No. 1405

In the Supreme Court of the United States

OCTOBER TERM, 1969 70

WILLIE S. GRIGGS ET AL., PETITIONERS

v.

DUKE POWER COMPANY

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18a–62a) is reported at 420 F. 2d 1225. The opinion of the district court (Pet. App. 1a–17a) is reported at 292 F. Supp. 243.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1970. The petition for a writ of certiorari was filed on April 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is unlawful under Title VII of the Civil Rights Act of 1964 for an employer to require the

completion of high school or the passage of certain general intelligence tests, as a condition of eligibility for employment for, or transfer to, jobs formerly reserved only for white employees, when

(1) both the high school standard and the substitute tests operate to disqualify Negroes at a substantially higher rate than whites; *and*

(2) neither possession of a high school education, nor passage of the substitute tests, has been shown to measure the capacity of employees to perform such jobs.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) provides in pertinent part as follows:

Sec. 703(a) It shall be an unlawful employment practice for an employer—

* * * * *

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(h) * * * it shall not be an unlawful employment practice for an employer to * * * give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. * * *

INTRODUCTION AND INTEREST OF THE UNITED STATES

This brief is submitted in response to an order of this Court, entered on May 25, 1970, inviting the Solicitor General to file a brief in this case expressing the views of the United States.

Federal responsibility for enforcing Title VII of the Civil Rights Act of 1964 is assigned by that Title to the Attorney General and the Equal Employment Opportunity Commission. Pursuant to that statutory mandate, and the provisions of Executive Order 11246 prohibiting employment discrimination by government contractors and subcontractors, the United States is engaged in comprehensive efforts to eliminate racially discriminatory employment practices and to remedy the continuing effects of past discrimination. But the goal of equal employment opportunity remains unrealized; unemployment among Negroes and other minority groups continues to be substantially higher than it is among the population at large,[1] and such unemployment and underemployment continues to be a serious national problem.

The decision of the majority of the court of appeals, if permitted to stand, would give judicial sanction to the use of employment screening devices which do not measure abilities to perform specific jobs but have the effect of seriously limiting employment and promotion opportunities for Negroes and other minority groups. This result would seriously impede the

[1] For example, in May 1970, unemployment for non-whites was 8%, while that for whites was 4.6%. See Bureau of Labor Statistics, *Employment and Earnings*, June 1970, Table A–3, Major Unemployment Indicators.

government's efforts to achieve equality of employment opportunities.

STATEMENT

1. Traditionally, and at least until some five years ago, respondent Duke Power Company discriminated on the basis of race in the hiring and assigning of employees at its Dan River Steam Station in Eden, North Carolina. Negroes were employed only in its Labor Department, where the best jobs paid less than the lowest paying jobs in the four "operating" departments, staffed solely by white personnel. While normally promotions were made within each department on a job seniority basis, there was some mobility between the operating departments. No Negro held a job in a department other than Labor, however, until August 1966, some five months after the filing of charges with the Equal Employment Opportunity Commission. At that time, a Negro employee assigned to the Labor Department was promoted into a formerly white job in the Coal Handling Department.

Beginning in 1956, the Company instituted a policy of requiring a high school education as a prerequisite for initial assignment to any department except Labor and for transfer from the Coal Handling Department or from Watchman to any "inside" department (*i.e.*, Operations, Maintenance or Laboratory and Test Departments). When the Company abandoned its policy of restricting Negroes to employment in the Labor Department, the high school requirement was

also applied to transfers from Labor to any other department.

In July 1965, the Company instituted the additional requirement that new employees register satisfactory scores on two commercially prepared aptitude tests [2] to qualify for assignment to any but the Labor Department. Possession of a high school education alone continued to render incumbent employees eligible for transfer to the four desirable departments. In September of that year, a procedure was instituted whereby incumbent employees who lacked a high school education could qualify for transfer by passing the same two aptitude tests. One of the tests purports to measure general intelligence; the other, general mechanical comprehension. Neither of the tests was intended to measure the ability of an employee to perform any particular job. For both initial hiring and for transfers, the cut-off scores chosen were the national median scores of all high school graduates, making the test standards more stringent than the high school requirement, since the tests would screen out approximately half of all high school graduates.

2. This suit was brought by the thirteen Negro employees of the Labor Department on October 20, 1966, alleging that the testing, transfer, and seniority practices violated the rights of incumbent Negro employees under Title VII of the Civil Rights Act of 1964 by conditioning their eligibility to transfer out of the Labor Department on educational or testing requirements which did not have to be met by white employees pre-

[2] The tests used at all times relevant to the action were the Wonderlic test and the Bennett Mechanical test.

viously assigned to jobs in the more desirable departments. They further contended that, even if applied by the Company only to Negroes hired after 1956, the high school requirement and the alternative testing requirements were unlawful; by disqualifying Negroes in substantially higher proportions than they did whites, the requirements tended to restrict Negroes to the low paying jobs in the Labor Department, without any business necessity for doing so, thus unlawfully perpetuating the effects of the Company's past discrimination.

Through expert testimony, the plaintiffs attacked the testing requirements on the ground that the Company had not shown that the tests measured capacity to perform the work of any particular job or class of jobs in the plant, or that they predicted success on any job or category of jobs. The testimony of the experts for plaintiffs also tended to show that the testing requirements disqualified Negroes in disproportionate numbers (App. 140a, 147–148a, 154–155a). The Company's expert conceded that the tests were not designed to measure a person's capacity to perform certain jobs, but testified that they were intended merely as a substitute for a high school education "on the assumption that a high school education provides the training, ability and judgment that a person needed to do the jobs in the plant" (App. 181a).

3. The district court found that the Company had followed a policy of overt racial discrimination prior to the adoption of the Act, and agreed that the inequities of the pre-Act racial discrimination were continued by the Company's limitations on transfer

eligibility and department seniority system, but found that, as of the time of trial, the practice of making initial assignments based on race had ceased. The court ruled that, since the application of Title VII was intended to be prospective only, no relief was authorized as to any of the Negro incumbents.

The court of appeals reversed in part, unanimously rejecting the district court's holding that Title VII does not prohibit allegedly neutral practices which perpetuate the effects of past discrimination. The court ruled that Negroes hired and assigned to the Labor Department at a time when there was no high school requirement for entrance to the higher paying departments could not now be made subject to that requirement, since whites hired contemporaneously into the other departments were never subject to such a requirement. As to those Negroes, the court also ruled that their seniority rights be measured on a plant-wide, rather than on a departmental, basis.

With respect to Negroes hired *after* imposition of the high school requirement, however, a majority of the court of appeals affirmed the holding of the district court, finding that the high school requirement had been applied fairly to whites and Negroes alike. The court found that there was no racial purpose or motivation in the adoption of the education requirements, and that in the absence of such a purpose, their use was permitted by Section 703(h) of the Act. The court expressly rejected petitioners' contention that, since both the high school requirement and the tests operated to disqualify proportionately more Negroes than whites, those requirements were unlawful under Title VII ab-

sent a showing that they were, in fact, valid predictors of job success (that is, that they were "job-related"). Judge Sobeloff dissented from this part of the decision, maintaining, as do petitioners in this Court, that Title VII does not protect the use of employment tests which do not measure the skills or abilities necessary to performance of the jobs which the applicants are seeking.

ARGUMENT

This case presents the issue whether Title VII of the Civil Rights Act of 1964 permits the use of allegedly objective employment criteria which disqualify disproportionately large numbers of Negro and other minority group persons from employment opportunities for which they are actually or potentially qualified. The issue is one of a high importance, because use of employment criteria of the kind utilized by the Company here is widespread in many parts of the country today. Yet those criteria bear no demonstrated relationship to employees' abilities to perform the jobs for which they are used, and they operate to disqualify Negroes in substantially higher proportions than they do whites. In these circumstances, the use of such criteria needlessly perpetuates the effects of past discrimination, and is, in our view, prohibited by Title VII of the Civil Rights Act of 1964. In holding to the contrary, the court of appeals expressly rejected the interpretation of Title VII adopted by the Equal Employment Opportunity Commission, and refused to follow an Eighth Circuit decision proscrib-

ing the use of tests which do not measure relevant abilities. Review by this Court is appropriate to resolve this important issue.

1. In the nearly five years since Title VII of the Civil Rights Act of 1964 became effective, efforts to enforce that Act through litigation, both by the United States and by aggrieved private individuals, have resulted in nearly unanimous judicial acceptance of the proposition that covert as well as overt, and residual as well as active, discrimination is proscribed by Title VII.

The courts have regularly been confronted with records showing prior racial discrimination by employers or unions and current restrictions and practices which, although arguably serving some identifiable business or economic purpose, were not derived from any compelling business necessity and which, while not inherently discriminatory, tended to perpetuate the discriminatory disadvantages at which Negroes had been placed. In each of these cases, the courts of appeals have ruled that the "neutral practices" involved were unlawful. *Local 189, United Papermakers* v. *United States,* 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Local 53 Asbestos Workers* v. *Vogler,* 407 F. 2d 1047 (C.A. 5); *United States* v. *Sheet Metal Workers,* 416 F. 2d 123 (C.A. 8). The district courts have generally reached the same result.[3]

[3] *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.); *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio); *Clark* v. *American Marine Corporation*, 304 F. Supp. 603 (E.D. La.); *Robinson, et al.* v. *P. Lorillard Co.* (M.D. N.C.

In our view, the high school education and test requirements used by the Company in this case are legally indistinguishable from the employment, promotion and referral restrictions found unlawful in the cases cited above. Like the apparently neutral restrictions in those cases, imposition of the high school requirement and use of the test alternatives here demonstrably fall far more heavily on Negroes than they do on whites. Nationally, of all non-white males over the age of 25, only 19.6 percent have attained 12 years of formal education as compared with 34.6 percent of all white males in the same age group.[4] Necessarily, the imposition of a high school education, or the ability to demonstrate the equivalency of such formal educational attainment on a paper and pencil test, as a condition precedent to consideration for employment or employment advancement, will result in a disproportionately higher percentage of Negroes being excluded.

To be sure, if the possession of a twelfth grade education or its intelligence test score equivalent is shown to be a necessity for satisfactory performance on the jobs for which it is required, the fact that such a requirement eliminates a disproportionately higher percentage of Negroes than it does whites, does not make it an unlawful employment practice. Title VII does not prohibit the use of valid criteria to select

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1970), 62 Lab Cas. ¶ 9423; but see, *United States* v. *H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala.), appeal pending, C.A. 5, No. 27,703.

[4] 1960 Census of the Population, Characteristics of the Population, Vol. 1, U.S. Summary, Table 174, p. 1–420.

qualified applicants for particular jobs. On the other hand, if the requirement does not measure the applicant's ability to perform the job in question satisfactorily, then the requirement serves to restrict the employment opportunities of Negroes to the advantage of other applicants without satisfying a demonstrated business need, and is unlawful.

In the case at bar, the respondent acknowledges, and the courts below have found, that the requirement of a high school education or attainment of minimum scores on the tests are not valid predictors of success in performing the jobs involved in this litigation. Unless and until such a showing is made, we think the discriminatory impact of those requirements for promotion and transfer constitutes a classification of employees which would "tend to deprive [Negroes] of employment opportunities" on account of race, in violation of Section 703(a)(2) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2(a)(2)).

2. We turn to the Company's contention, sustained by the court of appeals, that the use of the Wonderlic and Bennett tests as a substitute transfer requirement is specially protected by Section 703(h) of the Act (42 U.S.C. 2000e–2(h)).

Shortly after Title VII of the Civil Rights Act of 1964 became effective, the United States Equal Employment Opportunity Commission interpreted Section 703(h) as protecting only tests which measured the ability to perform the jobs for which they were used, that is, valid and "job-related" tests.[5] Similarly,

[5] Equal Employment Opportunity Commission, *Guidelines on Employment Testing Procedures*, August 24, 1966, re-

the Eighth Circuit has proscribed under Title VII the use of a journeyman's test which does not measure the ability of the applicant to do the work usually required of journeymen. *United States* v. *Sheet Metal Workers, supra,* 416 F. 2d at 136. Conceding that the tests in the case at bar were not job related,[6] the majority below rejected the "job-related" standard and concluded instead that in adopting Section 703(h), Congress specifically intended to permit the use of any professionally developed test, so long as there was no discriminatory purpose or motive. We think that reading of Section 703(h) is in error, and that, notwithstanding the majority's disclaimer,[7] it invites the use by employers of a wide and varied array of tests and other qualifying devices which operate unjustly to limit employment opportunities for Negroes as a class.

While the legislative history surrounding the adoption of the Tower amendment is subject to more than one interpretation,[8] the overall congressional intent manifested by the enactment of Title VII compels the view that, where tests tend to perpetuate the effects of past discrimination by disqualifying disproportionately large numbers of Negroes, only those tests which are job related are protected by Section

printed in CCH Employment Practices Guide, ¶ 16,904. The Secretary of Labor has applied that standard with respect to the employment practices of Federal contractors and subcontractors under Executive Order 11246, see, 33 Fed. Reg. 14392.

[6] The district court so found, and the majority below did not question that finding. 420 F. 2d at 1234.

[7] 420 F. 2d 1235, n. 8.

[8] *Compare* the legislative analysis of the majority below, 420 F. 2d at 1234–1235, with that of Judge Sobeloff dissenting, 420 F. 2d at 1241–1243.

703(h). For while it is understandable that Congress should have reserved to employers the right to test the abilities of prospective employees to perform the jobs for which they are being considered, it is contrary to the language of section 703(h) itself,[9] and inconsistent with the overriding objective of Title VII, to conclude, as the majority below did, that Congress intended to protect the use of such tests in circumstances where they are not shown to measure any such abilities.

The majority of the court of appeals also appears to have relied upon the proposition that the tests in question were the equivalent of the requirement of a high school education, and could be justified on that ground. But the passing scores used were the median scores of high school graduates, so that approximately one-half of all high school graduates would be barred from jobs by the use of those tests.

More significantly, however, the Company's reliance on Section 703(h) begs the question. For it is clear that the requirement of a high school education has a highly discriminatory impact. And the lack of any business necessity is shown by the fact that white employees have performed satisfactorily and have been promoted to high ranking jobs in the favored "inside" departments without such an education.

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[9] The protection of 703(h) is limited to "any professionally developed *ability* test" which is not "intended *or used*" to discriminate (emphasis added). The concept of an "ability test" suggests a test which measures relevant abilities. And the coupling of the word "used" with that of "intended" demonstrates that Congress was concerned with discriminatory impact as well as discriminatory motive and purpose.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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