C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

WILLEE S. GRIGGS, ET AL.,

Petitioners

vs. No. 124

DUKE POWER COMPANY,

Respondents

Washington, D.C.
Monday, December 14, 1970

The above entitled matter came on for argument at 11:20 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

JACK GREENBERG, ESQ.
New Youk City
On behalf of Petitioners

GEORGE W. FERGUSON, JR., ESQ.
Charlotte, North Carolina
On behalf of Respondents

APPEARANCES (continued)

LAWRENCE M. COHEN, ESQ.
Chicago, Illinois
For Chamber of Commerce of the United States,
as amicus curiae.

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P R O C E E D I N G S

MR. CHIEF JUSCICE BURGER: Mr. Greenberg, you may proceed.

MR. JACK GREENBERG, ESQ: Mr. Chief Justice and may it pleasethe Court. This case is here on Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit which affirmed in part and reversed in part the decision of the United Stated Dictrict Court for the middle district of North Carolina by a decision in which Judge Sobeloff dissented.

The issue is one of statutory construction of Title 7 of the Civil Rights Act of 1964. And the particular statutory pro isions to which I would like to draw the Courts attention appears on page 2 of our brief. The statute makes it an unlawful employment practice for an empolyer to fail or refuse to hire or discharge any indivudual or otherwise to discriminat against him with regard to race.

And then in section 2 which more particularly applies to the issue we have pending here, to limit, segregate, or classify his employees in any why which would deprive or tend to deprive any individual of employment opportunities or otherwise adversly affect his status as an employee, because of race and other forbidden reasons.

The question presented in this case is whether intelligence tests and a high school graduation requirement may be used as

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a prerequisite to promotion from the job of laborer to the job of coal handler, and perhaps other jobs at Respondents power plant.

When these tests, that is the intelligence tests, which I might say was adopted on July 2, 1965, the effective date of Title 7 of the Civil Rights Act of 1964, and these tests screen out Negroes at a significantly higher rate than they screen out whites, and there has been no demonstration that the tests and the high school requirement predict ability to do the job, and indeed there are some evidence to the contrary that they do not predict ability to do the job.

Now the Court below held in the case of employees employed after the high school requirement was instituted that the statute was not violated and as I read the opinion of the Court below and the position of Respondents, they rest on three separate grounds.

First of all, that there was no demonstration of an intent to discriminate. Secondly this is a statutory argument and that is that such tests are priveledged as professionally developed ability tests under section 703H of Title 7. And then there is an assertion by the Respondent which we say has no support in the record, in fact the record is in some parts contrary that the tests are a legitimate business need. That is, that certain employees are not fully promotable throughout the plant, to higher positions, and that the high school education require-

ment helps select employees who are.

Now before elaborating on our argument, we would like to make our position clear with regard to ability testing. No employer, we submit under the statute, is required to employ enyone who is unable to do the job. And any employer may use tests and educational requirements which predict whether an employee, a perspective employee, can do the job.

But if the test that's used, or the education requirement that's used means that members of a race, or of a group protected by the statute, and does not predict who can do the job, in other words does not have predictive validity as industrial psychologists use the term, and this record uses the term, then it cannot be justified merely on the basis of good faith.

Good faith or intent, we submit, is an elusive concept which regularly, frequently is advanced in Civil Rights cases. We hear good faith defenses in school segregation cases, in jury discrimination cases, in voting discrimination cases, and the courts have regularly responded that they look to results and not make an effort to read the mind of an employer, indeed it's something much more difficult to do to read the mind of a corporation as to what it intends to do by the application of certain standards of testing.

Indeed, whili it is not impossible on this record to challenge the good faith of the Respondent, because that's just

something that one can very rarely develop evidence on, such a test would be an invitation to many who would seek to evade the statute to hide behind the concept of good faith.

Now, as I said, Duke Power Company adopted the test requirement for initial employment on July 2, 1965, the date of the act in question. Until then, and until after the filing of the charge in this case, in fact, employment at Duke Power Company was rigidly racially segregated. Black persons worked in the Labor Department only. White persons worked in the better and higher paying jobs, that is the Departments described in the record, as Operations, Maintenance, Test and Laboratory and Coal Handling. And the highest paid black worker made less money than the lovest paid white worker, under this system.

Q Now, I uundestand, in the Labor Department, that that was all Negro, was it?

A Yes, well, it one thme----

Q All Negro?

A ---there was a white foreman in the Labor Department.

Q Well, what my real question is as a matter of fact, and I don't know that I fully understand, was the Labor Department all Megro and every other department in the company all white, prior to 1965?

A Yes.

Q Or was it only that the Labor Department was all

Negro, and that the other departments, Coal Handling, did have some Negroes in it?

A Your first formulation is the correct one, there was rigid racial segregation. The Labor was all black, everything else was all white.

Q Up until 1965?

A Well, indeed, until up until after the filing of the charge in this case. Some time after that.

Q (inaudible)

A Well, I think the first black man probably got out of the Labor Department in 1966, after the charge of the unequal employment opportunities.

Q And there were no Negroes in the other four departments?

A That is correct.

Q Up until---

A And there's no question about that, on the record, I don't think the Respondents would challenge that for a moment.

Q No, I just was inquiring as a matter of fact, is all.

A But the intelligence test was put in at the request of certain, non-high school graduate workers in the Coal Handling Department as a substitute for a high school education, and it has been described in the record as a test which would identify the average high school graduate , so it's perhaps somewhat more stringent than the high school graduation re-

quirement in that half the high school graduates presumably would be unable to pass this test.

And to enable them to be promoted to the so called inside departments, Labor and Coal Handling are outisde, all the other departments are inside. The high school education requirement was adopted considerably earlier, and the date is not certain, but it appears to be, people talk in terms of about, about 1955 as a prerequisite to employment and promotion in all departments but the Labor Department. Black people could be employed in the Labor Department without a high school education, others could be employed in the other departments initially only with a high school education. But many pre-1955 Duke Power employees are non-high school graduates at all pay levels throughout the plant. And indeed the, our brief has an analysis of the pay which is earned by various workers, the pay earned by an average high school worker, an average non-high school worker, is about the same, the calculations are on page 38 of our brief.

And the governments brief engages in a similiar analysis of promotibility, comparable promotibility and promotion rates of high school and non-high school graduates, and it finds that high school and non high school graduates within the plant are roughly promoted at approximately the same rate.

Q Does this record show the total employment figure in 1955, and the total employment figure currectly?

A I couldn't spell it out. To quote the Respondents in this case, and I'm sure this is right, they quote a real, stable employment situation there and there have been about 95 workers at all times that are relevant to this case.

Q I wondered at that figure, because it certainly would be counter to the general growth of everything in the last 15 years.

A Well, I'm not familiar with the industry. It just may be that the power industry - it's possible to expand power production perhaps from other locations without increasing the work force, but the employment situation has remained just about the same.

I think there doesn't seem to be any real doubt about that and they characterize it as stable, and it apparently is.

After the passage of the Act and the filing of the complaint before the Equal Employment Opportunity Commission, Duke did promote a number of black workers with a high school education over a period of a couple of years.

q And the Court of Appeals then ordered the promotibility but not the actual promotion of others employed before the high school education requirement was adopted. This is now in further litigation by the District Court because there's a claim which Court has not yet rendered any decision and some white people have been brought in above these black workers. The Court has not resolved that.

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This case involves four workers frozen in the Labor Department by the test requirement of July 2, 1965, and by the fact that they have no high school education.

Q Have they taken and failed these tests?

A The record is not clear on who has taken and who has not taken this test. The record indicates that three workers some of them black and some of them white, we don't know which two are black and which one is white, have taken and failed the test. Everyone who has taken the test has failed it. The record indicates that applicants for employment almost an entirely overwhelming number declined to take the test. They don't want to take the test, this is, however, class action and our argument about the test it that it is patently discriminatory as I hope to develop in a moment or two that that really doesn't matter, it doesn't have any---

Q Well---

A ---bearing on the decision in this case.

Q I thought you said there were four identifiable Negro workers in the Labor Department.

A The four identifiable---

Q What class do they represent beyond their own number?

A The class in the complaint and in the order allowing an amendment to the complaint is defined as persons presently working at Duke Power and those who may be accepted for em-

ployment in the futute. So it is in some sense a rather well defined (inaudible).

Q And that open ended class was accepted, was it? By the Courts?

A Oh, yes, the District Court right on page 17 of the complaint filed an order allowing an amendment to the complaint and defines it and then well, on page 19 also, the same thing again - an order allowing class action.

This action is maintainable as a class action only insofar as it seeks injunctive relief and so on, and the class presented are those Negroes presently employed as well as those who may subsequently be employed at defendants Dan River Station. Both those orders on page 17 and 19a---

Q Who may be subsequently employed, it's not future applicants. Is it?

A No, that's not future applicants, those who may subsequently be employed.

Q Employees?

A Yes.

Q And there are now four identifiable people, is that it? If I understand you submission.

A I'm sorry, it's also on page 14 those who may subsequently seek employment. On page 14, order allowing amendment to complaint. So it's both.

Q You're talking about 14 a---

A A 14 A. An order allowing amendment to the complaint,

Q Yes.

A Who are now employed or may subsequently seek employment. The firstparagraph (inaudible) line.

Q Have these---

A In the opinion of the Court---

Q Have these four people, you say it's not clear which---

A We do not know---

Q Which, if any, have taken the test---

A That is Cocrect.

Q Any who have, have all failed.

A Everybody who has taken the test has failed.

Q It's not clear that any of these four have taken it?

A We do not know. But I might point out the order of the Court of Appeals defines a class as those who may subsequently be employed and may hereafter seek employment. That's the very first sentence of Judge Boremans ---

As I was saying, the case involves those workers who want to be promoted from Labor to Coal Handling. Now white men without a high school education who have not passed the tests, and who do not have a high school education are doing the coal handling jobs today. Typically, the way the workers qualify for the coal handling job is by on the job training, on page 124 of the larger volume of the record, an official of the company testifies "We would have to determine that by ac-

tion or actually putting them in if there were an opening to see how they would perfomm. You would take the next senior man who is qualified to go on the job and make a trial of him and try him out.

And then the method of qualifying for the job is elaborated also on page 23 as in response to interrogatory 27. The company provides on the job trainig.

Q Prior to 1955 the, you say, there was no high school---

A That'c correct.

Q ---test.

A That's correct.

Q Does the record show how many people are in the non-laber force who did not meet the high school, who would not today be able to meet the high school---

A Yes. The record shows that there is a document filed by the Respondent which lists the education of everyone who, page 126 of this record, of everyone who works in the plant, by my rough calculation, about a third of the people in the plant do not ahve a - are not high school graduates.

Q Would that be---does this record show how that compares with the change in standards generally in comparable industries? That is, I assume, mamy people today have requirements of either high school or college, who did not have it 15 or 20 years ago.

A The---

Q Does this show any---

A There is some statement by Respondents that elsewhere in the utility industry tests are being used, but I would like to day that, first of all, there is no demonstration that to perform the job of coal handler, you have to have a high school education, in fact if you look at the laborers job - the laborers job and the coal handlers job specifications appear on pages 48 and 65 of the record, and they're roughly the same. The coal handler has to , just to read a few of them, has to operate certain vehicle service including coal handling equipment and be able to record weights.

On page 65, the laborer has to operate company vehicles, has to be able to operate floor sweeping machines, tractors, trucks, and so forth.

Things are comparable. People are trying for the jobs by on the job training, there is no indication that a high school education in any way qualifies one to do the job.

Indeed if one were to look at the Wonderlic test that appears here on page 102 of the record, it's difficult to see hww for the qualifications put down for a coal handler that there's any need to know or to have a sense of the difference between the words ADOPT and ADEPT, REFLECT and REFLEX, PRETENTIONS and PRETENSIOUS, IMAGE and IMAGINARY, and LARGE and AGGRANDIZE and various other kinds of---

Q Would that have validity in the promotibility aspect

or not?

A There is absolutely no evidence that it would at all. We do not deny that there are jobs that that kind of a test, or some kind of a test might have some valididy. But the Wonderlic people themselves say the test is not useful unless it has predictive validity. You have to see whether or not passing this test qualifies you to do this job, this test is not an open sesame to decide who can do any job in the whole would.

Q Well would it be a violation of the act if an employer had a general policy that he would not hire anyone, in any capacity if they didn't meet certain potential promotibility qualificationa?

A That would not be a violation of the job if he could demonstrate that that kind of a capacity is necessary to do the job. And necessary for the operatoion of his plant. It then might not be a violation either if it did not disporportionately screen out members of a protected race or national group or---

Q Well now that's the key to---

A That's the key.

Q To your case, isn't it?

A That;s the key.

Q But if the impact of---

A There is a---

Q any test screens out one particular category whether it happens to be women, or Negroes, or orientals or whatever,

then it's at least suspect.

A Then it must be justified in terms of some sort of validation of its ability to predict. And here we have, in the state of North Carolina, one third as many black people as white people graduate from high school. Examinations of this Wonderlic test by the Equal Employment Opportunity Commission now recently in a case in the Eastern District of Louisianna, Hicks against Crown Zellerbach, show that the Wonderlic test have vast didporportions screened out black people for the very same reason, that the high school education requirement does - it is really a test of the capacity to do the kind of things that a high school graduate may---

Q Then if a power plant in let us say the state of Maine on the assumption that there would be an almost all white population there, if a power plant in the state of Maine had a high school or other aptitude test that was directed at promotibility, and it did not have any adverse impact on any racial group or national origin group, it would not be---

A That would be an industrial problem. I would suggest that they might be depriving themselves of people who could do the job very well, but that would not be the problem---

Q No violation problems?

A No violation problem. If it has a disporportionment effect on black people or members of the various protected groups than they can use it, if they can justify it in terms of

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business necessity. But if this test of July 2, 1965 screened out blacks, and the high school education requirement screens them out, and they - it has no bearing on who can and who cannot be (Inaudible). I'd like to reserve the balance of my time.

Q All right, Mr. Greenberg. Mr. Ferguson?

ARGUMENT OF GEORGE W. FERGUSON, JR., ESQ.

ON BEHALF OF RESPONDENTS

MR. FERGUSON: Mr. Chief Justice, and may it please the Court.

We are here today to determine the rights, duty, and obligations of employers and employees inprivate employment. In the mid-1950s, as has been indicated to you, Duke Power Company adopted a practice of requiring a high school education for pormotion or hifing into all departments other than the Labor Department, at extreme stations. The heart of this case is whether or not that practice is discriminatory under Title 7 of the Civil Rights Act of 1964.

As to four Negroes who were hired after the adoption of that requirement. Since adoption of the requirement, no employee, white or black, has been hired into departments other than the Labor Department unless he had a high school education. A collateral issue in this case, in our view, is whether or not the tests used by the company as a substitute for the high school requirement violates that.

Petitioners assert that the educational requirement is discriminatory because it fails to meet the test of business necessity. To meet that test, Petitioners claim, that any such requirement must be validated for job relatedness. On the other hand the company claims, and the District Court below, and the majority of the Court of Appeals below, found and concluded that under the record evidence in this case, the educational requirement had a genuine business purpose and was adopted to upgrade the quality of the defendants work force and was not adopted with any intedt to discriminate against Negroes hired after adoption of the requirement.

The uncontridicted evicende of recor in this case is that employees in the operations amd main enance department are responsible for the safe, efficient, and eliable operation and maintenance of compler machinery used int e production of electricity and energy.

Those in the laboratory department must be able to perform laboratory operations which include water analysis, coal analysis, and keep accurate logs with respect to those operations.

Those in the test department must maintain the accuracy of instruments, guages, and control devides.

Employees in coal handling must be able to read and understand manuals relating to complax machinery and operate that machinery in order to progress throogh the coal handling classification satisfactorily.

All of these jobs we submit to you require a degree of skill, judgement, and intelligence, and we would respectfully say to you that it supports the companys decision to require an overall general intelligence and mechanical comprehendion level ad reasonably necessary to safely and efficiently operate a plant costing millions of dollars which performs a complex function of electric power production which this company as a public utility is required by law to maintain adequate and continuous service.

Q If there were no high school graduation requirements in the labor force, how do you suggest that that would adversely affect the companys operations?

A There is no high school requirement for the labor force, may it please Your Honor.

Q Then I misheard you . I thought you said every person hired on the labor force.

A No sir. Every person hired since 1955 in all departments other than the labor department hace a high school education.

Q I'm glad you corrected that. I thought your statement was in conflict with what I remembered in the record.

A Thank you for calling it to my attention, sir.

In addition this record shows that---yes,sir?

Q May I just ask to clarify this? Tosay, if a person applies for a job---

A Yes, sir.

Q ---at this plant, he must have a high school education must he, if he is to be considered for employment at any of the four departments other than the Labor Department.

A Yes, sir.

Q Is that it?

A Yes, and he must also pass these tests.

Q He must do both?

A Yes, sir, he must do both---

Q A new applicant as of now must do both?

A Yes, sir. He must have a high school education and he must pass the test with the score of the average high school graduate. The test that we use here---

Q It's a double test?

A Yes, sir, that is for new employees only.

Q Yes.

A The test here, may it please Your Honor, were utilized as an altermate for the ---

Q High school test---

A The hich school requirement, to give incumbents only a change to enter and progress into the higher lines of progression without the necessity of havein a high school education.

Q But a new applicant, today, m ust have a high school diploma, in the first place---

A Yes, sir.

Q And then must he also take both the Wonderlic test and the Bennett or Bennett test?

A Yes, sir.

Q Well, he----

A And he must make 20 on the Wonderlic and 30 on the Bennett.

Q And this is true for any of the four departments oghee than the Labor Department?

A Yes, sir.

Q And as of today the Labor Department still requires neither of those qualifications?

A No, sir, they have to take a revised Bader test that is really no more than just an appreciation of danger and understanding how to follow instructions.

Q Yes.

A In addition I would say to you that Mr. A.C. Theis, Vice President of Power Prôduction and in charge of the steam plants on our company system, stated that the company instituted the high school requirement because its business was becoming more comples. It had employees who were unable to grasp situationsm to read, to write, and who didn't have an intelligence level, really to pmogress upward in the higher skill lines of progression that we're talking about.

In fact some refused promotion, because they didn't feel

that they could do the job.

Q Now, then you say were talking about, are you talking about promotion within the department or are you talking about interdepartmental transfers?

A Interdepartmental transfers. At that point, Your Honor, I was saying this. That we found that we were gettinggsome road-blocks because we had hired people without a high school education and without mechanical and general intelligence level that ultimately,in view of our business becoming more complex, we were hiring people and we were suffering road blocks and these tests, and the Petitioners own evidence, were designed to include not to exclude anybody without a high school education.

They had three non-discriminatory alternatives by which they could travel into the other, the higher skilled lines of progression. One, they could take the test, and make satisfactory scores and progress. Two, they could take advantage of the companys tuition refund program which we pay 75% of the cost of a high school diploma or a GED equivalent. Or they could do it on their own. They had those three alternatives.

Q Existing employees.

A Yes, sir, this is for incumbents, only, about which we're talking. The Court below cured discrimination as to the six black employees who were contemporaneously hired with the whites who were hired into the better departments and who had

been progressing along and ordered that when the District Court fashined a decree that it would take those six employees, waive the educational and test requirement as to them, and require plant wide rather than departmental seniority. With respect to those two. Does that answer your question, sir.

Q Well, I think so, I've had a little trouble with the facts in this case and I---

A As to the high school graduates, they were all promoted after the Civil Rights Act became effective on July 2, 1965, they were all promoted out of Labor into the higher skill lines of progression and which we would contend is the precise effect Congress intended. Because both Courts below found and concluded that Negroes were relegated to the Labor Department prior to the effective date of the Act.

Q Let me see if I can translate what you've said not in terms of the actual situation on this record, but the operation of it. If a man of any racial or national origin is hired in the Labor Department now without a high school education or any other test, and at some point thinks he can qualigy for one of the other operating departments in the company, is he permitted to, does he come within this group in which his tuition is paid three-fourths by the company?

A Yes,sir.

Q And if he passes the test he can join in this upward movement?

A Yes, sir. If he comes in without a high school---I see your point, Mr. Chief Justice---if he comes in at the Labor Department without a high school education, your question is does he have to pass the test and have a high school education requirement also, is that it?

Q To get out of it - move on up?

A Yes, sir, he could take the test and move on up. We're speaking about new hires in to departments other than Labor. They must have a high school education and in addition thereto pass these two tests, that's what we're talking about.

Q Now since these tests have been inaugurated, since this policy is in effect, how many people have moved out of the labor force by this route, into other branches?

A Through the testing route?

Q Yes.

A As indicated earlier three, two blacks and one white have passed the test, no, have taken the test, but none have passed.

Q So---

A None have moved out by virtue of the additional promotional avenue we gave them.

Q Have all three of them taken the training course at the shared expense of the company?

A No, sir they have not, they, one, we have one who has recently passed, or given us, or shown us satisfactory

evidence of a high school education, and he is now out of the Labor Department force.

Q Who conducted these tests?

A Sir?

Q Who conducts these tests?

A Mr. Richard Lemons at this particular plant, Mr. Justice White,---

Q Is he an employee of the company?

A Yes, sir.

Q Anyone else participate?

A No sir, I don't believe anyone else at this particular plant---

Q Has any charge of unfairness of any kind in any of the tests---

A No, sir. They pass by that.

Q Well, there is a claim that the test is inherently an unfair test, insofar as Negroes are concerned.

A All right, sir, any I speak to that just a moment?

Q Well, that is the - do I understand the claim in the opposition correctly?

A They claim the test as to Negroes are unfair because they're culturally deprived and therefore placed at a competitive disadvangage.

Q And what they're asking is that you tailor a new test that will be directed at the particular job ahead.

A Yes, sir and I would respectfully submit to you that the legislative history of the Act clearly shows that general intelligence, and aptitude tests, that Congress intended that they should be used. And I point specifically to Senator Towers language, this is all discussed in pages 27 - 40 of the brief, I would direct the attention of the Court to this, when Senator Tower called up his original amendment he stated, "It is an effort to protect the system, whereby employers give general ability and intelligence tests to determine the trainability of employees."

Q What page were you on, precisely?

A That is page 31 of our brief, Your Honor. If you'll go on over to page 32 you'll see Senator Lausche's question, demanding to know where there is language in this bill that allows the Motorola-type test be given. I would point out even more particularly to you, on page 38, the Clark case interpretated memorandum, prepared by the Justice Department which states this,"There is no requirement in Title 7 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." Now the Justice Department, through the

Solicitor General as [illegible] curaie, apparently, now claims that thess are valid only of they're specifically job related.

Amd apparently, repudiates the interpretated memorandum on which Congress of the United States relied when it enacted that legislation.

Q Nothing that I heard you read would say that the test could be non-job related. It said that he can be as high as he likes---

A Yes, sir.

Q ---but it do sn't say that they can be wholly irrelevant to the job that he's being employed to fill.

A Well, now, I would answer that this way. The Bennet and the Wonderlic are, of courme, professionally developed tests. That alone, we realize, is not enough. The courts below found that we had a genuine business purpose in adopting the high school education requirement and they found that the tests were a reasonably satisfactory substitute for the high school education requirement.

Now, if we assume that the tests are professionally developed ability tests, and that Congress intended to allow the use of general aptitude and ability tests, then, and in that event, the crucial inquiry becomes this. Are the tests designed, used, or intended to discriminate?

Now, as to design, the two tests in question here were designed by professional psychologists. The record evidence

shows that the Wonderlic was designed to measure general intelligence, and that the Bennet mechanical AA was designed as a measure of mechanical comprehension. The use of the two tests is as a substitute for the high school education requirement. Purely and simply to determine of the employee has a general intelligence or overall mechanical comprehension level of the average high school graduate.

What about the intent? Well, once the employer establishes a legitimate business purpose for an employment practice, testing or otherwise, then that practice is non-discriminatory even if it operates to prefer whites over blacks.

The intent and the legitimate business purpose are inextricably bound up together, I would submit to the Court.

Q That's very well used as kind of a slippery and ambiguous word in this context. It could be read, couldn't it, and that's, I gather, how your brothers on the other side read it, that is if their use results in discrimination, then they're used to discriminate, and on the other hand it could be read as if they did it, they're not subjectively used for purposes of discrimination then they're all right. I simply suggest that that's not the clearest word in the world, in this context.

A Well, sir, I would submit to you that it's factually impossible to use it to discriminate in this case as I point out on page 26 of the Respondents brief.

Q Let me see if I can focus with you for a moment on

a diffenence that you suggested existed between the Department of Justice position previously and now. On page 38, the italicized language that you were referring to, I think, is the amendment relates to the business or enterprise. Not to the specific jobs. That's what the Department of Justice said in that memorandum. The Department of Justice seems to be saying now, do you suggest that the amendments concerning the tests relates to specific jobs as distinguished from enterprise?

A Apparently so. What you're referring to Mr Chief Justice, is the first Tower amendment. And this is - I believe the Clark case interpretated memorandum was submitted after the first Tower amendment. Now, I'm not sure about that, but the language I had reference to is on page 31, of the brief.

Down about middle of the page where it says,"It is an effort to protect the system". I would point out also to you that both the EEOC, the EEOC has held that educational qualifications don't violate the act, I believe you'll find that as Defendant's exhibit No. 4,---

Q Well, general ability add intelligence tests wouldn't universally relate to specific jobs, would they? We can ponder on that at lunch while we recess?

A If you please, Your Honor, someone else has ten minutes of my time.

(Whereupon argument on the above-entitled matter was recessed to reconvene at 1:00 o'clock the same day.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Let's see, Mr. Ferguson, you have eleven minutes left.

ARGUMENT OF MR. GEORGE W. FERGUSON, JR., ESQ.,

ON BEHALF OF RESPONDENTS

(RESUMED)

MR. FERGUSON: Thank you, Mr. Chief Justice, I've yeilded ten minutes of my time to someone else and I want to finish up as quickly as I can.

The Appellant has produced no evidence at the trial that educational test requirement had, or failed to meet the test for legigimate business purpose. I would respectfully submit to the Court that the findings and conclusions of the Court below should not be set aside unless they are found to be clearly erroneous and in closing I would comment on the Petitioners argument that the educational test requirement has a vast discriminatory potential.

That simply is not a valid contention because the lower court carefully guarded against broad approval of all educational and testing requirements by restricting its decision soley to the facts of this case and that decision should, we respectfully submit, be affirmed.

Q Mr. Fegguson, may I ask you one quastion?

A Yes, sir.

Q I got the impression that there were 13 original plaintiffs here. Is this correct, to you know?

A Yes, sir, that is correct. One, who had a hich school education was not a Plaintiff. There are 14 Negroes employed at the Dan River Steam Station, one of which had been promoted into Coal Handling and was not a Plaintiff in this action.

Q I wondered what had happened to him, and this is the answer to it, then.

A Yes, sir.

Q All right, Mr. Cohen.

ARGUMENT OF LAWRENCE M. COHEN, ESQ.

FOR CHAMBER OF COMMERCE OF THE UNITED STATES,

AS AMICUS CURAIE

MR. COHEN: Mr. Chief Justice, and may it please the Court.

I appear before you today on behalf of the Chamber of Commerce of the United States to urge affirmance of the decision below.

This case is one which is of vital concern to employers. Both small and large throughout the United States. In todays labor market there are often many applicants for the same job, just as there are many employees who desire to be promoted into a better position.

The employer must make a choice, and the choice confronting

him is often a diffucult one. We believe employers must be permitted to use objective, generally accepted standards of intelligence, educaitonal achievement, or ability in order to make that decision.

Q Mr. Cohen, let me put this question to you. Assume an area of the country, where, I suppose in the Southwest, there are people whose family language is Spanish, and have a rather limited comprehension of English. Suppose an employer provided for farm workers that they must pass a test, something like a literacy test in English, on the face of it that would be a rational request generally for employers, I'm sure. It's impact in ghe Southwest in that particular area for farm workers might or might not have any relationship at all to the job.

Wouldn't that bring it under the Act, if the impact was there?

A I think that this is really the heart of this case. Most educational tests today, unfortunately, or aptitude tests, have a discriminatory impact on one or more racial groups.

This is the (inaudible) problem of the socio-economic status of these groups has historically evolved. The position that Petitioners urge says that whereever you have an educational requirement, wherever you have an intelligence test, the employer is then obligated to prooce business necessity. That he had to use that particular test. We b

We believe that where the employer has a legitimate business

purpose and can demonstrate to the Court on the basis of the evidence in the case that he has a legitimate business purpose for the test, then he ought to be permitted to use it.

When Congress, in the act of Title 7, it knew that educational requirements and tests had a potential discrimination of the type you just referred to. It didn't outlaw the use of tests. It didn't prohibit the use of educational requirements. It tried to reach a compromise where employers could use such tests, use such educational requirements as long as they were not a pretext, or subtrefuge for discrimination.

I---

Q Well, does it go that far, that it must be subtrefuge, or is it on the impact?

A It's whether on the basis of the evidence in the case, did the employer use or intend that the test be discriminatory? That's the words, of, for example, 703H.

All through here, really, is that if a business necessity test is adopted of the type that Petitioners have urged in this Court, the result will be that employers won't be able to use any objective tests.

Q Well would you regard business necessity and business related as being the same---

A No.

Q ---or is one stronger than the other?

A No. I think the difference is between business necessity

which is the position that Petitioners and the government urge, and legitimate business purpose, this is the way the Court of Appeals split on the case. In a majority opinion the Court said that the Respondent has a legitimate business purpose, and proceeds to detail some six or seven reasons why it believs that they ha a legitimate business purpose.

They approached it on a case by case basis and on the basis of the entire record. Judge Sobeloff in his dissent says that the test is one of business necessity and that in turn is the position that Petitioners urge before this Court today.

The problem here is one of what do s business necessity mean? One Court of Appeals recently held that b siness necessity means essential to the safe and efficient operation of the employers business.

The troubles with educational requirements or tests or never going to be shown to be essential, so the test is essential The employer must fall back and use something other than objective criteria, because under the EEOCs definition of a test, any objective means of selecting employees is considered a test.

That's really what we're talking about today. We're not talking about the Wonderlic test, we're not talking about the Bennet tes , we're talking about objective means of choosing which employee shou d fit into a particular job. Or which employee should be hired in the first place.

And if employers cannot use objective means, then the only

way they can choose employees will be subjectively, who does the interviewer like, or on the basis of some arbitrary method like the first person in is the first person hired.

Now we feel, as the Court noted in the Porter case, that if you use subjective or arbitrary means, they have a vastly greater potential for discrimination and a vastly greater potential for poor business decisions (inaudible) decisions than a test in the objective kind of criteria which Duke Power used here, and out theory is that---

Q Mr. Cohen, what relationship does either of these tests have to "Coal Handling"?

A The Court of Appeals found that on the facts of this case the tests served a legitimate business purpose by hiring a reservoir able employees in Coal Handling who could not only do the job there, but were reasonably able to be promoted into the higher skilled jobs. I would feel that theCourt of Appeals decision here is a reasobabl one, and it should not be disturbed. But the point here ! ---

Q W not put the s le test before you hire a laborer?

A I'm sorry Mr, Justice (inaudible)

Q Why dont they have the same test before you're hired as a laborer, in Duke?

A Well I think the difference is that greater skills are required by employees in the Coal Handling.

Q Well, they might go up to be President, too.

A That's correct, but the question is, should you in each case require the employer, before he uses a test, to first demonstrate that that test is related just to that particular job, or can you have a test that relates to more than one job?

Q I still think that you can hire somebody as a Coal Handler and put the requirement that he have a PhD. You have that right. Any employer does. But does he have that right under this Act? That's the question.

A Mr Feeling, Mr. Justice Marshall, is that this is like a case of an employer who discharges a union employee during a union organizational campaign.

He has no right to discharge, if he's discharging the employee because he's engaged in union activities. But he does have the right if he's acting for a legitimate purpose, business purpose, and not because he's trying to get at the employee because he's a union person.

If someone sets up a standard for the Coal Handling department and does that with no business purpose and only so that he can prevent Negroes from entering that department, then I think he's violated this law.

Q But he did it, knowing fully well that he had a prior policy of rigid segregation and exclusion. He's not writing on a clean slate.

A That's---

Q And he put this rule, in as I understand it the day

the bill became effective.

A The company put in the policy of permitting, as an alternate to the education requirement, of permitting tests. That was put in the day(inaudible). The educational requirement antedated that by some ten years. Now do you let the employer given the act became effective (inaudible) an additional avenue for promotion that was over and above what he had done prior to the act.

Q Before that all you needed to show was a high school diploma. And after that if you didn't have a high school diploma you had to give a test which he gave. Duke gave the test, marked the test, right?

A Yes. I think the point that I'd like to make is that I think what the Court of Appeals needed to consider was all factors, the timing of the test, what the employers race relations, what his general action was in the area of race relations, what kind of expert opinion he relied on, what he did later on, in fact he's engaged in validation studies now. And

And on the basis of that entire record, the Court of Appeals had to make a decision of whether there was a legitimate business purpose. The summary in the Court of Appeals I said were to have considered whether the employer really had a legitimate purpose in discharging the union employee. I think the Court of Appeals considered all these facts, it rated the timing, as you've indicated along with all the other facts in

the record, and it reached what is a reasonable decision. And it's the decision that I think that this Court ought not to disturb.

My principal reason for appearing here as an amicus is not so much to argue the facts as to whether the Courts decision was correct, but whether the Court of Appeals applied the correct test.

That, I think, is the key issue in this case. Now we would urge that the Court of Appeals did apply the correct test. That it reached the correct results applying that test is a different story. But we think the correct test should be one, as the Court of Appeals did, of whether the employer, in all the circumstances of the case, and on a case by case approach adopted a - had a legitimate business purpose for its testing requirement of for its educational requirement.

Q Without regard to job relations.

A Yes, I think job relationship is one aspect, and not the only aspect of the case.

Q That should be considered, do you agree?

A Oh, absolutely. But it should not be determinative, either under the EEOCs guidelines or under the business necessity test.

Q Well, let me be sure that I understand your response to my hypothetical question. If the fruit pickers and the farm workers down in the Southwest had this English language test,

you'd regard that as not very job related?

A My feeling is that you could never proove that there was a business necessity for that test. And nor that it was job related in the sense that the employees had to have that skill in order to perform that job.

As I understand the Petitioners position, if it had not been validated, which includes job relatedness, under the EEOCs guidelines, the employer could not use it.

Q Their command of English would be relevant only to the extent that it was necessary to understand instructions, isn't that about it?

A You would have to demonstrate that the employees could not do the job if they did not understand English. And that an understanding of English was essential to the job. If The employer could not proove those two points, he would have violated the law. Thank you.

Q Thank you, Mr. Chhen. Mr. Greenberg, you have about ten minutes.

REBUTTAL ARGUMENT OF MR. JACK GREENBERG, ESQ.

ON BEHALF OF PETITIONERS

MR. GREENBERG: Mr. Chief Justice, and may it please the court.

I would like to get to the record in this case, because I would like to assert to this Court that this record nowhere demonstrates that this high school education or the ability to

pass the test is related to any job that is from Labor to Coal Handler or from Coal Handler to anywhere else.

I'm not saying that somewhere, in some plant, on some record someone might not demonstrate that, and if they did it would be a differnet case. It is not demonstrated here, and I'd like to read just but two of many portions of the record that indicate that the---

Q What are you reading?

Z Well, I'm going to read from page 179, Dr. Moffee, the Respondents Industrial Psychologist, and he said the same thing a number of times. And here he said,"We are doing job related validities. For example, we have completed one study where we---"

Q That's about one fourth of the page down, isn't it?

A That's right. "We had completed one study where we had taken roughly one hundred to two hundred people in some categories, well over 200 people at different job levels where we ha - attempted to validate the Wonderlic. And we are finding, as pointed out this morning by Dr. Barrett, that we are too broad."

You can find that throughout the record,. Now as to the high school education, on page 188. And ofcourse this is redundant because the test in this case is to demonstrate an ave average hich school graduate, and so it is redundant. In any event, Dr. Moffee says, "High school education would really tell

you that you have the necessary---

Q Let's locate our spot first.

A Page 188, just above the colliquy on the bottom of the page.

Q Fine.

A High school education would really tell you that you have the necessary abilities defined by a high school education, and if the company feels that this is required in these jobs, then that's all it would tell you.

That's what Respondents and the amicus are saying. That the company feels that you ought to have these qualifications, and the company ought to have the right to do it. But thtt's not what the statute says. The statute changes the pre-existing situation.

It says it's an unlawful employment practice for an employer to, and I'll just summarize here, classify employees in any way which would tend to deprive any individual of employment opportunities or which would in any way adversely affect his status. And the statute says you may not classify. They have classified them by ability to take the test, and have a high school education.

And it deprives, and certainly tends to deprive them, and adversley affects them with respect to employment and promotion and pay. And we submit that that's a violation of the statute.

Now there is an exception in this statute which we refer

to, section 703H, which is the professionally developed ability test provision, and that comes out of the Mototola case which was refered to.

The Motorola case was a case quite unlike this case. The Motorola case and this case are not the same at all. Motorola was a case in which the hearing examiner held that even though a Negro applicant for a job could not pass a test and could not do the job he neverthelass ought to be employed with some notion of conpensatory employment, compensatory credit for being deprived and so on.

Now that's not this case, and that's not this statute. If these Petitioners were taking a job validated, job related test and they could not pass the test, and not passing the test indicated that they could not do the job, we would nothe here today, but these are tests which Respondents have conceeded throughout the record do not indicate anything at all about the ability to do the job, non-high school graduates are in Coal Handling, Maintenance, Laboratory Test, Operations, they're being promoted at the same rate, approximately as the calculations in the governments brief indicates, being promoted at the same rate as high school graduates.

They're earning approximately the same pay as high school graduates, and the argument that they have to be able to pass these tests to go from Labor to Coal Handling so that they then can reach some very much higher level at the plant is just not

borne out.

In addition to which I mean just to---

Q. Mr. Greenberg, perhaps you're saying that on the facts here there are---the company hasn't made out that any of its other jobs---the higher jobs require a high school diploma or an ability to pass these tests. Now let's assume that it's shown that, although the jobs for which they were hiring initially didn't require it.

A. Then we would have a different case. If it were shown that this---

Q. Not only a different case, but how would you come out on it?

A. Well, if it were shown that this were a plant with rapid and frequent promotion, which is not true here, the place is stagnant, or stable as they call it.

Q. But anyway, promotions are from inside, mostly.

A. If promotions were from inside and it were necessary and the company could deronstrate that blocking up the lines of progression would adversely affect the plant, we would not be urging the position- -our position with respect to that situation.

In other words it would be job related. It would be job validated, but in some other sense, with regard to promotibility---

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Q Judge Sobeliff, I gather, would agree with what you just said, and he said, however, that there's been no showing in this case that any---that these tests are related to any of these other jobs.

A That's right. It 's not---you can divide the job validation into two parts. Job validation with respect to immediate employment and future employment, over some peroid of time. And that second category is not quite so simple because I think a company might have to demonstrate that there is a regular flow of people through the plant and that they can't function with people stopping off somewhere on the way up the ladder, but nevertheless if they could show that, ahd they could show that it would interfere with their function improperly to have people stopping the line of progression and not become foremen and supervisors, and so forth, then they would have established a kind of job validation.

But they haven't done that yet. Theyve just made an assertion about it. And that's not adequate to divest the Petitioners of their rights, we submit.

Q You dont' think general allegations that a lot of jobs on the ladder that require some kind of abstract skills or something like that is not enough---

A I would say that would not be enough when you're dealing in an area like this where, without speaking about any particular case, there's a lot of duplicity going on, in a lot

cases, you have to have something you can deal with objectively. But apart from that, we have non-high school graduates across the total range of employment in this plant, so that really doesn't hold water.

Just a final word about 703H. We submit that the Equal Employment Opportunity Commission, which is charged by the statute with the enforcement of the statute, is in a partucularly, peculiarly advantageous position to construe it. And it has construed the term"professionally developed ability tests" to mean a job validated test.

So far as the legislative history is concerned the briefs are full of, we think, that the conclusion of the Equal Opportunity Employment Commission should be despositive, we think that we have demonstrated quite clearly in the brief, the legislative history indicates that one ought to be able to pass a test which indicates his ability to do a job, not to pass a test of the abstract which doesn't indicate anything at all. Mr. Chief Justice, you adked a question about the ability to speak Spanish, there was a case quite like that, it was settled. It was against one of the Southwestern power companies, which involved height.

In order to be a line man, you had to be above a certain height, and for a variety of reasons, Mexican-Americans in that part of the country were not above a certain height, generally speaking, and they could not get the jobs. Yet there was no indication that height had anything at all to do with the ability

to do the job. Procedings were brought and the case was settled and the case never came to a decision. But we would submit that if one could show that this was a height test, and that only one third as many black people qualified for the height test as white people, and that height had nothing whatsoever to do with the ability to do the job, we'd have exactly this case here, and that the result should be the same.

Q. Let me ask you this, Mr. Greenberg. Suppose in terms of eligibility to intern in a hospital, the hospital standard required that they be persons whose scholastic training and general aptitude measured by some reasonable test, were such that they were qualified to become staff members. In standing alone would you regard that as a reasonable---

A. Mr. Chief Justice---

Q. ---criteria?

A. This is not a subject about which I know anything at all but it would seem to me that a medical education is or at least ought to be directly related to the ability to practice medicine, and that the excellence of ones training and what one has learned as demonstrated by his record would bear some relation. I would assume that that would be job validated.

Q. The implications of my questions are that some medical graduates would and some would not be able to take that ultimate test of being ultimately qualified to be staff members.

A. Well, I would assume that relevant criteria would be

used, and that that would be job validated. It would make sense to me. I can't imagine why it wouldn't but it's not anything I really know anything about.

Q Thank you, Mr. Greenberg. Thank you gentlemen, the case is submitted.

(Whereupon at 1:20 o'clock p.m. argument in the above entitled matter was concluded.)

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