IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969 70

No. 1405

WILLIE S. GRIGGS, et al.,

*Petitioners*

v.

DUKE POWER COMPANY, a Corporation,

*Respondent*

On Petition For Writ of Certiorari To the United States Court of Appeals For The Fourth Circuit

## BRIEF FOR RESPONDENT IN OPPOSITION

George W. Ferguson, Jr.
Carl Horn, Jr.
William I. Ward, Jr.
Power Building
422 S. Church Street
Charlotte, North Carolina
*Attorneys for Respondent*

INDEX

Table of Cases

*Page*

STATUTES



OTHER AUTHORITIES

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

---

No. 1405

---

WILLIE S. GRIGGS, et al., *Petitioners*

v.

DUKE POWER COMPANY, a Corporation, *Respondent*

---

On Petition For Writ of Certiorari To the United States Court of Appeals For The Fourth Circuit

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the Court of Appeals is reported at 420 F. 2d 1255 (1970). The opinion of the District Court for the Middle District of North Carolina is reported at 292 F. Supp. 243 (1968). Both are reported in the Appendix to the Petition. (Pet. App.)

### JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 9, 1970. The Petition for Writ of Certiorari (Pet.) was filed on April 9, 1970,

jurisdiction of this Court being invoked under 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

In addition to the facts stated in the Petition, Respondent deems the following as material to the consideration of the questions presented.

The certified evidence of record (R) shows that the employees in the Operating Department at the Dan River Station are responsible for the safe, efficient, and reliable operation of the generating equipment at the station. They operate the boilers, the turbines, the auxiliary and control equipment, the electrical substation and the interconnections between the station, the Duke Power system, and the systems of other power companies. The Maintenance Department is responsible for maintenance of all the mechanical and electrical equipment and machinery in the plant. The employees in the Coal Handling Department weigh, sample, unload, crush, and transport coal received from the mines. In so doing they operate diesel and electric equipment, bulldozers, crushers, heavy machinery, conveyor belts, travelling trippers and other equipment. They must be able to read and understand manuals relating to such complex machinery and equipment in order to progress in this department.

In addition there are service departments such as a Laboratory Department where technicians analyze boiler water to keep it pure enough for use and a Test Department where technicians are responsible for the performance of the power station by maintaining the accuracy of instruments, gauges, and control devices.

In the test, laboratory and clerical groups, the skills required generally relate to intelligence and not man-

ual or mechanical skills. In operations, maintenance and coal handling a general intelligence level and mechanical comprehension are required to progress within those departments.

At least 10 years prior to institution of this action, the Company realized that its business was becoming more complex and that it had employees who were unable to grasp situations, to read, to reason, and in general did not have an intelligence level high enough to enable them to progress in the Operations, Maintenance and Coal Handling Departments. (R. pp. 20b-21b) In an effort to upgrade the quality of its work force, the Company placed into effect the requirement that an employee had to have a high school education or its equivalent (such as a Certificate of Completion of General Education Development (GED) tests, High School Level) to be considered for transfer from the Labor Department or watchman classification into operations, maintenance and coal handling. The same requirement was applicable to those in coal handling who desired to transfer into operations and maintenance. The Company realized that the high school requirement was not perfect, but believed it would give the Company a chance to obtain employees who were more capable of operating generating equipment in an industry which was rapidly developing new technology for electric power generation. The Company uses employees at existing plants to form nuclei of employees at new plants. At the time this case was tried, the Company had a number of computers on order for its generating plants; and it was making plans for placing into operation its first nuclear generating plant. (R. pp. 84a-87a, 92a, 93a, 20b, 21b)

The Company subsequently amended its promotion-transfer requirements by providing that an employee who was on the Company payroll prior to September 1, 1965, and who did not have a high school education or its GED equivalent could become eligible for consideration for promotion or transfer to a department containing higher classified jobs by passing a general intelligence test (Wonderlic) and a general mechanical test (Bennett Mechanical AA) with scores equal to the norms of the average high school graduate. (R. pp. 86a-88a, 137b) This change was made in response to requests from employees in coal handling and was designed to include, rather than exclude, for consideration for promotion those employees, including the plaintiffs, who were employed prior to September 1, 1965. (R. pp. 199a, 200a, 21b) Those employees without a high school education who did not desire to qualify for consideration for transfer or promotion to a higher classified department by taking the tests could take advantage of the Company's Tuition Refund Plan in order to obtain a high school education. (R. pp. 90a, 91a, 21b).

## QUESTIONS PRESENTED

Whether the use of a high school educational requirement is an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964; and whether it is an unlawful practice under the Act (in lieu of said educational requirement) to require incumbent employees without a high school education to take and pass a general intelligence test and a mechanical ability test with the score of the average high school graduate prior to entering the higher skilled lines of progression where the evidence of record conclusively shows and the trial court found:

1. That the tests were "professionally developed ability tests" within the meaning of section 703(h) of the Act; and

2. That the Company had legitimate business reasons for establishing said requirements because it was necessary to have the general intelligence level and over-all mechanical comprehension of a high school graduate to enter and progress in the higher skilled lines of progression and said tests measure such qualifications.

## ARGUMENT

### I

### THE COURT BELOW PROPERLY CONCLUDED THAT RESPONDENT'S EDUCATIONAL AND TESTING REQUIREMENTS WERE LAWFUL, NON-DISCRIMINATORY EMPLOYMENT CRITERIA UNDER TITLE VII, SECTIONS 703 (a), (h), & (g), OF THE CIVIL RIGHTS ACT OF 1964, AND THE COMPANY HAD LEGITIMATE BUSINESS REASONS FOR ESTABLISHING SAID CRITERIA.

Petitioners cite four District Court cases as authority for the proposition that tests and educational requirements which are not job-related are unlawful under Title VII of the Civil Rights Act of 1964 (hereinafter referred to as the "Act"). *Arrington v. Massachusetts Bay Transportation Authority*, 61 Lab. Cases 9375, 2 FEP Cases 371 (D. C. Mass. 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S. D. Ohio 1968); *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40 (N. D. Ala. 1968), appeal noticed 5th Cir. No. 27703; *Penn v. Stumpf*, 62 Lab. Cases 9404, 2 FEP Cases 391 (D. C. N. Calif. 1970). In each instance, their claim is unfounded.

Insofar as Respondent can determine there has been no judicial determination that the use of educational requirements constitutes an unlawful employment practice under Title VII of the Act. In *Dobbins* as well as in *Porter*, *Arrington*, and *Penn*, the District Court was dealing with *tests, not educational requirements*.

The legislative history clearly shows that discrimination based on educational qualifications does not violate Title VII of the Act. The interpretative memorandum submitted jointly by Senators Clark and Case, two of the Act's leading sponsors, stated:

> "With the exception noted above, therefore, section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by Section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. *Any other criterion or qualification for employment is not affected by this Title.*" 110 Cong. Rec. 6692; Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, p. 329 (Emphasis added).

During the Senate debate on June 9, 1964, Senator Humphrey said: "The Employer will outline the qualifications to be met for the job. The employer, not the Government, will establish the standards." 110 Cong. Rec. 13088. Respondent submits that Congress has made it clear that an employer can set his qualifica-

tions, educational or otherwise, as high as he likes without violating Section 703 of Title VII of the Act so long as they are applied without discrimination.

On October 2, 1965, the General Counsel of the Equal Employment Opportunity Commission (EEOC) issued an interpretation stating that discrimination based on educational qualifications does *not* violate Title VII of the Act (R. p. 147b). Petitioners cite a subsequent decision of the EEOC on December 6, 1966, (issued almost two months *after* the Complaint was filed in this case) as holding that unless educational requirements are related to job performance they violate Title VII of the Act (Pet. p. 10—f.n. 8) *Educational requirements were not under consideration in that case.* The only thing *decided* by the EEOC was that reasonable cause existed to believe that an employer who owned a food processing plant (where the great majority of jobs required unskilled personnel) was discriminating against Negroes by administering a *test* not related to job requirements.

The Petitioners are unable to cite a single decision to support their contention that educational requirements violate Title VII of the Act unless they are job-related. *A fortiori,* they are unable to cite a decision of the agency charged with administration and enforcement of the Act that so holds.

Petitioners cite *Dobbins, supra* for the proposition that a test is not "professionally developed" unless it is related to job performance. Section 703(h) provides that it is not an unlawful employment practice for an *employer* to give and act on the results of a "professionally developed ability test". *This section was enacted to provide exemptions for employers only, not labor*

*unions. Dobbins* has to do with tests being given for membership in a labor organization or in connection with a referral system. The question of "professionally developed tests" within the meaning of Section 703(h) was not before the Court in that case. Moreover, as indicated by the Court below, it was clear in that case that the purpose of the tests was to discriminate. (Pet. App. 31a)

In *Porter, supra* the question of job-related tests was not at issue because the Court found that the tests were related to the abilities required for performance of jobs. After stating the thesis of the EEOC guidelines, Judge Allgood said at 296 F. Supp. p. 78:

> "*Accepting this interpretation for purposes of analysis, and applying it to the record in this case,* the result is that there is not sufficient evidence here from which it could be properly said that the SRA and the USES tests used by the Company do not fairly measure the knowledge or skills required by the jobs." (Emphasis added)

Even though the Court stated that it agreed in principle that aptitudes measured by a test should be relevant to aptitudes involved in the performance of jobs, Judge Allgood did *not hold* that Section 703(h) required that tests be specifically job-related.

*Arrington, supra* and *Penn, supra* are equally inapposite and clearly distinguishable in that the action was brought under the Civil Rights Acts of 1870 and 1871 and a *governmental agency* was the employer in both cases. Neither *Penn* nor *Arrington* would support Petitioner's contention that Section 703(h) requires that tests used by *private* employers must be related to specific jobs.

Here again, Petitioners are unable to point to a single case that supports the position they take with respect to tests. As observed by the Court below, there are no cases directly in point. (Pet. App. 26a)

The majority decision below concisely and succinctly reviews the legislative history of Section 703(h) of Title VII. The decision of the EEOC that tests *must* be related to a particular job or group of jobs and properly validated is clearly contrary to the legislative history of Section 703(h) as the Court below correctly concluded. (Pet. App. 30a-35a) The Court's conclusion is fortified by the fact that in May 1968 an amendment to Section 703(h) requiring a "direct relation" between a test and a "particular position" was proposed and *defeated.* Senate Report No. 1111 on S. 3465, 90th Congress, 2nd Sess. (May 8, 1968) In view of such clearly compelling legislative history, it would have been patent error for the Court to conclude otherwise.

The District Court *found* that in adopting the educational-testing requirements the Respondent had legitimate business reasons and did not intend to discriminate against its Negro employees. The Circuit Court agreed. (Pet. App. 26a-30a) Rule 52(a) of the *Federal Rules of Civil Procedure* provides that the trial court's findings of fact should not be set aside unless they are "clearly erroneous." This Court has held that even though the Appellate Court would construe the facts differently, the trial court's findings cannot be set aside unless they are "clearly erroneous". *United States v. Yellow Cab Co.*, 338 U. S. 338, 341-342, 94 L. Ed. 150, 70 S. Ct. 177 (1949).

More weight than usual should be accorded the opportunity of the trial court to judge the credibility of

Respondent's witness, A. C. Thies, the Company official who prescribed the educational-test requirement for interdepartmental transfer. Whether the Company intended to discriminate against Negro employees had to be determined primarily from the credibility and weight accorded Mr. Thies' testimony by the trial judge. Having had the opportunity to observe Mr. Thies' demeanor and conduct while on the stand, Judge Gordon found:

> "More than ten years ago it (Respondent) put into effect a high school education requirement *intended to eventually upgrade the quality of its entire work force.* At least since July 2, 1965, the requirement has been fairly and equally administered."
>
> "The requirement was made applicable to a departmentalized work force *without any intention or design to discriminate against Negro employees.* The departments serve as a *reasonable* system of classification with each department having a *different* function and *each department requiring different skills.* (Pet. App. 10a, Emphasis added).

When the questions before this Court are concerned with determining the intent of the employer, particular weight should be accorded the trial court's findings. *United States v. Yellow Cab Co., supra.* The Petitioners ask that this Court give them a trial *de novo* on the record and attribute to the Respondent a base motive and sinister intent to discriminate against its Negro employees. To do so would require this Court to attribute a devious purpose to discriminate behind the Respondent efforts to upgrade the quality of the work

force to keep pace with the growing technology in the electric utility industry.

In *United States v. National Association of Real Estate Boards*, 339 U. S. 485, 495-496, 94 L. Ed. 1007, 70 S. Ct. 711 (1950), Mr. Justice Jackson viewed the subject thusly:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'."

This is a case wherein Petitioners want this Court to set aside the trial court's findings as being "clearly erroneous", but they are unable to point out any evidentiary basis which would warrant it.

Petitioners contend that where testing and educational requirements are not related to a particular job or group of jobs there can be no business necessity. The other side of the coin is that where a private employer determines that educational and test requirements are necessary to upgrade the quality of its work force so as to safely and efficiently operate his business such requirements are job related, albeit, not related to the particular job or class of jobs to be performed. Once a private employer makes such a determination his business reasons for doing so are legitimately established, absent any showing of an intent to discriminate.

The lower court carefully guards against a broad approval of all educational and testing requirements and restricts its decision solely to the facts of this case.

(Pet. App. p. 35a, f.n. 8) This proceeding was instituted as a class action and the class defined by the District Court (R. p. 19a) was extremely limited; therefore, the rights of only a few litigants are affected by the lower court's decision. Based on the record evidence in this case, the decision of the court below is manifestly correct. In the light of the legislative history of the Act no other result could have been reached. There is, therefore, no important question of federal law requiring decision by this Court.

## II

## THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS INVOLVING TITLE VII OF THE ACT.

The Circuit Court cases[1] cited by Petitioners in this connection hold only that where a *seniority system*, which originated before the effective date of the Act, has the effect of perpetuating discrimination, relief may be granted under the Act to remedy present and continuing effects of past discrimination. The Court below expressly approved the decisions of the Fifth and Eighth Circuits (Pet. App. 24a) and held that in this case the District Court should order that the seniority rights of the six Negro employees granted relief should be considered on a plantwide rather than a departmental basis to remedy the present effects of past discrimination. (Pet. App. 37a) Petitioners seek to set up a conflict by engrafting on the decision of the Fourth Circuit in this case a "fundamental inconsist-

---

[1]*United States v. Local 189*, 416 F. 2d 980 (5th Cir. 1969), *cert. denied*——U.S.———(1970); *United States v. Hayes International Corp.*, 415 F. 2d 1038 (5th Cir. 1969); *United States v. Sheet Metal Workers, Local 36*, 416 F. 2d 123 (8th Cir. 1969).

ency" with the principles established in the seniority context in the Fifth and Eighth Circuits (Pet. p. 14) *while at the same time admitting that no other Court of Appeals has dealt with the issues of testing and educational requirements.* (Pet. p. 15) The Petition, therefore, falls of its own weight.

It should also be noted that more than ten years ago this Court denied certiorari in a case strikingly similar to this. *Whitfield vs. United Steelworkers of America, Local No. 2708*, 263 F. 2d 546, 43 LRRM 2496 (5th Cir. 1959) *cert. denied* 360 U. S. 902, 79 S. Ct. 1285, 3 L. Ed. 2d 1254. Although that case was decided long before enactment of Title VII, the question of *tests* in the context of *business necessity* was before the Court and Respondent submits that it is truly analogous in principle to this case. In *Whitfield* the employer for many years had separate all-Negro and all-white lines of progression. Only the white lines of progression led to skilled jobs. The Company and union entered into an agreement which allowed Negroes to bid for positions in the white line of progression as they became available. *Negroes bidding for jobs in the white lines of progression had to pass a test showing their ability to perform the job. White incumbents did not have to pass the test.* The Court held that the agreement was not a violation of the union's duty to fairly represent all its members.

Referring to *Whitfield*, Judge Butzner said in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E. D. Va. 1968) at page 518:

> "*Whitfield* does not stand for the proposition that present discrimination can be justified simply because it was caused by conditions in the past.

> Present discrimination was allowed in *Whitfield* only because it was rooted in the Negro employees' lack of ability and training to take skilled jobs on the same basis as white employees. *The fact that white employees received their skill and training in a discriminatory progression line denied to the Negroes did not outweigh the fact that the Negroes were unskilled and untrained. Business necessity, not racial discrimination, dictated the limited transfer privileges under the contract.*" (Emphasis added)

Respondent respectfully submits that the decision below does not conflict with decisions of other circuits. The issues in this case are uniquely narrow and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

## III

## THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER DECISIONS OF THIS COURT.

Petitions try to draw this case into the ambit of civil rights cases heretofore decided by *this* Court. The cases relied on by Petitioners involve the constitutionality of state statutes, not employment practices.

In *Guinn v. United States*, 238 U. S. 347 (1915) the court decided that a state statute was unconstitutional because it deprived citizens of the right to vote secured by the Fifteenth Amendment. Moreover, the petition for certiorari was drawn by the Court below, seeking instructions. *Lane v. Wilson*, 307 U. S. 268 (1938) also held a state statute unconstitutional because it deprived Negroes of the right to vote. *Gaston County,*

*North Carolina v. United States*, 395 U. S. 285 (1969) was a case brought under the Voting Rights Act of 1965; and *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E. D. La. 1967), *aff'd per curian* 389 U. S. 571 (1968) held unconstitutional a state statute which set up a program of tuition grants to pupils attending private schools because it was designed to maintain segregated schools.

Title VII of the Civil Rights Act deals with *employment practices of private employers*. None of the cases cited by Petitioners in this context are even remotely connected with employment practices. In cases involving voting, schooling, or jury service it can be presumed or assumed that a significant number of the group involved have the necessary qualifications. It cannot be assumed *without evidence* that a significant number of Negroes in the group involved at Dan River have the qualifications to perform jobs in the higher skilled classifications. At least two District Courts agree in principle.[2]

Accordingly, Respondent submits that no questions analogous to the ones presented here have been decided by this Court and there can be no direct conflict.

---

[2]*U.S. v. H. K. Porter, supra*; *Dobbins v. Local 212, IBEW, supra* where Judge Hogan said at page 445: "There is no such thing as an 'Instant Electrician' by Court decree or otherwise." (footnote 15).

**CONCLUSION**

For the foregoing reasons, the Petition for Certiorari should be denied.

*Respectfully submitted,*

George W. Ferguson, Jr.
Carl Horn, Jr.
William I. Ward, Jr.

Power Building
422 S. Church Street
Charlotte, North Carolina 28201
*Attorneys for Respondent*

May 5, 1970