IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 124

WILLIE S. GRIGGS, ET AL., *Petitioners,*

v.

DUKE POWER COMPANY, a Corporation, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

The subject matter of the instant case—the utilization of educational or test requirements to select employees for hiring or promotion—is a matter of significant national concern. Virtually all employers, in all parts of the country, utilize a "test" as the Equal Employment Opportunity Commission has broadly de-

* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

fined that term, "any paper-and-pencil or performance measure used as a basis for any employment decision."[1] For example, 55% of all companies in the United States employing more than 1600 employees use the Wonderlic Personnel Test here involved and the Bennett Mechanical Aptitude Test, also at issue in the present case, is used by over 20% of these companies,[2]

The interest of the National Chamber, therefore, in filing this brief *amicus curiae* urging affirmance of the decision below, is predicated on the substantial and far-reaching consequences that the result in this case will have for American industry.

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[1] EEOC's *Guidelines on Employee Selection Procedures,* effective August 1, 1970, 29 C.F.R. 1607 (hereinafter referred to as the "Guidelines"), at Section 1607.2 thereof, further defines a "test" as follows:

> ". . . This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperment. The term 'test' includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc."

Moreover, the Guidelines also cover, in Section 1607.13, "[s]election techniques other than tests . . . includ[ing], but . . . not restricted to, unscored or casual interviews and unscored application forms."

[2] Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education,* 68 Colum. L. Rev. 691, 712 (1968). It is perhaps not surprising, therefore, that an estimated *one-fifth* of all charges filed under Title VII involve the issue now before this Court. Report of the Committee on Equal Employment Opportunity Law, II 1970 Proceedings of the Section of Labor Relations Law of the American Bar Association, 75.

ARGUMENT

I.

INTRODUCTION

Prerequisite to achievement of the goal of Title VII, the elimination of discrimination in employment relations, is the restriction of subjective factors as criteria for employee selection. As one observer commented, "The more control over hiring and promotion policies is taken away from management and is placed in objective events outside its control the nearer we will be to eliminating discrimination. This quest for objectivity is seen in the recent wholesale adoption of standardized employment tests by American industry."[3] Indeed, tests and educational requirements constitute the *only* objective means available to employers to perform the necessary task of selecting among applicants or employees on the basis of individual merit when previous job experience is not relevant or available in quantified form.[4]

Employment tests and educational requirements could, of course, become vehicles for discrimination. While such an invidious device is no less to be con-

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[3] Affeldt, *Title VII in the Federal Courts—Private or Public Law—Part II,* 15 Vill. L. Rev. 1, 17 (1969). Similarly, the Justice Department has recognized the desirability of objective selection devices by insisting that remedial orders to correct discriminatory hiring practices contain "objective and reviewable standards." Speech of Assistant Attorney General Leonard to the American Bar Association Section of Labor Law, August 10, 1970, reprinted at 157 Daily Labor Report E-1, E-3 (BNA, August 13, 1970).

[4] The necessity that an employer select one of many potentially eligible individuals is a critical distinction between the instant case and the education and voting rights cases (e.g., *Gwinn* v. *United States,* 238 U.S. 347, and the other decisions cited at footnote 9 of the Government's brief herein) where it is both feasible and desirable that the relevant population include *everyone* with minimum eligibility.

demned than any overtly discriminatory practice, there is no reason to believe that such requirements are so used, or would ever be so used, by a significant number of employers. Advocates of Petitioners' position, including co-counsel for Petitioners, have recognized that "there is frequently no discriminatory intent underlying the adoption of . . . testing practices" [5] and that "there are many easier ways to discriminate if the employer is so inclined." [6] The answer, thus, is not to condemn the use of educational or test requirements by all employers in all cases but, rather, to ascertain in which particular instances the employer does not, in fact, use such devices for a *bona fide* business purpose. As in so many other areas of civil rights and industrial relations, an accommodation must be reached between all of the legitimate interests involved "with as little destruction of one as is consistent with the maintenance of the other." [7]

Initially, there appears to be little dispute as to the case-by-case approach that is necessary to strike such a balance. First, there must be a determination of the racial impact of the practice involved. As co-counsel for Petitioners acknowledges, this step is essential "to assure that a practice is not found discriminatory merely because it disadvantages an in-

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[5] Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring and Promotion,* 82 Harv. L. Rev. 1598, 1670 (1969).

[6] Barrett, *Gray Areas in Black and White Testing,* Harv. Bus. Rev., Jan.-Feb. 1968, at 92, 94.

[7] *N.L.R.B.* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112. See also *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308, 323; *N.L.R.B.* v. *Great Dane Trailers, Inc.,* 388 U.S. 26, 33-34; *N.L.R.B.* v. *Fleetwood Trailer Co.,* 389 U.S. 375.

dividual black in some isolated situation. A practice should be found discriminatory only where it *consistently* and *systematically* prefers whites over blacks." Cooper and Sobol, *supra* n. 5, at 1671 (Emphasis added). Petitioners similarly concede that before a test or educational requirement can be deemed unlawful it must operate as "a serious barrier" to minority employment; if there is no such barrier, the case "need be subjected to little, if any, examination under fair employment laws." Brief for Petitioners at note 18 and p. 30, citing *Parham* v. *Southwestern Bell Telephone Co.*, —— F. Supp. ——, 60 CCH L.C. ¶ 9297 (E.D. Ark., 1969), *appeal noticed,* 8th Cir., No. 19969.

The second step, assuming that a "serious barrier" does, in fact, exist, is to determine those cases in which a discriminatory intent can reasonably be inferred. There is no dispute, for example, that such an intent may exist, where, as stated by the Government in its *amicus* brief (p. 19), there is an absence of "legitimate business needs" which justified the employer's utilization of such educational or test requirements. But what constitutes a "legitimate business need"? Petitioners argue that, if the business justification is not readily apparent, as where tests are used to measure skills which are an integral component of the job involved,[8] the employer must prove the requirements utilized were validated in conformity

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[8] See, e.g., the typing and dictation required of clerical employees in *Colbert* v. *H.-K. Corp., Inc.*, — F. Supp. —, 63 CCH L.C. ¶ 9514 (N.D. Ga. 1970), *appeal noticed,* August 3, 1970, and the arithmetic and change-making tests utilized for grocery clerks in EEOC Decision No. 70-501, Case No. YAT9—633, reprinted in CCH FEP Guide, ¶ 6112 (1970).

with the EEOC's Guidelines.[9] If there has no such validation, then, in their view, there has not been a sufficient showing of overriding business necessity. It is at this point that the National Chamber, for the reasons set forth below, submits that Petitioners' case must fall.

II.

THERE HAS BEEN A SUFFICIENT SHOWING OF BUSINESS JUSTIFICATION HERE TO SANCTION DUKE POWER'S TEST AND HIGH SCHOOL EDUCATION REQUIREMENTS

A. The Guidelines Are Entitled to Little Deference

As the court below found, while the Guidelines are entitled to appropriate respect, they are not conclusive on the courts. 420 F.2d at 1234 citing *International Chemical Workers Union* v. *Planters Manufacturing Company,* 259 F. Supp. 365 (N.D. Miss., 1966). In contrast to "legislative" rules or regulations which have the force and effect of law, the Guidelines are "interpretative" opinions constituting the EEOC's construction of Title VII and having "validity in judicial proceedings only to the extent that they correctly construe the statute." See, e.g., 1 Am. Jur. 2d *Administrative Law,* § 95 (1962). The principal salutary effect of the Guidelines is to inform

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[9] The "job-related" concept is but one aspect of the validation process. Thus a test which is job-related may still not have been validated as required by the Guidelines, and presumably, under the Petitioners' view, could not then be utilized. Accordingly, the critical inquiry to which this brief will be addressed is the extent to which the absence of validation, rather than job-relatedness, is sufficient to infer a discriminatory intent.

"the public of the Commission's interpretation of the statute" (*American Newspaper Publishers Assn.* v. *Alexander,* 294 F. Supp. 1100, 1103 (D.D.C., 1968), *motion for summary reversal denied,* —— F.2d ——, 59 CCH L.C. ¶ 9203 (D.C. Cir., 1969)) and the Guidelines' persuasiveness, in turn, is dependent "upon the thoroughness evident in [the EEOC's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140.[10]

Moreover, in considering the deference to be accorded the Guidelines, it should be recognized that the EEOC has consciously sought to construe Title VII "as broadly as possible in order to maximize the effect of the statute on employment discrimination without going back to Congress for more substantive legislation".[11] In doing so, the Commission "de-

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[10] See *Dewey* v. *Reynolds Metal Company,* — F. 2d —, 63 CCH L.C. ¶ 9455 (6th Cir., 1970), where the court, in noting that it is the statutory proscriptions which serve to limit and define the sphere of legitimate administrative action, stated at footnote 1:

> "It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000 e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted." (Emphasis the court's).

[11] Alfred Blumrosen, a participant in many EEOC policy determinations between 1965 and 1967, in *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission,* 38 Geo. Wash. L. Rev. 695, 702-3 (1970).

part[ed] . . . from previous notions of what discrimination is" [12] and, in taking "its interpretation of Title VII a step further than other agencies have taken their statute", disregarded "intent . . . as crucial to the finding of an unlawful employment practice." [13] In the process of this "creative interpretation" of the law, the legislative history of the Act was regarded as only an outer limit, not a guide, apparently based

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[12] Richard Berg, Deputy General Counsel of the EEOC from 1965 to 1967 and the Justice Department attorney who assisted the Senate leadership during its consideration of Title VII, in his review of Berger: *Equality by Statute* and Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern,* 17 Amer. Univ. L. Rev. 379, 387-388 (1968).

The importance of this departure from the established definition of the term "discrimination" is underscored by the following statement inserted in the Congressional Record during the debates on Title VII by Senator Clark:

> "Objection: The language of the statute is vague and unclear. It may interfere with the employers' right to select on the basis of qualifications.
>
> Answer: Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act, for even a longer period. To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex or national origin) any other criteria or qualification, is untouched by this bill."

110 Cong. Rec. 6997.

[13] Samuel Jackson, a Commission member from 1965 to 1968, in remarks to a meeting of the National Association for the Advancement of Colored People Region 1 on September 23, 1967, reprinted at CCH FEP Guide, ¶ 8179 at 6312.

on the premise that the courts "were available to prevent serious error" and might sustain the EEOC's interpretation of Title VII "partly out of deference to the administrators." [14]

In these circumstances, the Guidelines do not represent an objective interpretation of Title VII. Rather, they contain such a pervasive and definitive set of standards[15] that they are tantamount to an assumption of the substantive rule-making power which Congress specifically denied to the EEOC.[16] There is surely serious reason to question their practicality and feasibility. While test validation is a desirable objective, it is often an elusive one because of the prohibitive expense and difficulties involved, particularly in view of the infant state of the art of industrial psychology,

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[14] Blumrosen, *supra,* n. 11 at 703.

[15] To give a few examples: The Guidelines would even require that, wherever "technically feasible", each separate "test" utilized be validated for each racial component of the work-force, for each separate unit of a multi-unit organization, and in such a manner so that the results can be presented with the necessary inclusions of "graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior". Guidelines, Sections 1607.4-1607.6. In addition, "alternative, suitable hiring, transfer or promotion procedures" to the *particular* "test" used must be shown to be "unavailable" and the *particular* "test" used must evidence "a high degree of utility" as defined by the Guidelines. Section 1607.3. And the subject matter of the test, notwithstanding a legitimate employer desire to promote *many* employees from within, must be restricted only to those jobs which employees "will probably within a reasonable period of time and in a *great majority* of cases, progress to . . ." Guidelines, Section 1607.4(c)(1) (Emphasis added).

[16] Section 713(a) of Title VII, 42 U.S.C. 2000e-12(a). The word "procedural" in Section 713(a) was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations. 110 Cong. Rec. 2575 (1964).

in securing an adequate and representative sample.[17] Given these limitations, it is unreasonable to require employers to cease using tests which have been professionally developed and selected by a testing specialist who has considered the specific job and manpower needs of that employer. However, Petitioners seek to force Duke Power to cease using precisely such tests and the Guidelines would require the same result of all similarly-situated employers. To paraphrase *Skidmore,* the Guidelines demonstrate little thoroughness in the Commission's consideration, little validity in its reasoning, a lack of consistency (as discussed *infra*) with the EEOC's earlier pronouncements and a corresponding lack of persuasiveness.

B. Duke Power's High School Education Requirement Constitutes a Valid Means of Employee Selection

Congress, when it enacted Title VII, was well aware that the historic educational disadvantages of Negroes and other minorities constituted an impediment to equal employment opportunity.[18] It was also widely recog-

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[17] See, e.g., the testimony of Petitioners' expert witness at Appendix, pp. 133a-137a, and the testimony of Respondent's expert witness at Appendix, pp. 178a-181a. See also Barrett, *supra* n. 6, at 94: ". . . tests for probably less than one job out of twenty can be adequately validated, because there are few job categories with enough whites and Negroes to make research for better tests possible."

[18] For example, in his Civil Rights Message of June 19, 1963, U.S. Code Cong. and Admin. News, 88th Cong., 1st Sess., at 1526, 1531-4, President Kennedy noted that Negro workers and job seekers suffered from a scarcity of jobs and educational disadvantage as well as from employer and union prejudice. Secretary of Labor Wirtz similarly stated in 1963 that

> "Disproportionate unemployment among nonwhites is unquestionably related to the fact that about one-third of the 3 million adults in this country who cannot read or write are non whites; also to the fact that 25 percent (or 2.3 million)

nized that many employers required a high school education as a hiring or promotion prerequisite. This fact was specifically noted without criticism in a report by the House Education and Labor Committee on an earlier version of Title VII.[19] Also, a Senate Labor Subcommittee chaired by Senator Clark, the co-manager of Title VII during its consideration in the Senate, received without comment a full description of employer and union preference for high school graduates.[20] And the House Judiciary Subcommittee which reported the Civil Rights Act of 1964 heard Secretary of Labor Wirtz testify that those who dropped out of school at 16 "never had the real ad-

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of the nonwhites 25 years of age or older did not complete 5 years of schooling (compared with 7 percent of the adult white population); and to the fact that almost half of the adult nonwhites in the country today did not finish grade school (compared with about 20 percent of the whites)".

Hearings on Civil Rights, 88th Cong. 1st Sess., House Committee on Judiciary, Subcommittee No. 5, Hearing Vol. 2 at p. 1491, (1963).

[19] H. Rep. 1370 on H. R. 10144, 87th Cong. 2d Sess. at p. 2. H. R. 10144 was essentially identical to Title VII as reported by the House Judiciary Committee. See Additional Views of Hon. George Meader, H. Rep. No. 94 on H. R. 7152, 88th Cong. 1st Sess. at p. 57 (1963).

[20] "... in every occupation for which data are shown high school graduates earn more than men who quit school after the eighth grade ....

Why the difference? There are many reasons. High School graduates have higher IQ's. This is partly due to their greater education. It may also reflect greater native intelligence and aptitude to learn. But there are other reasons.

Employers give preference to high school graduates. With a diploma a man can drive a bus for a transcontinental bus line; without it he is lucky to get a job with Podunk Transit Co. which pays much lower wages .... Unions also prefer high school graduates."

Testimony of Special Assistant to the Director of the Bureau of the Census, Senate Hearings on Equal Employment Opportunity, 88th Cong. 1st Sess. at pp. 324, 326 (1963).

vantages of the kind of education which would qualify them for anything except unskilled work." [21] Indeed, the use of educational requirements and tests was frequently discussed during the formulation of Title VII in the House.[22]

Yet, notwithstanding this ample recognition that employer use of educational requirements was prevalent and in many cases had a disproportionately adverse effect on minorities, no attempt was made by Congress to require employers to justify the use of such qualifications. In fact, Senator Case, the other Senate co-manager of Title VII, gave explicit assurance that employer utilization of educational requirements would not be affected by Title VII.[23] The

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[21] Hearing on Civil Rights, 88th Cong. 1st Sess. House Committee on Judiciary, Subcommittee No. 5, Hearing Vol. 2, p. 1460 (1963).

[22] See colloquy between Senator Williams and Congressman Martin, Hearing on Equal Employment Opportunity, 88th Cong. 1st Sess., House of Representatives, General Subcommittee on Labor of the Committee on Education and Labor at pp. 17-19 (1963); testimony of Secretary of Labor Wirtz, *id.* at p. 466; the remarks of Congressman Pucinski, *id.* at p. 24; the colloquy between Congressman Pucinski and Reverend Hildebrand, *id.* at pp. 37-38; and the discussions involving Samuel E. Harris, *id.* at pp. 228-231, Wesley Stearns and J. C. McCormack, *id.* at pp. 423-428 and Murray Preston and Donald Mowbray, *id.* at pp. 434-438. See also H.R. No. 570, 88th Cong., 1st Sess. at p. 5 (1963).

[23] ". . . it would be ridiculous, indeed, in addition to being contrary to Title VII, for a court to order an employer who wanted to hire electronics engineers with Ph.D's to lower his requirements because there were very few Negroes with such degrees or because prior cultural or educational deprivation of Negroes prevented them from qualifying.

. . . Title VII would in no way interfere with the right of an employer to fix job qualifications and any citation of the *Motorola* case to the contrary as precedent for Title VII is wholly wrong and misleading."

110 Cong. Rec. 7026 (1964).

Congressional decision to permit the use of unvalidated educational attainment standards may have been the product of an understandable legislative reluctance to avoid the substantial disruptive effects that would flow from imposing such a prohibition. It may have been based on a compelling desire not to denigrate the paramount significance of educational achievement in the American way-of-life.[24] Whatever the reason, Congress neither prohibited the use of educational requirements nor declared that such standards must be validated to be lawful. Given this history, it is not surprising that the initial decision by the EEOC in this area—the "contemporaneous construction" of Title VII by those "charged with the responsibility of setting its machinery in motion" (*Udall* v. *Tallman,* 380 U.S. 1, 16)—held that educational qualifications uniformly imposed were not violative of the Act.[25]

The fact that Duke Power utilized an unvalidated high school education requirement should not, therefore, *in and of itself,* be deemed sufficient to impute to the Company the "intent" to discriminate required by Section 706(g) of Title VII. There must be, in addition, *independent* evidence which demonstrates that the Company's use of educational requirements was a mere pretext or subterfuge and not the product of a *bona fide,* good faith business objective. For example, such an unlawful motivation might be evidenced

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[24] Cf., e.g., the case, reported at Note, 68 Columbia L. Rev., *supra* n. 2, at p. 719, in which the Office of Federal Contract Compliance "permitted a southern company to retain its requirement of a high school diploma although the job in question clearly required less education. The reason was that the Company was attempting to force local teenagers, many of them Negroes, to complete high school by removing the temptation of jobs for drop-outs".

[25] G.C. Opin. 296-65, October 2, 1965, reprinted in CCH FEP Guide ¶ 17,251.0262.

by the limited nature of the jobs for which the educational qualification is imposed as, for example, if it applied to menial jobs which have no promotion potential. Independent evidence in other instances might be predicated on the timing of the institution of the requirement or even the employer's "overlay" of poor performance in the area of race relations. Cf., e.g., *Colbert* v. *H-K Corp., supra.* In the present case, however, as the court below carefully delineated, Duke Power's high school educational requirement was imposed *nine years* prior to the passage of the Act; it was not applied to laborer jobs; the requirement was approved by an expert as a reasonable means of selective employees with "the training, ability and judgment" required by the Company; the adoption of the requirement adversely affected both whites and Negroes; and the Company's good faith in race relations was manifested by its discontinuance of prior discriminatory practices and its willingness "to pay for the education of incumbent Negro employees who could thus become eligible for advancement." 420 F. 2d at 1232-1233.

C. Duke Power's Testing Requirement Constitutes a Valid Means of Employee Selection

Employer utilization of tests as a means of employee selection, notwithstanding that such tests may have a disparate adverse effect on culturally disadvantaged groups, was also a subject that was widely debated during the legislative hearings on Title VII. During Senate consideration of the House bill (H.R. 7152), attention was specifically focused on this subject by the decision of a hearing examiner for the Illinois Fair Employment Practices Commission in *Myart* v. *Motorola, Inc.,* reprinted in 110 Cong. Rec. 5476-5479 (1964), which held that the continued use of a general

aptitude test, professionally developed for Motorola but not differentially validated for disadvantaged and culturally deprived groups, constituted a form of racial discrimination.

The Senate sponsors of the Civil Rights Act repeatedly insisted that a *Motorola* decision could not result under Title VII for two reasons: first, because the power to interpret and enforce its provisions was placed in the courts and not in the Equal Employment Opportunity Commission,[26] and second, because "title VII would not permit even a Federal court to rule out the use of particular tests by employers because they do not 'equate inequalities and environmental factors among the disadvantaged and culturally deprived groups.' " [27] Senators Clark and Case, the comanagers of Title VII, thus declared that ". . . [a]n 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." [28]

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[26] As Senator Case stated: "Only a Federal court would have the authority to determine whether or not a practice is in violation of the act and only the court could enforce compliance". 110 Cong. Rec. 7026 (1964). See also *id.* at 6205 and 12641-2.

[27] *Id.* at 7026.

[28] *Id.* at 6997. In addition, Senator Clark placed the following objection and answer in the Record:

> "Objection: The bill would make it unlawful for an employer to use qualification tests based upon verbal skills and other factors which may relate to the environmental conditioning of the applicant. In other words, all applicants must be treated as if they came from low income, deprived communities in order to equate environmental inequalities of the culturally deprived group.
>
> Answer: The employer may set his qualifications as high as he likes, and may hire, assign, and promote on the basis of test performance."

Ibid.

Broad as these guarantees were, they did not satisfy Senator Tower who introduced an amendment to insure the right of an employer to use tests "designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . [or] whether such individual is suitable or trainable within such business or enterprise" as long as such tests were given "without regard to the individual's race, color, religion, sex or national origin." [29] Senator Case declared, however, that the amendment was "unnecessary . . . [and] would tend to complicate and make more difficult dealing with cases of actual discrimination . . . " and Senator Humphrey assured his colleagues that "[e]very concern of which this amendment seeks to take cognizance has already been taken care of in Title VII . . . . These tests are legal. They do not need to be legalized a second time". On the basis of these statements, the amendment was voted down.[30]

Two days later Senator Tower reintroduced his amendment, containing the language of the present Section 703(h), noting that there had been "agreement in principle" on his earlier amendment but that "the language was not drawn as carefully as it should have been." [31] The revision provided that the amendment's sanction of professionally developed ability tests would not extend to tests "designed, intended or used" to discriminate on racial or other bases prohibited by Title VII. Senator Humphrey accepted the revised amendment as "in accord with the intent and pur-

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[29] *Id.* at 10879.

[30] *Id.* at 13030-13031, 13054.

[31] *Id.* at 13246.

pose" of Title VII stating that, "[t]he Senator has won his point." [32]

The Petitioners now contend that all that Senator Tower won, and all that Title VII intended, was to permit employers to utilize professionally developed tests if *they have been properly validated in accordance with the EEOC's Guidelines.* This would indeed have been a hollow victory. It was the very finding of a violation in *Motorola,* premised on the absence of differential validation, that triggered the Senate debates. Indeed, it was the express purpose of Senator Tower's amendment to prevent

> ". . . an Equal Employment Opportunity Commission ruling that would in effect unvalidate 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.[33]

It is also significant that contemporary observers of the legislative process that produced Title VII did not suggest that tests could only be used if they had been validated. Thus Assistant Attorney General Norbert Schlei stated in a briefing for the Bar Association of the City of New York in early 1965:

> "The entire question under this statute is whether the test is being used as an instrument of discrimination or not. *If it is being used in an honest attempt to find the best people, it is not a violation of the statute."* (Emphasis added).[34]

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[32] *Ibid.*

[33] *Id.* at 13019.

[34] *The Implications for Business of the Civil Rights Act of 1964* (Panel of Benetar, Knight, Schlei, Fowler), 20 Record of the Assn. of the Bar of N. Y. 128 at 139 (1965).

Richard Berg similarly commented that Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. . . . The issue in any case where the use of an ability test is questioned is not whether the test is professionally developed, or whether it is a good test or a bad test, but whether it is used in good faith or with intent to discriminate." [35] Professor Sovern also conceded that Title VII permits employers to use tests which "require a high degree of literacy when the job being tested for does not" as long as the tests are not being used for the purpose of racial discrimination.[36] The EEOC, in one of its initial opinions construing Title VII, held that employers may use professionally developed tests, without proof of validation, where there is no evidence of intent to discriminate on the basis of race.[37] And, as the court below noted, "[a]n amendment [to Title VII] requiring a 'direct relation' between the test and a 'particular position' was proposed in May, 1968, but was defeated." 420 F. 2d at 1235 citing Senate Report No. 1111, May 8, 1968.

In sum, as in the case of educational requirements, Congress was well aware in 1964 that tests were widely used by many employers as a basis for employee selection and that such tests often had an adverse impact on disadvantaged and culturally deprived

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[35] Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964,* 31 Brook. L. Rev. 62, 74-5 (1964).

[36] Severn, Legal Restraints on Racial Discrimination in Employment, 73 (Twentieth Century Fund, 1966).

[37] G.C. Opin., 461-65, Opin. Ltr. December 16, 1965, reprinted in CCH FEP Guide, ¶ 17,252.25.

groups. The balance that Congress struck, however, neither precluded the future utilization of such tests nor required validation as a prerequisite to continued employer use. Indeed, Congress specifically sanctioned the use of tests *as they had been instituted and applied by Motorola,* i.e., tests which had been professionally-developed and used for legitimate business purposes in an atmosphere free from any *independent* evidence of a discriminatory intent.

Such independent evidence of discrimination might relate to the menial nature of the jobs for which the test requirement is imposed, to the timing of its adoption of the test requirement or to the employer's general performance in the area of race relations. It might also consist of utilizing a test that has not been developed by trained psychologists or which, in the view of qualified experts, would not reasonably suffice for the purposes intended. Even the failure to undertake a comparison of the results of such tests with actual employee performance might be sufficient to infer a discriminatory intent. Where, however, as here, no such evidence has been adduced, and presumably none exists which demonstrates a discriminatory motive, there should be no finding of a violation of Title VII. As the court below concluded, in addition to the evidence of the Company's good faith described at page 14, *supra,* the tests used by Duke Power were, according to the testimony of an expert witness, "professionally developed and . . . reliable and valid" and the reason for adopting the testing requirement, therefore, was "one of business necessity" rather than discrimination. 420 F.2d at 1233-4. Moreover, Duke Power is presently in the process of validating the tests here involved, a procedure which

necessarily requires "a fairly good sized group" and a considerable period of time. Appendix, pp. 179a-181a.

CONCLUSION

For the foregoing reasons the decision of the court below should be affirmed.

Respectfully submitted,

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EMPLOYERS' RIGHT TO TEST JOB APPLICANTS OR REQUIRE

HIGH SCHOOL DIPLOMA UPHELD BY NATIONAL CHAMBER

WASHINGTON, Oct. 26 -- The right of employers to require job applicants to pass a professionally developed employment test or possess a high school diploma was strongly defended today by the Chamber of Commerce of the United States.

Such requirements should be upheld where there is no evidence that they are imposed with an intent to discriminate, the National Chamber asserted in a "friend of the court" brief filed in a case before the Supreme Court of the United States.

The litigation involves employment practices of the Duke Power Company at its Dan River Station in North Carolina. Plaintiffs contend that the utility firm's requirements that candidates for promotion or initial applicants for certain jobs be high school graduates or pass an employment test are discriminatory and violate Title VII of the Civil Rights Act of 1964.

Petitioners further contend that Negroes and other minority group members are disproportionately rejected from employment opportunities under the impact of these requirements.

National Chamber Labor Relations Counsel Anthony J. Obadal emphasized the importance of the case to the business community which has long relied on a high school education or the passage of a professionally developed, standardized employment test as an initial, objective, screening device for selecting the person whom management believes is the best possible man for the job.

"Fifty-five percent of all companies in the United States employing more than 1,600 persons use the Wonderlic Personnel Test," Mr. Obadal said. "The Bennett Mechanical Aptitude Test, also at issue, is used by over 20 percent of these firms."

It is estimated that one-fifth of all charges filed with the Equal Employment Opportunity Commission involve employer usage of tests or educational requirements, Mr. Obadal said, adding that this is the first time the question has reached the Supreme Court. "Employers should closely examine the Supreme Court's treatment of this issue because of its far-reaching impact on American business," he said.

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(more)

While recognizing that tests and education requirements may become "vehicles for discrimination," the Chamber's brief explains that they remain the "only objective means available to employers to perform the necessary task of selection among applicants or employees on the basis of individual merit when previous job experience is not relevant or available in quantified form."

Mr. Obadal added that the EEOC's Guidelines on Employee Selection Procedures, in effect since August 1, "do not represent an objective interpretation of Title VII." He said they are "of questionable practicality and feasibility."

He contended that EEOC Guidelines that call for employers to "validate" their requirements is a "desirable objective" but "often elusive because of the prohibitive expense and difficulties involved" particularly in view of the infant state of the art of industrial psychology.

"Given these limitations, it is unreasonable to require employers to cease using tests which have been professionally developed and selected by a testing specialist who has considered the specific job and manpower needs of that employer," the brief declared.

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