handling department, the defendant promulgated a policy by which employees in the coal-handling and labor departments and the watchman classification without a high school education could become eligible for consideration for transfer to another department by attaining a satisfactory score on the two tests previously mentioned. This procedure was made available only to persons employed prior to September 1, 1965.

Applicable Provisions of the Act

Sections 703(a) (1) and (2) of Title VII of the 1964 Civil Rights Act provide:

"Section 703(a), 42 U.S.C. § 2000e-2(a):

"It shall be an unlawful employment practice for an employer—

"(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

"(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."

The mandate of those two sections is qualified by the following sections of the Act:

"Section 703(h), 42 U.S.C. § 2000e-2(h):

"Notwithstanding any other provision of this title, 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 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. It shall not be an unlawful employment practice under this title 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 6(d) of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. § 206(d))."

"Section 703(j), 42 U.S.C. § 2000e-2(j):

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparision with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Congress intended the Act to be given prospective application only. Any discriminatory employment prac-

tices occurring before the effective date of the Act, July 2, 1965, are not remedial under the Act.[3]

The plaintiffs first contend that they are restricted to the menial and low-paying jobs and are effectively denied an equal opportunity to advance to the more remunerative positions because of their race.

The evidence shows that there are approximately 95 employees at the Dan River Station, 14 of whom are Negroes. As of July 2, 1965, the 14 Negroes held jobs in the labor department which has a lower pay scale than any other department. On August 8, 1966, three months prior to the institution of this suit, Jesse Martin, the senior Negro laborer with a high school education was promoted to learner in the coal handling department. The 13 Negroes remaining in the labor department are the plaintiffs in this action. One of those, R. A. Jumper, the next senior Negro laborer with a high school education has since been promoted to the watchman position. Only one other Negro has a high school education. Actually, the high school and testing requirements which plaintiffs allege are violative of the Act affect only those plaintiffs without a high school education.

The evidence shows that only three of the nine white employees in the coal handling department have a high school education; only eight of the seventeen white employees in the maintenance department have a high school education; two white shift supervisors in the power plant have less than a high school education; the two coal handling foremen have less than a high school education, and the labor foreman has less than a high school education.

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[3] Actually, the evidence places the number of defendant's employees between 90 and 95. The Act was not made applicable to employers with under 100 employees until July 2, 1966.

Although company officials testified that there has never been a company policy of hiring only Negroes in the labor department and only whites in the other departments, the evidence is sufficient to conclude that at some time prior to July 2, 1965, Negroes were relegated to the labor department and prevented access to other departments by reason of their race.

The plaintiffs contend that upon their initial employment they were placed in the low paying labor department and were denied access to the more desirable departments as a result of the defendant's discriminatory hiring and promotional policies. Since the discrimination occurred prior to July 2, 1965, it is not remedial under the 1964 Civil Rights Act. But the plaintiffs reason that in subsequently applying the high school education requirement on a departmental basis only, the initial discrimination was carried over and continues to the present. This result, they say, is demonstrated by the fact that white employees without a high school education are eligible for job openings in the more lucrative departments while Negro employees with the same or similar educational qualifications are restricted to job classifications in the lower paying labor department.

Under plaintiffs' theory, the departmental structure of defendant's work force is tainted by prior discriminatory practices and therefore cannot serve as a basis for applying educational or general intelligence standards as prerequisites to promotion. Plaintiffs contend that the present system continues the past discrimination and violates the Act.

The plaintiffs do not contend nor will the evidence support a finding that the division of defendant's work force into departments is an unreasonable system of classifica-

tion. To the contrary, the evidence shows that jobs within each department require skills which differ in degree and kind from the skills required in the performance of jobs in other departments. Also, each department has a different function in the total operation of the plant.

The plaintiffs do not contend that discrimination on the basis of education is proscribed by the Act. But they do contend that a high school education requirement which of itself continues the inequities of prior racial discrimination is prohibited.

This theory brings into issue how Congress intended the Act to be applied.

The legislative history of the Act is replete with evidence of Congress' intention that the Act be applied prospectively and not retroactively. Clark-Case Memorandum, Bureau of Nat'l Affairs Operations Manual, The Civil Rights Act of 1964, p. 329; Justice Dept. Reply on Ttile VII, Bureau of Nat'l Affairs Operations Manual, The Civil Rights Act of 1964, p. 326.

In providing for prospective application only, Congress faced the cold hard fact of past discrimination and the resulting inequities. Congress also realized the practical impossibility of eradicating all the consequences of past discrimination. The 1964 Act has as its purpose the abolition of the policies of discrimination which produced the inequities.

It is obvious that where discrimination existed in the past, the effects of it will be carried over into the present. But it is also clear that policies of discrimination which existed in the past cannot be continued into the present under the 1964 Act. Plaintiffs do labor under the inequities resulting from the past discriminatory promotional policies of the defendant, but the defendant discontinued those

discriminatory practices. More than ten years ago it put into effect a high school education requirement intended to eventually upgrade the quality of its entire work force. At least since July 2, 1965, the requirement has been fairly and equally administered.

The requirement was made applicable to a departmentalized work force without any intention or design to discriminate against Negro employees. The departments serve as a reasonable system of classification with each department having a different function and each department requiring different skills. It is important to remember that the departmental structure does not result in Negroes doing the same or similar work as white employees but receiving smaller wages. The past discrimination was in restricting Negroes to the menial and low paying jobs in the labor department. Had Negroes not been restricted in this fashion prior to the institution of the high school education requirement, there would be no question of the present legality of defendant's policies.

If the relief requested by plaintiffs is granted, the defendant will be denied the right to improve the general quality of its work force or in the alternative will be required to abandon its departmental system of classification and freeze every employee without a high school education in his present job without hope of advancement. And these harsh results would be necessary, under plaintiffs' theory, because of discriminatory practices abandoned by the defendant over ten years ago.

It is improbable that any system of classification used by an employer who has discriminated prior to the effective date of the Act could escape condemnation if this theory prevailed, regardless of how fair and equal its present policies may be. This Court does not believe such

application of the Act to have been contemplated by Congress. Otherwise, it would have been unnecessary to indicate an intention that the Act receive only prospective application.

The plaintiffs cite Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (1968), a decision in the Eastern District of Virginia. That case held that restrictions on departmental transfers where the departments had been organized on a racially segregated basis were violative of the Act. Interdepartmental transfers had been completely prohibited under the prior discriminatory practices. Provisions of two collective bargaining agreements negotiated in the fall of 1964 and effective over a three-year period from February 1, 1965, modified the previous no-transfer policy only to the extent that a limited number of employees from the previously all-Negro departments would be allowed to transfer to the previously all-white department. A "Memorandum of Understanding" executed on March 7, 1966, modified seniority and transfer provisions only in degree. These provisions, in effect, continued the old discriminatory no-transfer policies except that four Negroes were allowed to transfer every six months without effect on their seniority rights. These present practices retained the discriminatory flavor of the past and were held violative of the Act.

The restrictions on departmental transfers at Duke Power's Dan River Station are distinguishable from the restrictions of Philip Morris, Inc., condemned in *Quarles*. The restrictions on interdepartmental transfers at Duke Power are based on educational requirements whereas the policy at Philip Morris represented only a relaxation of earlier restrictions based on race. Philip Morris exhibited no business purpose or reason for its transfer restrictions,

but as pointed out heretofore, Duke Power had legitimate reasons for its educational and intelligence standards and for applying those standards to its departmental structure.

If the decision in *Quarles* may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise. The text of the legislation redounds with the term "unlawful employment practice." There is no reference in the Act to "present consequences." Moreover, under no definition of the words therein can the terms "present consequences of past discrimination" and "unlawful employment practice" be given synonymous meanings.

This does not mean that a court cannot look beyond the effective date of the Act to determine whether present practices are discriminatory. That, in fact, was what the court did in the *Quarles* case.

Plaintiffs secondly contend that the defendant's policy of allowing passing marks on two general intelligence tests to substitute for a high school education in determining eligibility for departmental transfer is discriminatory and in violation of the Act.

The application of defendant's testing procedures on a departmental basis is not in violation of the Act for the same reasons expressed previously in the discussion of the high school requirement.

In light of this Court's holding that the defendant's policy of making a high school education a prerequisite to departmental transfers is non-discriminatory, it would appear to be in derogation of the plaintiffs' interest to abolish the use of test scores as a substitute for the high school requirement. But to the extent that the nature of the tests may be discriminatory, their validity under the Act must be examined.

Section 703(h), (42 U.S.C. § 2000e-2(h)) of the Act provides that it shall not be

> "[A]n 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."

The clause was inserted by an amendment introduced by Sen. Tower (R.Tex.). It was designed to insure the employer's right to utilize ability tests in hiring and promoting employees which practice had been condemned by a hearing examiner for the Illinois Fair Employment Practices Commission.

The plaintiffs apparently read the section to allow tests only when they are developed to predict a person's ability to perform a *particular* job or group of jobs. That is, if the job requires only manual dexterity, then the Act requires an employer to utilize only a test that measures manual dexterity. Guidelines on employment testing procedures set out by the Equal Employment Opportunity Commission serve to fortify that appraisal of the Act:

> "The Commission accordingly interprets 'professionally developed ability test' to mean a test 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 applicant's ability to perform a particular job or class of jobs."

This Court cannot agree to this interpretation of § 703(h). Title VII of the 1964 Act has as its purpose the

elimination of discriminatory employment practices. It precludes the use of ability tests which may be used to discriminate on the basis of race, color, religion, sex, or national origin. Nowhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs. Nowhere does the Act require the use of only one type of test to the exclusion of other non-discriminatory tests. A test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma. In fact, a general intelligence test is probably more accurate and uniform in application that is the high school education requirement.

The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available. Rather, they are intended to indicate whether the employee has the general intelligence and overall mechanical comprehension of the average high school graduate, regardless of race, color, religion, sex, or national origin. The evidence establishes that the tests were professionally developed to perform this function and therefore are in compliance with the Act.

The Act does not deny an employer the right to determine the qualities, skills, and abilities required of his employees. But the Act does restrict the employer to the use of tests which are professionally developed to indicate the existence of the desired qualities and which do not discriminate on the basis of race, color, religion, sex or national origin.

The defendant's expert testified that the Wonderlic Test was professionally developed to measure general intelligence, i.e., one's ability to understand, to think, to use good

judgment. The Bennett Test was developed to measure mechanical understanding of the operation of simple machines. These qualities are general in nature and are not indicative of a person's ability to perform a particular task. Nevertheless, they are qualities which the defendant would logicaly want to find in his employees. The Act does not deprive him of the right to use a test which accurately, reliably, and validly measures the existence of those qualities in an applicant for initial employment or for promotion.

Plaintiffs lastly contend that the defendant discriminates on the basis of race in the allocation of overtime work at its Dan River Station.

Overtime work at Dan River is referred to as "scheduled overtime" or "emergency overtime." Every employee at the station is allotted eight hours of "scheduled overtime" every four weeks. All other overtime is "emergency overtime."

Between July 2, 1965, and February, 1967, employees in the coal-handling department worked approximately 10.39 per cent of their total working hours in overtime. The percentage of overtime worked by employees in other departments was as follows: maintenance, 7.84 per cent; operations, 5.39 per cent; labor, 5.22 per cent; and other, 5.19 per cent. The high percentage of overtime worked by employees in coal handling was due to erratic deliveries of coal and the difficulty in handling frozen coal during winter months. As a general rule, overtime work is done by the employees of the department which would ordinarily do the work. But occasionally in coal handling, the work load becomes so great that employees from other departments are called in to help. The gist of plaintiffs' contention is that Negroes are denied overtime work in coal-handling and so are discriminated against in the allo-

cation of overtime. The evidence does not support this contention.

The percentages of overtime worked in each department, with the exception of coal-handling, are very similar. The higher percentage in the maintenance department appears to have been due to overtime work in repairing equipment and not in overtime in the coal-handling operations. Further, the evidence is that Negroes in the labor department assigned to work in coal-handling do not work the same overtime as employees in the coal-handling department because of the danger involved in doing their work at night while the coal-handling operations are going on.

It is concluded that the difference between allocation of overtime to employees is not the result of discriminatory practices and is not in violation of the Act.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter of this action, pursuant to the provisions of Section 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. By order of this Court dated June 19, 1967, this action was permitted to be maintained as a class action, but the order was made conditional in nature pursuant to the Federal Rules of Civil Procedure 23(c) (1). The order defined the class plaintiffs sought to represent as all Negroes presently employed, all Negroes who may subsequently be employed, and all Negroes who may hereafter seek employment at the defendant's Dan River Steam Station in Draper, North Carolina.

3. The Court is of the opinion, finds, and concludes that the defendant's high school education requirement does not

violate Title VII of the Act. It has a legitimate business purpose and is equally applicable to both Negro and white employees similarly situated.

4. The tests in use by the defendant at its Dan River Station are professionally developed ability tests within the meaning of Section 703(h) of the Act and are not administered, scored, designed, intended, or used to discriminate because of race or color.

5. Title VII of the Civil Rights Act of 1964 became effective July 2, 1965. The legislative history of the Act clearly shows that it is prospective and not retroactive in effect. Since the effective date of the Act, the defendant has not limited, classified, segregated, or discriminated against its employees in any way which has deprived or tended to deprive them of any employment opportunities becaues of race or color.

6. The defendant has not discriminated in the allocation of overtime on the basis of race or color and is not in violation of the Act.

7. The plaintiffs have failed to carry the burden of proving that the defendant has intentionally discriminated against them on the basis of race or color. There are no legally established facts from which the Court could draw an inference that the defendant has so discriminated.

Accordingly, no relief is appropriate, and a judgment dismissing the complaint will be entered. Within ten (10) days of this date, counsel for the defendant will submit a proposed judgment, first submitting same to counsel for the plaintiffs for approval as to form.

Opinion of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 13,013

WILLIE S. GRIGGS, *et al.*,

Plaintiff-Appellant,

versus

DUKE POWER COMPANY,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

(January 9, 1970)

Before

SOBELOFF, BOREMAN, and BRYAN,

Circuit Judges.

BOREMAN, Circuit Judge:

Present Negro employees of the Dan River Steam Station of Duke Power Company in Draper, North Carolina, in a class action with the class defined as themselves and those Negro employees who subsequently may be employed at the Dan River Steam Station and all Negroes who may hereafter seek employment at the station, appeal from a judgment of the district court dismissing their complaint brought under Title VII of the Civil Rights Act of 1964.

(Duke Power Company will be referred to sometimes as Duke or the company.) The plaintiffs challenge the validity of the company's promotion and transfer system, which involves the use of general intelligence and mechanical ability tests, alleging racial discrimination and denial of equal opportunity to advance into jobs classified above the menial laborer category.

Duke is a corporation engaged in the generation, transmission and distribution of electric power to the general public in North Carolina and South Carolina. At the time this action was instituted, Duke had 95 employees at its Dan River Station, fourteen of whom were Negroes, thirteen of whom are plaintiffs in this action. The work force at Dan River is divided for operational purposes into five main departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. The positions of Watchman, Clerk and Storekeeper are in a miscellaneous category.

The employees in the Operations Department are responsible for the operation of the station's generating equipment, such as boilers, turbines, auxiliary and control equipment, and the electrical substation. They handle also interconnections between the station, the company's power system, and the systems of other power companies.

The Maintenance Department is responsible for maintenance of all the mechanical and electrical equipment and machinery in the plant.

Technicians working in the Laboratory Department analyze water to determine its fitness for use in the boilers and run analyses of coal samples to ascertain the quality of the coal for use as fuel in the power station. Test Department personnel are responsible for the performance of the station by maintaining the accuracy of instruments, gauges and control devices.

Employees in the Coal Handling Department unload, weigh, sample, crush, and transport coal received from the mines. In so doing, they operate diesel and electrical equipment, bulldozers, conveyor belts, crushers and other heavy equipment items. They must be able to read and understand manuals relating to such machinery and equipment.

The Labor Department provides service to all other departments and is responsible generally for the janitorial services in the plant. Its employees mix mortar, collect garbage, help construct forms, clean bolts, and provide the necessary labor involved in performing other miscellaneous jobs. The Labor Department is the lowest paid, with a maximum wage of $1.565 per hour, which is less than the minimum of $1.705 per hour paid to any other employee in the plant. Maximum wages paid to employees in other departments range from $3.18 per hour to $3.65 per hour.

Within each department specialized job classifications exist, and these classifications constitute a line of progression for purposes of employee advancement. Promotions within departments are made at Dan River as vacancies occur. Normally, the senior man in the classification directly below that in which the vacancy occurs will be promoted, if qualified to perform the job. Training for promotions within departments is not formalized, as employees are given on-the-job training within departments. In transferring from one department to another, an employee usually goes in at the entry level; however, at Dan River an employee is potentially able to move into another department above the entry level, depending on his qualifications.

In 1955, approximately nine years prior to the passage of the Civil Rights Act of 1964 and some eleven years prior

to the institution of this action, Duke Power initiated a new policy as to hiring and advancement; a high school education or its equivalent was thenceforth required for all new employees, except as to those in the Labor Department. The new policy also required an incumbent employee to have a high school education or its equivalent before he could be considered for advancement from the Labor Department or the position of Watchman into Coal Handling, Operations or Maintenance or for advancement from Coal Handling into Operations or Maintenance. The company claims that this policy was instituted because it realized that its business was becoming more complex and that there were some employees who were unable to adjust to the increasingly more complicated work requirements and thus unable to advance through the companys lines of progression.

The company subsequently amended its promotion and transfer requirements by providing that an employee who was on the company payroll prior to September 1, 1965, and who did not have a high school education or its equivalent, could become eligible for transfer or promotion from Coal Handling, Watchman or Labor positions into Operating, Maintenance or other higher classified jobs by taking and passing two tests, known as 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. The company admits that this change was made in response to requests from employees in Coal Handling for a means of escape from that department but the same opportunity was also provided for employees in the Labor Department.

Until 1966, no Negro had ever held a position at Dan River in any department other than the Labor Department. On August 6, 1966, more than a year after July 2,

1965, the effective date of the Civil Rights Act of 1964, the first Negro was promoted out of the Labor Department, as Jesse C. Martin (who had a high school education) was advanced into Coal Handling. He was subsequently promoted to utility operator on March 18, 1968. H. E. Martin, a Negro with a high school education, was promoted to Watchman on March 19, 1968, and subsequently to the position of Learner in Coal Handling. Another Negro, R. A. Jumper, was promoted to Watchman and then to Trainee for Test Assistant on May 7, 1968. These three were the only Negroes employed at Dan River who had high school educations. Recently, another Negro, Willie Boyd, completed a course which is recognized and accepted as equivalent to a high school education; thereby he became eligible for advancement under current company policies. Insufficient time has elapsed in which to determine whether or not Boyd will be advanced without discrimination, but it does appear that the company is not now discriminating in its promotion and transfer policies against Negro employees who have a high school education or its equivalent.

The plaintiff Negro employees admit that at the present time Duke has apparently abandoned its policy of restricting all Negroes to the Labor Department; but the plaintiffs complain that the educational and testing requirements preserve and continue the effects of Duke's past racial discrimination, thereby violating the Civil Rights Act of 1964.[1]

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[1] Pertinent sections of Title VII of the Civil Rights Act of 1964 are:

Section 703(a), 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

The district court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Negroes were relegated to the Labor Department and deprived of access to other departments by reason of racial discrimination practiced by the company. This finding is fully supported by the evidence.

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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.

Section 703(h), 42 U.S.C. § 2000e-2(h):

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 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.

Section 706(g), 42 U.S.C. § 2000e-5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice.)

However, the district court also held that Title VII of the Civil Rights Act of 1964 does not encompass the present and continuing effects of past discrimination. This holding is in conflict with other persuasive authority and is disapproved. While it is true that the Act was intended to have prospective application only, relief may be granted to remedy present and continuing effects of past discrimination. *Local 53* v. *Vogler,* 407 F.2d 1047, 1052 (5 Cir. 1969); *United States* v. *Local 189,* 282 F.Supp. 39, 44 (E.D. La. 1968), *aff'd,* No. 25956, —— F.2d. —— (5 Cir. 1969); *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968). *See, United States* v. *Hayes International Corporation,* No. 26809, —— F.2d —— (5 Cir. 1969), 38 L.W. 2149 (Sept. 16, 1969). In *Quarles,* it was directly held that present and continuing consequences of past discrimination are covered by the Act, the court stating, "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." *Quarles* v. *Philip Morris, Inc.,* supra at 516. The *Quarles* decision was expressly approved and followed in *United States* v. *Local 189, supra,* as the district court, with subsequent approval of the Fifth Circuit Court of Appeals, struck down a seniority system which had the effect of perpetuating discrimination. ". . . [W]here, as here, 'job seniority' operates to continue the effects of past discrimination, it must be replaced * * *." *United States* v. *Local 189, supra* at 45. In *Local 53* v. *Vogler,* 407 F.2d 1047, 1052 (5 Cir. 1969), the court said: "Where necessary to ensure compliance with the Act, the District Court was fully empowered to eliminate the present effects of past discrimination."

Those six Negro employee-plaintiffs without a high school education or its equivalent who were discrimina-

torily hired only into the Labor Department prior to Duke's institution of the educational requirement in 1955 were simply locked into the Labor Department by the adoption of this requirement. Yet, on the other hand, 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 or transferred into better, higher paying positions. Thus, it is clear that those six plaintiff Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief; the educational requirement shall not be invoked as an absolute bar to advancement, but must be waived as to these plaintiffs and they shall be entitled to nondiscriminatory consideration for advancement to other departments if and when job openings occur.

Likewise, as to these same six Negro plaintiffs, the testing requirements established in 1965 are also discriminatory. The testing requirements, as will be fully explained later in this opinion, were established as an approximate equivalent to a high school education for advancement purposes. Since the adoption of the high school education requirement was discriminatory as to these six Negro employees and the tests are used as an approximate equivalent for advancement purposes, it must follow that the testing requirements were likewise discriminatory as to them. These six plaintiffs had to pass these tests in order to escape from the Labor Department while their white counterparts, many of whom also did not have a high school education, had been hired into departments other than the Labor Department and therefore were not required to take the tests. Therefore, as to these six plaintiffs, the testing requirements must also be waived and shall not be invoked as a bar to their advancement.

Next, we consider the rights of the second group of plaintiffs, those four Negro employees without a high school education or its equivalent who were hired into the Labor Department after the institution of the educational requirement. We find that they are not entitled to relief for the reasons to be hereinafter assigned. In determining the rights of this second group of plaintiffs, it is necessary to analyze and determine the validity of Duke's educational and testing requirements under the Civil Rights Act of 1964. We have found no cases directly in point. The Negro employee-plaintiffs contend that the requirements continue the effects of past discrimination and, therefore, must be struck down as invalid under the Act. We find ourselves unable to agree with that contention.

Plaintiffs claim that Duke's educational and testing requirements are discriminatory and invalid because: (1) there is no evidence showing a business need for the requirements; (2) Duke Power did not conduct any studies to discern whether or not such requirements were related to an employee's ability to perform his duties; and (3) the tests were not job-related, and § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), requires tests to be job-related in order to be valid.

The company admits that it initiated the requirements without making formal studies as to the relationship or bearing such requirements would have upon its employees' ability to perform their duties. But, Duke claims that the policy was instituted because its business was becoming more complex, it had employees who were unable to grasp situations, to read, to reason, and who did not have an intelligence level high enough to enable them to progress upward through the company's line of advancement.

Pointing out that it uses an intracompany promotion system to train its own employees for supervisory positions inside the company rather than hire supervisory personnel from outside, Duke claims that it initiated the high school education requirement, at least partially, so that it would have some reasonable assurance that its employees could advance into supervisory positions; further, that its educational and testing requirements are valid because they have a legitimate business purpose, and because the tests are professionally developed ability tests, as sanctioned under § 703(h) of the Act, 42 U.S.C. 2000e-2(h).

In examining the validity of the educational and testing requirements, we must determine whether Duke had a valid business purpose in adopting such requirements or whether the company merely used the requirements to discriminate. The plaintiffs claim that centuries of cultural and educational discrimination have placed Negroes at a disadvantage in competing with whites for positions which involve an educational or testing standard and that Duke merely seized upon such requirements as a means of discrimination without a business purpose in mind. Plaintiffs have admitted in their brief that an employer is permitted to establish educational or testing requirements which fulfill genuine business needs and that such requirements are valid under the Act. In support of this statement, we quote verbatim from appellants' brief:

> *"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 need can be shown,* as it can where typing ability is necessary for performance as a secretary, *the fact that the test tends to exclude more Negroes than whites does not make it discriminatory.* We do not wish even to suggest that employers are required by law to compensate for centuries of discrimination by hiring Negro applicants who are incapable of doing the job. But when a test or educational requirement is not shown to be based on business need, as in the instant case, it measures not ability to do a job but rather the extent to which persons have acquired educational and cultural background which has been denied to Negroes." (Emphasis added.)

Thus, plaintiffs would apparently concede that if Duke adopted its educational and testing requirements with a genuine business purpose and without intent to discriminate against future Negro employees, such requirements would not be invalidated merely because of Negroes' cultural and educational disadvantges due to past discrimination. Although earlier in this opinion we upheld the district court's finding that the company had engaged in discriminatory hiring practices prior to the Act and we concluded also that the educational and testing requirements adopted by the company continued the effects of this prior discrimination as to employees who had been hired prior to the adoption of educational requirement, it seems reasonably clear that this requirement did have a genuine business purpose and that the company initiated the policy with no intention to discriminate against Negro employees who might be hired after the adoption of the educational requirement.

This conclusion would appear to be not merely supported, but actually compelled, by the following facts:

(1) Duke had long ago established the practice of training its own employees for supervisory positions rather than bring in supervisory personnel from outside.[2]

(2) Duke instituted its educational requirement in 1955, nine years prior to the passage of the Civil Rights Act of 1964 and well before the civil rights movement had gathered enough momentum to indicate the inevitability of the passage of such an act.[3]

(3) Duke has, by plaintiffs' own admission, discontinued the use of discriminatory tactics in employment, promotions and transfers.[4]

(4) The company's expert witness, Dr. Moffie, testified that he had observed the Dan River operation; had observed personnel in the performance of jobs; had studied the written summary of job duties; had spent several days with company representatives discussing job content; and he concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skilled classifications. This testimony is uncontroverted in the record.

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[2] The company had an obvious business motive and objective in establishing the high school requirement, that is, hiring only personnel who had a reasonable expectation of ascending promotional ladders into supervisory positions thereby eliminating road blocks which would interfere with movement to higher classifications and tend to decrease efficiency and morale throughout the entire work force.

[3] It is highly improbable that the company seized upon such a requirement merely for the purpose of continuing discrimination.

[4] This tends to demonstrate the company's good faith.

(5) When the educational requirement was adopted it adversely affected the advancement and transfer of white employees who were Watchmen or were in the Coal Handling Department as well as Negro employees in the Labor Department.[5]

(6) Duke has a policy of paying the major portion of the expenses incurred by an employee who secures a high school education or its equivalent. In fact, one of the plaintiffs recently obtained such equivalent, the company paying seventy-five percent of the cost.[6]

Next, we consider the testing requirements to determine their validity and we conclude that they, too, are valid under § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). In pertinent part, § 703(h) reads: "* * * nor shall it 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."

There is no evidence in the record that there is any discrimination in the administration and scoring of the tests. Nor is there any evidence that the tests are not professionally developed. The company's expert, Dr. D. J. Moffie, testified that in his opinion the tests were professionally developed and are reliable and valid; that they are "low

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[5] It is unreasonable to charge the company with prospective discrimination by instituting an educational requirement which was to be applied prospectively to white, as well as Negro, employees.

[6] It would be illogical to conclude that Duke established the educational requirement for purposes of discrimination when it was willing to pay for the education of incumbent Negro employees who could thus become eligible for advancement.

level" tests and are given at Dan River by one who has had special training in the administration of such tests. The minimum acceptable scores used by the company are approximately those achieved by the average high school graduate, which fact indicates that the tests are accepted as a substitute for a high school education. The evidence disclosed that the minimum acceptable scores used by Duke are Wonderlic-20, and Bennett Mechanical-39; the score of the average high school graduate, *i.e.,* the fiftieth percentile, is 21.9 for the Wonderlic, nearly two points higher than the score accepted by Duke, and 39 for the Bennett Mechanical.

The plaintiffs claim that tests must be *job-related* in order to be valid under § 703(h). The Equal Employment Opportunity Commission which is charged with administering and implementing the Act supports plaintiffs' view. The EEOC has ruled that tests are unlawful "* * * in the absence of evidence that the tests are properly related to specific jobs and have been properly validated * * *." *Decision of EEOC,* December 2, 1966, reprinted in CCH, Employment Practices Guide, ¶ 17,304.53. The EEOC's position has been supported by two federal district courts. *United States* v. *H. K. Porter,* 59 L.C. ¶ 9204 (M.D. Ala. 1969); *Dobbins* v. *Local 212, IBEW,* 292 F. Supp. 413 (S.D. Ohio 1968). In *Dobbins* the court invalidated a test which was being given for membership in a labor union or in connection with a referral system because it was not adequately related to job performance needs. However, in that case it was clear that the testing requirement was not one of business necessity and the reasons for adopting such a requirement compellingly indicated that the purpose of such requirement was discrimination, which is not true in the present case.

The court below held that the tests given by Duke were not job-related, but then refused to give weight to the

EEOC ruling that tests must be job-related in order to be valid under § 703(h). The plaintiffs assert that such refusal was error. It has been held that the interpretation given a statute by an agency which was established to administer the statute is entitled to great weight. *Udall* v. *Tallman,* 380 U.S. 1, 15 (1965). This principle has been applied to EEOC interpretations given the Civil Rights Act of 1964. *Weeks* v. *Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228, 235 (5 Cir. 1969); *Cox* v. *United States Gypsum Co.,* 284 F. Supp. 74, 78 (N.D. Ind. 1968); *International Chemical Workers Union* v. *Planters Manufacturing Co.,* 259 F. Supp. 365, 366 (N.D. Miss. 1966). Plaintiffs cite these cases last mentioned above to support their argument that this court should adopt the EEOC ruling that tests must be job-related in order to be valid. However, none of these cases stands for the proposition that an EEOC interpretation is binding upon the courts; in fact, in *International Chemical Workers, supra* at 366, it was held that such interpretations of the EEOC are "* * * not conclusive on the courts * * *." We cannot agree with plaintiffs' 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.

The amendment which incorporated the testing provision of § 703(h) was proposed in modified form by Senator Tower, who was concerned about a then-recent finding by a hearing examiner for the Illinois Fair Employment Practices Commission in a case involving Motorola, Inc. The examiner had found that a pre-employment general intelligence test which Motorola had given to a Negro applicant for a job had denied the applicant an equal employment

opportunity because Negroes were a culturally deprived or disadvantaged group. In proposing his original amendment, essentially the same as the version later unanimously accepted by the Senate, Senator Tower stated:

> "It [the amendment which, in substance, became the ability testing provision of § 703(h)] is an effort to protect the system whereby employers give *general ability and intelligence tests to determine the trainability of prospective employees.* The amendent arises from my concern about what happened in the Motorola FEPC case * * *.
>
> "Let me say, only, in view of the finding in the Motorola case, that the Equal Employment Opportunity Commission, which would be set up by the act, operating in pursuance of Title VII, might attempt to regulate the use of tests by employers * * *.
>
> *"If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests* of various kinds of employees by both private business and Government *to determine the professional competence or ability or trainability or suitability of a person to do a job."* (Emphasis added.) 110 Congressional Record 13492, June 11, 1964.

The discussion which ensued among members of the Senate reveals that proponents and opponents of the Act agreed that general intelligence and ability tests, if fairly administered and acted upon, were not invalidated by the Civil Rights Act of 1964. *See,* 110 Congressional Record 13503-13505, June 11, 1964.

The "Clark-Case" interpretative memorandum pertaining to Title VII fortifies the conclusion that Congress did

not intend to invalidate an employer's use of bona fide general intelligence and ability tests. It was stated in said memorandum:

> "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." (Emphasis added.) 110 Congressional Record 7213, April 8, 1964.

When Senator Tower called up his modified amendment, which became the ability testing provision of §703(h), Senator Humphrey—one of the leading proponents and the principal floor leader of the fight for passage of the entire Act—stated:

> "I think it should be noted that the Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and found it to be in accord with the intent and purpose of that title.
>
> "I do not think there is any need for a rollcall. We can expedite it. *The Senator has won his point.*
>
> "I concur in the amendment and ask for its adoption." (Emphasis added.) 110 Congressional Record 13724, June 13, 1964.

At no place in the Act or in its legislative history does there appear a requirement that employers may utilize only those tests which measure the ability and skill re-

quired by a specific job or group of jobs. In fact, the legislative history would seem to indicate clearly that Congress was actually trying to guard against such a result. An amendment requiring a "direct relation" between the test and a "particular position" was proposed in May 1968,[7] but was defeated. We agree with the district court that a test does not have to be job-related in order to be valid under § 703(h).[8]

Having determined that Duke's educational and testing requirements were valid under Title VII, we reach the conclusion that those four Negro employees without a high school education who were hired after the adoption of the educational requirement are not entitled to relief. These employees were hired subject to the educational requirement; each accepted a position in the Labor Department with his eyes wide open. Under this valid educational requirement these four plaintiffs could have been hired only in the Labor Department and could not have been promoted or advanced into any other department, irrespective of race, since they could not meet the requirement. Consequently, it could not be said that they have been discriminated against. Furthermore, since the testing requirement is being applied to white and Negro employees alike

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[7] Senate Report No. 1111, May 8, 1968.

[8] This decision is not to be construed as holding that *any* educational or testing requirement adopted by *any* employer is valid under the Civil Rights Act of 1964. There must be a genuine business purpose in establishing such requirements and they cannot be designed or used to further the practice of racial discrimination. Future cases must be decided on the bases of their own fact situations in light of pertinent considerations such as the company's past hiring and advancement policies, the time of the adoption of the requirements, testimony of experts and other evidence as to the business purpose to be accomplished, and the company's stated reasons for instituting such policies.

as an approximate equivalent to a high school education for advancement purposes, neither is it racially discriminatory.

Once we have determined that certain of the plaintiffs are entitled to relief the next question for consideration is the nature and extent of relief to be provided.[9] Those six Negro employees without a high school education or its equivalent who were hired prior to the initiation of the educational requirement are entitled to injunctive relief under § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).[10] The educational and test requirements are

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[9] The plaintiffs disclaim any request for or entitlement to relief other than by way of injunction. Had there been an issue as to monetary awards for damages to those plaintiffs found to have been the victims of racial discrimination, there would have been presented the further issue as to the date of applicability of the Act. There were only 95 employees at the Dan River plant when the Act became effective on July 2, 1965, but Duke Power Company then employed some 6,000 persons throughout its entire system. The Act was initially applicable to employers with 100 or more employees, and it did not become applicable to employers with 75 to 100 employees until July 2, 1966. However, since the relief requested and awarded is solely injunctive in nature no question as to the applicability date of the Act is presented for decision.

[10] Section 706(g) of the Civil Rights Act of 1964 limits injunctive relief to situations in which an employer or a union has "intentionally engaged in or is intentionally engaging in" an unlawful employment practice. While we have found Duke's educational and testing requirements valid as to employees hired subsequently to the adoption of the educational requirement, we further conclude that Duke had intentionally engaged in discriminatory hiring practices in earlier years long prior to the enactment of the Civil Rights Act of 1964 and that, as to those six Negro employees hired prior to the adoption of the educational requirement, the effects of this discrimination were continued. Thus, these six plaintiffs may be granted appropriate injunctive relief under § 706(g). See, Clark v. American Marine Corp., No. 16315, —— F. Supp. —— (E.D. La. Sept. 15, 1969); Local 189 v. United States, No. 25956, —— F.2d —— (5 Cir. July 28, 1969).

invalid as applied to their eligibility for transfer and promotion. Thus, on remand, the district court should award proper injuctive relief to insure that these six employees are considered for any future openings without being subject to the educational or testing requirements. This will work no hardship upon the company since the relief provided will simply require it to consider those Negro employees equally with similarly situated white employees, many of whom do not have a high school education or its equivalent. If a Negro employee is advanced to a job in one of the better departments and his inability to perform the duties of the job is demonstrated after a reasonable period the company will be justified in returning him to his previous position or placing him elsewhere. As Judge Butzner said in *Quarles,* 279 F.Supp. 505, 521 (E.D. Va. 1968), *supra*:

> "If any transferee fails to perform adequately within a reasonable time * * * he may be removed and returned to the department and job classification from which he came, or to another higher job classification for which the company may believe him fitted."

In granting relief, the district court should order that seniority rights of the six Negro employees who are victims of discrimination be considered on a plant-wide, rather than a departmental, basis. To apply strict departmental seniority would result in the continuation of present effects of past discrimination whenever one of the six is considered in the future for advancement to a vacant job in competition with a white employee who has already gained departmental seniority in a better department as a result of past discriminatory hiring practices. In *United States*

v. *Local 189,* 282 F.Supp. 39, 44 (E.D. La. 1968), *aff'd,* No. 25956, —— F.2d —— (5 Cir. 1969), *supra,* the court held:

> "Where a seniority system has the effect of perpetrating discrimination, and concentrating or 'telescoping' the effect of past discrimination against Negro employees into the *present* placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system." [11]

It is to be understood and remembered that there are thirteen named Negro plaintiffs who bring this action. Jesse C. Martin, a Negro formerly employed in the Labor Department who had a high school education, was advanced to a higher position subsequent to the effective date of the Act. He is not joined as a plaintiff since the past discrimination against him has been removed. This case is now moot as to two of the named Negro plaintiffs who have high school educations and have been advanced; also as to Willie Boyd, who has acquired the equivalent of a high school education and is now eligible for advancement.

Briefly summarizing, only those six Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief. As to them the judgment below is reversed and the case is remanded to the district court

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[11] Here, despite the company's representations to the contrary, it is apparent that strict departmental seniority is not always followed since the company admits that an employee sometimes enters a new department at a position *above* the entry level; however, it is the more general practice for an employee to enter a new department at the lowest classification therein.

with directions to fashion appropriate injunctive relief consistent with this opinion. As to the remaining Negro plaintiffs the judgment below is affirmed.

Affirmed in part,
reversed in part,
and remanded.

SOBELOFF, Circuit Judge, concurring in part and dissenting in part:

The decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years. For that reason and because the prevailing opinion puts this circuit in direct conflict with the Fifth,[1] I find it appropriate to set forth my views in some detail.

While I concur in the grant of relief to six of the plaintiffs, I dissent from the majority opinion insofar as it upholds the Company's educational and testing requirements and denies relief to four Negro employees on that basis.

The case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified.[2] This is not the first time the federal courts of our circuit have been exposed to this problem. In what has become a leading case, Judge Butzner of our court, sitting

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[1] Local 189 v. United States, —— F.2d ——, 71 LRRM 3070, 3081 (5th Cir., July 28, 1969), discussed at note 8, *infra*.

[2] *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 (June 1969) [hereinafter cited as Cooper and Sobel]; Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Col. L. Rev. 691 (April 1968).

as a district judge by designation, authoritatively dealt with the question of the denial of jobs to blacks because of a seniority system built upon a pattern of past discrimination. *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). Today we are faced with an analogous issue, namely, the denial of jobs to Negroes who cannot meet educational requirements or pass standardized tests, but who quite possibly have the ability to perform the jobs in question. On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to melliflu-ous but hollow rhetoric.

The pattern of racial discrimination in employment parallels that which we have witnessed in other areas. Overt bias, when prohibited, has ofttimes been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before. Illustrative is the use of the Grandfather Clause in voter registration—a scheme that was condemned by the Supreme Court without dissent over a half century ago. *Guinn* v. *United States*, 238 U.S. 347 (1915).[3] Another illustration is the resort to pupil transfer plans to nullify rezoning which would otherwise serve to desegregate school districts. Again, the illusory even-handedness did not shield the artifice from attack; the Supreme Court unanimously repudiated the plan. *Goss* v. *Bd. of Education*, 373 U.S. 683 (1963). It is long recognized constitutional doctrine that "sophisticated as well as simple-minded modes of discrimination" are prohibited. *Lane* v. *Wilson*, 307 U.S.

[3] The opinion was unanimous save for Mr. Justice McReynolds, who took no part in the consideration or decision of the case.

268, 275 (1938) (Frankfurter, J.). We should approach enforcement of the Civil Rights Act in the same spirit.[4]

In 1964 Congress sought to equalize employment opportunity in the private sector. Title VII, § 703(a) of the 1964 Civil Rights Act provides:

> It shall be an unlawful employment practice for an employer—
>
> (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
>
> (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. 42 U.S.C. § 2000e-2(a).

The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employ-

[4] It is not part of my contention that the defendant in the present case availed himself of "objective" employment procedures deliberately to evade the strictures of Title II. As will be developed, an employer's state of mind when he adopts the standards is irrelevant when the effect of his actions is not different from purposeful discrimination. At any rate, it is my view that the majority's construction of Title VII will invite many employers to seize on such measures as tools for their forbidden designs.

ment practices. The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end. *Quarles* v. *Philip Morris, supra; Local 189* v. *United States,* —— F.2d ——, 71 LRRM 3070 (5th Cir. July 28, 1969); *Local 53* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969). For example, a requirement that all applicants for employment shall have attended a particular type of school would seem racially neutral. But what if it develops that the specified schools were open only to whites, and if, moreover, they taught nothing of particular significance to the employer's needs? No one can doubt that the requirement would be invalid. It is the position of the Equal Employment Opportunities Commission (EEOC) that educational or test requirements which are irrelevant to job qualifications and which put blacks at a disadvantage are similarly forbidden.

I

Use of Non-Job-Related Educational and Testing Standards

The Dan River plant of the Duke Power Company is organized into five departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. There is also a miscellaneous category which includes watchmen. Until 1965 blacks were routinely relegated to the all-Negro Labor Department as part of a policy of overt discrimination.

The era of outrightly acknowledged bias at Duke Power is admittedly at an end. However, plaintiffs contend that administration of certain "objective" transfer criteria have accomplished substantially the same result. It was not until August 1966 that any Negro was promoted out of the Labor Department. Altogether, as of this date, three blacks

have advanced from that department. They were the only ones that could mesaure up to the Company's requisites for transfer.[5]

In 1955 the Company first imposed its educational requirement: a high school diploma (or successful completion of equivalency ["GED"] tests) would be necessary to progress from any of the outside departments (Labor, Coal Handling, Watchmen) to any of the inside departments (Operations, Maintenance, Laboratory and Test) or from Labor to the two other outside classifications. In 1965 the Company provided that in lieu of a high school diploma or equivalent, employees could satisfy the transfer standards by passing two "general intelligence" tests, the 12 minute "Wonderlic" test and the 30 minute "Bennett Mechanical AA" test. It is uncontroverted that all of these requirements are equivalent.

A. *The Necessity for Job-Relatedness*

Whites fare overwhelmingly better than blacks on all the criteria,[6] as evidenced by the relatively small promotion

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[5] At oral argument we were told that one other black has since qualified but has not yet been transferred.

[6] No one seriously questions the fact that, in general, whites register far better on the Company's alternative requirements than blacks. The reasons are not mysterious.

High School Education. In North Carolina, census statistics show, as of 1960, while 34% of white males had completed high school, only 12% of Negro males had done so. On a gross level, then, use of the high school diploma requirement would favor whites by a ratio of approximately 3 to 1.

Sandardized Tests. It is generally known that standardized aptitude tests are designed to predict future ability by testing a cumulation of acquired knowledge.

> In other words, an aptitude test is necessarily measuring a student's background, his environment. It is a test of his

rate from the Labor Department since 1965. Therefore, the EEOC contends that use of the standards as conditions for transfer, unless they have significant relation to performance on the job, is improper. The requirements, to withstand attack, must be shown to appraise accurately those characteristics (and only those) necessary for the job or jobs an employee will be expected to perform. In others, the standards must be "job-related."

Plaintiffs and the Commission are not asking, as the majority implies, that blacks be accorded favored treatment in order to remedy centuries of past discrimination. That many members of the long disfavored group find themselves ill equipped for certain employments is a burden which the 1964 Civil Rights Act does not seek to lift. The argument is only that educational and cultural differences caused by that history of deprivation may not be fastened on as a test for employment when they are irrelevant to the issue of whether the job can be adequately performed.

Duke Power, on the other hand, maintains that its selection standards are unimpeachable since in its view the

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cumulative experiences in his home, his community and his school.

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, —— F.2d —— (D.C. Cir. 1969) (en banc).

Since for generations blacks have been afforded inadequate educational opportunities and have been culturally segregated from white society, it is no more surprising that their performance on "intelligence" tests is significantly different than whites' than it is that fewer blacks have high school diplomas. In one instance, for example, it was found that 58% of whites could pass a battery of standardized tests, as compared with only 6% of the blacks. Included among those tests were the Wonderlic and Bennett tests. Decision of EEOC, cited in CCH Empl. Prac. Guide ¶1209.25 (Dec. 2, 1966).

For a comprehensive analysis of the impact of standardized tests on blacks, see Cooper and Sobel, 1638-1641.

tests (and therfore also the equivalent educational standard) are protected by § 703(h) of Title VII.

Section 703(h) provides, in pertinent part:

> * * * nor shall it 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. 42 U.S.C. § 2000e-2(h).

The Company asserts that its tests are "professionally developed ability tests" and thus do not have to be job-related. The District Court agreed and rejected the construction put upon § 703(h) by the EEOC. The majority here adopts this view.

In its *Guidelines on Employment Testing Procedures*[7] the Commission has held that a test can be a "professionally developed ability test" only if it

> 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 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.[7a]

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[7] Issued September 21, 1966. The *Guidelines* may be found in CCH Empl. Prac. Guide ¶16,904 at 7319.

[7a] The newly appointed chairman of the EEOC, William H. Brown, III, has recently reaffirmed this thesis. In an address on November 26, 1969 he asked representatives of more than forty

In rejecting the Commission *Guidelines* the District Court erred and the majority repeats the error. Under settled doctrine the Commission's interpretation should be accepted. The Supreme Court has held that

> [w]hen 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 Comm'n* v. *Aragon*, 329 U.S. 143, 153. *See also, e.g., Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. "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 Co.* v. *Electricians*, 367 U.S. 396, 408.

Udall v. *Tallman*, 380 U.S. 1, 16 (1965). In the *Tallman* case, the Court found that a construction of an Executive Order made by the Secretary of the Interior was not unreasonable. Accordingly, it followed the Secretary's interpretation.

Guidelines of the EEOC are entitled to similar consideration. The Fifth Circuit agrees. In *Weeks* v. *Southern Bell*

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trade associations to "review selection and testing procedures to make sure they reflect actual job requirements." 72 LRR 413, 416 (12/8/69).

Tel. & Tel. Co., 408 F.2d 228 (5th Cir., 1969), that court, in deciding a Title VII sex discrimination case, accorded "considerable weight" to the EEOC guideline which construed the relevant statutory provision. In a more recent case the same court noted the rejection of the EEOC's position by the lower court in the present case and specifically disapproved of the decision here under review.[8] *Local 189* v. *United States*, —— F.2d ——, 71 LRRM 3070, 3081 (July 28, 1969). We should do the same.

Other courts have reached similar results. Granting relief from the effects of a departmental and seniority structure, Judge Butzner found in *Quarles* that "[t]he restrictions do not result from lack of merit or qualification." 279 F. Supp. at 513. The Eighth Circuit has held that "it is essential that journeyman's examinations be objective in nature, that they be designed to test the ability of the applicant to do that work usually required by a journeyman * * * " *United States* v. *Local 36, Sheet Metal Workers*, —— F.2d —— (8th Cir. Sept. 16, 1969). *Accord, Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968).

Not only is the Commission's interpretation of § 703(h) not unreasonable, but it makes eminent common sense. The Company would have us hold that any test authored by

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[8] Judge Wisdom stated that

> [The *Griggs* court] went on to strike down an EEOC interpretation of that provision which would limit the exemption to tests that measure ability "*required* by the *particular job* or class of jobs which the applicant seeks." * * *
>
> When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes ongoing discrimination, unless the incidents are limited to those that safety and efficiency require. That appears to be the premise for the Commission's interpretation of § 703(h). To the extent that *Griggs* departs from that view, we find it unpersuasive.

71 LRRM at 3081.

a professional test designer is "professionally developed" and automatically merits the court's blessing. But, what is professionally developed for one purpose is not necessarily so for another. A professionally developed typing test, for example, could not be considered professionally developed to test teachers. Similarly, a test that is adequately designed to determine academic ability, such as a college entrance examination, may be grossly wide of the mark when used in hiring a machine operator. Moreover, the Commission's is the only construction compatible with the purpose to end discrimination and to give effect to § 703(a). Although certainly not so intended, my brethren's resolution of the issue contains a built-in invitation to evade the mandate of the statute. To continue his discriminatory practices an employer need only choose any test that favors whites and is irrelevant to actual job qualifications. In this very case, the Company's oft-reiterated but totally unsubstantiated claim of business need has been deemed sufficient to sustain its employment standards. The record furnishes no supporting evidence, only the defendant's *ipse dixit.*

It would be enough to rest our decision on the reasonableness of the EEOC's position. A deeper look, however, at the legislative history of § 703(h) provides powerful additional support for its construction.

Congressional discussion of employment testing came in the swath of the famous decisions of an Illinois Fair Employment Practices Commission hearing examiner, *Myart* v. *Motorola.*[9] That case went to the extreme of suggesting that standardized tests on which whites performed better than Negroes could never be used. The decision was

[9] Decided on February 26, 1964. Reproduced in 110 Cong. Rec. 5662-64 (1964).

generally taken to mean that such tests could never be justified *even if the needs of the business required them.*

Understandably, there was an outcry in Congress that Title VII might produce a *Motorola* decision. Senators Clark and Case moved to counter that speculation. In their interpretive memorandum they announced that

> [t]here 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.[10]

Read against the context of the *Motorola* controversy, the import of the Clark-Case statement plainly appears: employers were not to be prohibited from using tests that determine *qualifications*. "Qualification" implies qualification *for* something. A reasonable interpretation of what the Senators meant, in light of the events, was that nothing in the Act prevents employers from requiring that applicants be fit for the job. Tests for that purpose may be as difficult as an employer may desire.

Senator Tower, however, was not satisfied that a *Motorola* decision was beyond the purview of Title VII as written. He introduced an amendment which had the object of preventing the feared result. His amendment provided that a test, administered to all applicants without regard to race, would be permissible "if * * * in the case of any

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[10] 110 Cong. Rec. 7213 (1964).

individual who is an employee of such employer, such test is designed to determine or predict whether such individual is *suitable or trainable with respect to his employment* [or promotion or transfer] *in the particular business or enterprise involved* * * *." [Emphasis added.][11] It was emphatically represented by the author that the amendment was "not an effort to weaken the bill"[12] and "would not legalize discriminatory tests"[13] but was offered to stave off an apprehended *Motorola* ruling that might "invalidate tests * * * to determine the professional competence or ability or trainability or suitability of a person *to do a job.*" (Emphasis added.)[14] It is highly noteworthy that

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[11] The amendment was introduced on July 11, 1964. In its entirety it reads:

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—
>
> (1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or
>
> (2) in the case of an individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin.

110 Cong. Rec. 13492 (1964).

[12] *Id.*

[13] *Id.* at 13504.

[14] *Id.* at 13492.

Senator Tower's exertions were not on behalf of tests unrelated to job qualifications, but his aim was to make sure that job-related tests would be permitted. He squarely disavowed any broader aim.

Senators Case and Humphrey opposed the amendment as redundant.[15] Reiterating the message of the Clark-Case memorandum, Senator Case declared that "[t]he Motorola case could not happen under the bill the Senate is now considering."[16] Senator Case also feared that some of the language in the amendment would be susceptible to misinterpretation.[17] The amendment was defeated.[18]

Two days later Senator Tower offered § 703(h) in its present form, stating that it had been agreed to in principle "[b]ut the language was not drawn as carefully as it should have been."[19] The new amendment was acceptable to the proponents of the bill and it passed.[20]

What does this history denote? It reveals that because of the *Motorola* case there was serious concern that tests that select for job qualifications—job-related tests—might be deemed invalid under Title VII. Senators Clark, Case and Humphrey thought the fear illusory, but Senator Tower

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[15] *Id.* at 13503-04.

[16] *Id.* at 13503.

[17] In fact, it appears that Senator Case was concerned that the amendment might be construed the way Duke Power would have us construe the enacted § 703(h).

> 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.

Id. at 13504.

[18] *Id.* at 13505.

[19] *Id.* at 13724.

[20] *Id.*

expended great effort to insure against the possibility. At the same time he gave assurance that he did not mean to weaken the Act. His first proposed amendment contained language which contemplated that tests were to be job-related. According to his own formulation tests had to be of such character as to determine whether "an individual is suitable with respect to his employment." At no time was there a clash of opinion over this principle but the amendment was opposed by proponents of the bill for other reasons and was rejected. The final amendment, which was acceptable to all sides could hardly have required less of a job relation than the first.[21] Since job-relatedness was never in dispute there is no room for the inference that the bill in its enacted form embodied a compromise on this point. The conclusion is inescapable that the Commission's construction of § 703(h) is well supported by the legislative history.[22]

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[21] Indeed, the avowed tightening of language by Senator Tower in the interim, n.19, *supra,* was presumably in response to the misgiving expressed by Senator Case that the original amendment could lend itself to the construction that Duke Power now seeks. *See* n.15, *supra.*

[22] The majority argues that congressional action some years after the passage of the 1964 Act supports the Company's position. This is not legislative history. Even if the import of the action were unequivocal it would not speak for the will of the 88th Congress which passed the statute.

The cited legislative deliberation was occasioned by a bill introduced in May 1968 to modify Title VII. *See* S. 3465, 90th Cong., 2d Sess. § 6(c) (1968). If adopted it would have amended § 703(h) to embody a job-related standard in express terms. However, the bill was not enacted. One can draw differing and inconsistent conclusions from these events. It could be argued, as the majority does, that the bill's proponents recognized that § 703(h) as it stands does not contemplate job-relation. It is equally possible that the bill ultimately did not pass because the amendment was thought to be unnecessary. The bill's adherents might also have thought that the new amendment would represent no change,

Manifestly, then, so far as Duke Power relies on § 703(h) for the proposition that its tests (or other requirements) need not be job-related, it must fail.

B. *The District Court's Findings and the Evidence Supporting It.*

There can be no serious question that Duke Power's criteria are not job-related. The District Court expressly found that they were not,[23] and that finding is the only one consistent with the evidence.

To insure that a criterion is suitably fitted to a job or jobs, an employer is called upon to demonstrate that the standard was adopted after sufficient study and evaluation. It is not enough that officials think or hope that a requirement will work. In the District Court, Dr. Richard Barrett

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but offered it to forestall employers, such as Duke Power, from construing § 703(h) incorrectly. The inferences to be drawn from the introduction of the bill and its death are at best ambiguous and inconclusive.

If one must look to subsequent events for elucidation, consideration might be given to the comment of a Senator who was intimately involved in the passage of § 703(h). Senator Humphrey has stated that in his view § 703(h) did not protect tests if they were "irrelevant to the actual job requirements." Letter to American Psychological Association, quoted in The Ind. Psychologist (Div. 14, Am. Psychological Ass'n Newsletter), August, 1965, at 6, cited in Cooper and Sobel, 1653, n.67.

[23] The District Judge said:

> The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available.
>
> * * *
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> * * * These qualities are general in nature and are not indicative of a person's ability to perform a particular task. Nevertheless, they are qualities which the defendant would logically want to find in his employees.

292 F. Supp. 243, 250 (1968).

was qualified as an expert witness for plaintiff on the "use of tests and other selection procedures for selection in promotion and employment." He testified as to what sound business practice would dictate: First, a careful job analysis should be made, detailing the tasks involved in a job and the precise skills that are necessary. Then, on the basis of this analysis, selection procedures may be chosen that are adapted to the relevant abilities. Then, the most important step is to validate the chosen procedures, that is, to test their results with actual performance.

The EEOC concurs. The *Guidelines* detail methods to be used to develop, study, and validate employment criteria.[24]

Compare with the above what Duke Power has done and what it has failed to do. Company officials say that the high school requirement was adopted because they thought it would be helpful. Indeed, a company executive candidly admitted that

> there is nothing magic about it, and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up, but we felt this was a reasonable requirement * * *.

Duke Power offered the testimony of Dr. Dannie Moffie, an expert "psychologist in the field of industrial and per-

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[24] The recommended methods were adopted after study by a panel of psychologists. The Commission has the power "to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public[.]" 42 U.S.C. 2000e-4(f)(5). *Also see* 33 Fed. Reg. 14392 (1968). By order of the Secretary of Labor, detailed minimum standards of evidence of test validity have been issued for federal contractors. That evidence is reviewed by the Office of Federal Contract Compliance to determine whether or not a contractor has violated Executive Order 11,246, 3 C.F.R. 339 (1964-65 comp.), banning racial discrimination.

sonnel testing." Dr. Moffie agreed that a professionally developed test "should be reliable and * * * should be valid." The question of validity, he said, is whether "the test measures what it has been set up to measure." Dr. Moffie never asserted that the Bennett and Wonderlic tests had been validated for job-relatedness. In fact, he testified that a job-related validity study was begun at the Dan River plant in 1966 but has not yet been completed. What this expert did claim was that the tests had been validated for their express purpose of determining "whether or not a person has the intelligence level and the mechanical ability level that is characteristic of the High School graduate. According to Dr. Moffie,

> when [the tests] function as a substitute or in lieu of a High School education, then, the assumption is that the test then,—the High School education is the kind of training and ability and judgment that a person needs to have, in order to do the jobs that we are talking about here * * *.

It is precisely this assumption that is totally unsubstantiated. The tests stand, and fall, with the high school requirement. 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. This is a fatal omission and should mark the end of the story.

C. *The Alleged Business Justification*

But on the majority's theory, there can be business justification in the absence of job-relatedness. The Company's promotion policy has always been to give on-the-job

training—the next senior man is promoted if, after he tries out on the job, he is found qualified. The Company claims that ten years before the start of this suit it found that, its business having become increasingly complex, employees in the advanced departments "did not have an intelligence level high enough to enable them to progress" in the ordinary line of promotion. It is asserted that in order to ameliorate this situation and to "upgrade the quality of its work force" the Company adopted the high school requirement, and later the alternative tests, as conditions for entry into the desirable inside departments. On these claims the majority grounds its determination of business need.

In fairness to the majority and to the Company, the thrust of this factual presentation is to suggest an argument that does not necessarily disavow job-relatedness. Rather, the rule would be that the jobs for which the tests must be fitted may be jobs that employees will *eventually, rather than immediately*, be expected to fill. However, the plaintiffs and the Commission have neither addressed nor rejected that proposition. Rather, it is their contention, supported by the testing and finding below, that Duke Power has not shown that its educational and testing requirements are related to *any* job.[25]

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[25] The notion that future jobs can be the basis for a test is not inconsistent with the language of the *Guidelines* which speaks of "the applicant's ability to perform a particular job or class of jobs." Of course it would be impermissible for an employer to gear his requirements to jobs the availability of which is only a remote possibility. The office of Federal Contract Compliance administers Executive Order 11,246, 3 C.F.R. 339 (1964-65 comp.) which bans discrimination by government contractors. That agency has recognized this problem and has provided (by order of the Secretary of Labor) that when a hiring test is based on possible promotion to other jobs, promotion must be probable "within a

Distilled to its essence, the underpinning upon which my brethren posit their argument is their expressed belief in the good faith of Duke Power. For them, the crucial inquiry is not whether the Company can establish business need, but whether it has 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 corroborated business needs cannot be allowed, regardless of subjective intent. There can be no legitimate business purpose apart from business need; and where no business need is shown, claims to business purpose evaporate.[26]

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reasonable period of time and in a great majority of cases." 33 Fed. Reg. 14392, § 2(b)(1) (1968).

In this case, however, the issue is not the propriety of testing for remote positions. We might assume that once an employee joins the line of progression his advance will be inexorable. Nevertheless, the fact remains that Duke Power's requirements have never been validated for jobs at the end of the ladder, let alone those on the bottom rung.

[26] As I have noted from the outset of this discussion, the ultimate question under Title VII is whether there are business needs for

It may be accepted as true that Duke Power did not develop its transfer procedures in order to evade Title VII, since in 1955 this enactment could not be foreseen. However, by continuing to utilize them at the present time, it is now evading the Act. And by countenancing the practice, this court opens the door to wholesale evasion. We may be sure that there will be many who will seek to pass through that door.

The Company's claim to business justification is further attenuated by imbalance in the application of the standards. Even if we view the standards as oriented toward future jobs, the fact remains that of those that might apply for such positions in the inside partments, only the outsiders must meet the questioned criteria in order to qualify. Intra-departmental progression remains the same. Also there is apparently no restriction on transfer from any of the inside departments to the other two inside departments. An employee with no more than a fifth grade education who has not taken the tests may try out for new inside jobs and transfer to a vacancy in another department if he is already in an inside department. In spite of Duke Power's vaunted faith in the necessity of a high school education or its equivalent, such an employee may,

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an employer's policy. Plaintiffs agree and the majority properly quotes their brief, adding emphasis:

> An employer is, of course, permitted to set educational or test requirements that fulfill genuine business needs. * * * [W]here business needs can be shown * * * the fact that the test tends to exclude more Negroes than whites does not make it discriminatory.

The statement is correct and certainly does not "concede," as the majority urges, that the question is only whether Duke Power had a "genuine business purpose and [was] without intent to discriminate against future Negro employees * * *."

without any test, advance as far as his actual talents permit and qualify for higher pay.

The fact that Duke Power has not consistently relied on its standards, especially when viewed in light of the fact that the exempted inside group was constituted when racial descrimination was in vogue, belies the claim to business justification.

In short, Duke Power has not demonstrated how the exigencies of its business warrant its transfer standards. The realities of the Duke Power experience reveal that what the majority seizes upon as business need is in fact no more than the Company's bald assertion. The majority opinion's measure of "genuine business purpose" must be very low indeed, for, after all is said and done, Duke Power has offered no reason for allowing it to continue its racially discriminatory procedures.

II

Discriminatory Application of Standards

As described above, the Company's criteria unfairly apply only to outsiders seeking entrance to the inside departments. This policy disadvantages those who were not favored with the lax criteria used for whites before 1955. As I will show, this when juxtaposed with the history and racial composition of the Dan River plant, is itself sufficient to constitute a violation of Title VII.

It is true, as the majority points out, that the unevenhanded administration of transfer procedures works against some whites as well as blacks. It is also true that unlike the Constitution, Tile VII does not prohibit arbitrary classifications generally. Its focus is on racial and other specified types of discrimination. Thus, when an employer

capriciously favors the inside employees, to the detriment of those employed in the outside departments, this is not automatically an unlawful employment practice if whites as well as blacks are in the disadvantaged class.

On the other hand, it cannot be ignored that while this practice does not constitute forthright racial discrimination, the policy disfavoring the outside employees has primary impact on blacks. This effect is possible only because a history of overt bias caused the departments to become so imbalanced in the first place. The result is that in 1969, four years after the passage of Title VII, Dan River looks substantially like it did before 1965. The Labor Department is all black; the rest is virtually lily-white.

There no longer is room for doubt that a neutral superstructure built upon racial patterns that were discriminatorily erected in the past comes within the Title VII ban. Judge Butzner put the point to rest when he rejected an employer contention that "the present consequences of past discrimination are outside the coverage of the act." In his words, "[i]t is apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 515-16 (E.D. Va. 1968).

A remedy for this kind of wrong is not without precedent. The "freezing" principle (more properly, the anti-freezing principle), developed by the Fifth Circuit in voting cases is analogous. In those cases a pattern and practice of discrimination excluded almost all eligible Negroes from the voting lists but enrolled the vast majority of whites. Faced with judicial attack, the authorities found that they could no longer avowedly employ discriminatory practices. They invented and put into effect instead new,

unquestionably even-handed, but onerous voting requirements which had the effect of excluding new applicants of both races, but, as was to be expected, primarily affected Negroes, who in the main were the unlisted ones. As the Fifth Circuit explained the principle,

> [t]he term "freezing" is used in two senses. It may be said that when illegal discrimination or other practices have worked inequality on a class of citizens and the court puts an end to such a practice but a new and more onerous standard is adopted before the disadvantaged class may enjoy their rights, already fully enjoyed by the rest of the citizens, this amounts to "freezing" the privileged status for those who acquired it during the period of discrimination and "freezing out" the group discriminated against.

United States v. *Duke,* 332 F.2d 759, 768 (5th Cir. 1964). Accordingly, the new voting requirements were struck down. This remedial measure was approved by the Supreme Court in *United States* v. *Louisiana,* 380 U.S. 145 (1965).

Applying similar reasoning to the Title VII employment context, the Fifth Circuit invalidated the nepotism policy of an all-white union, which restricted new members to relatives of old ones. Although the policy of course discriminated against whites as well as others, it was prohibited since it enshrined the white membership and effectively forever denied membership status to Negroes or Mexican-Americans. *Local 53* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969).[27]

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[27] *See also* Houston Maritime Ass'n, 168 NLRB 83, 66 LRRM 1337 (1967). A union, after having consistently rejected Negroes for membership, adopted a new "freeze" policy whereby all new

Title VII bars "freeze-outs" as well as pure discrimination, where the "freeze" is achieved by requirements that are arbitrary and have no real business justification. Thus Duke Power's discrimination against *all* those who did not benefit from the pre-1955 rule for whites operates as an illegal "freeze-out" of blacks from the inside departments.

III

Conclusion

Beside the violation found by the majority, Duke Power is guilty of an unlawful employment practice in two other ways. First, it has used non-job-related transfer standards which have the effect of excluding blacks. Second, it has implemented those same standards in a discriminatory fashion so as to freeze blacks out of the inside departments.

This case deals with no mere abstract legal question. It confronts us with one of the most vexing problems touching racial justice and tests the integrity and credibility of the legislative and judicial process. We should approach our task of enforcing Title VII with full realization of what is at stake.

For all of the above reasons, the judgment of the District Court should be reversed with directions to grant relief to all of the plaintiffs.

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applicants were turned down, white and black. The Labor Board found that the union violated the National Labor Relations Act.

> [B]y adopting a practice which in operative effect created a preferred class in employment, the result was that the Union's previous policy of discrimination against Negroes as to job opportunities solely on the basis of race was continued and maintained.

66 LRRM, at 1339.

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