IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 124

WILLIE S. GRIGGS, et al.,
Petitioners,
v.
DUKE POWER COMPANY, a Corporation,
Respondent.

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

BRIEF FOR RESPONDENT

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INDEX

TABLE OF AUTHORITIES

Cases:

Other Authorities:

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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. (A.)

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 9, 1970. The Petition for Writ of Certiorari was filed in this Court on April 9, 1970, and certiorari was granted on June 29, 1970. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The certified evidence of record 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 manual 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. (A. pp. 93a, 94a, 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. (A. 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 Mechan-

ical AA) with scores equal to the norms of the average high school graduate. (A. 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 Petitioners, who were employed prior to September 1, 1965. (A. 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. (A. pp. 90a, 91a, 21b)

To be initially employed in the higher skilled classifications today, *it is necessary to have a high school education and pass the tests involved here* with the score of the average high school graduate.

The District Court found that the Company had a legitimate business purpose in adopting the high school education requirement; that the tests used by the Company were "professionally developed ability tests" within the meaning of Title VII of the Act; that the Company adopted the educational/test requirement without any intention or design to discriminate against the Petitioners because of race or color; that Title VII was prospective, not retroactive; and the requirement had been equally applicable to all employees similarly situated at least since the effective date of the Act, July 2, 1965; and that Petitioners had failed to carry the burden of proof that the Company intentionally discriminated against them on the basis of race or color. Accordingly, the District Court dismissed the complaint.

The Court of Appeals held that the six Negro Petitioners hired before adoption of the educational/test requirement

were entitled to injunctive relief and remanded to the District Court for fashioning of an appropriate remedial decree waiving the requirement as to them and application of plant-wide rather than departmental seniority for promotion of those employees as vacancies in the higher skilled classifications occurred. The situation adverted to on page 7 of Petitioners' Brief involving Clarence M. Jackson, a black employee without a high school education hired prior to adoption of the requirement, is thereby rectified. As to this aspect of the decision below, review was not sought. The Court held that discrimination had been removed with respect to black employees with a high school education and as to them the case was moot. As to the four black employees without a high school education, the Court held they were not entitled to injunctive relief; that the high school education requirement had a legitimate business purpose; that the Company adopted the requirement with no intention of discriminating against Negro employees hired after adoption of the requirement; and that the tests used as a substitute for the high school requirement were professionally developed ability tests within the meaning of Section 703(h) and not designed, intended, or used to discriminate against Petitioners on the basis of race or color. As to this aspect of the majority decision, Petitioners sought and were granted certiorari.

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 overall mechanical comprehension of a high school graduate to enter and progress in the higher skilled lines of progression and said tests measure such qualifications.

SUMMARY OF ARGUMENT

I

THE HIGH SCHOOL EDUCATION REQUIREMENT WAS ADOPTED IN GOOD FAITH TO SERVE A LEGITIMATE BUSINESS PURPOSE AND MINIMUM TEST SCORES BASED ON HIGH SCHOOL NORMS CONSTITUTE A REASONABLY SATISFACTORY SUBSTITUTE FOR DETERMINING IF EMPLOYEES HAVE THE GENERAL INTELLIGENCE AND OVERALL MECHANICAL COMPREHENSION LEVEL OF THE AVERAGE HIGH SCHOOL GRADUATE.

A. *Legitimate Business Purpose.*

The Company found that employees without a high school education were experiencing difficulty in progressing through the higher skilled lines of progression because they were unable to grasp situations, to read and to reason.

Stated differently, it became apparent that a general level of intelligence was necessary to satisfactorily progress in those classifications. Faced with the ever increasing complexity of operations, the Company concluded that it would upgrade the quality of its work force by adopting a policy that all those employed in the higher skilled classifications would, thereafter, be required to have a high school education. This would reasonably assure the Company that future employees would have a good chance to progress in those classifications. The Company's expert witness, Doctor Moffie, whom the Court found to be an expert in the field of industrial and Personnel Testing, agreed with the Company's conclusion in this respect. Petitioners failed to adduce any evidence to the contrary and the trial court and the majority below found that the Company had legitimate business reasons for adopting the high school education requirement.

B. *Tests Are Reasonably Satisfactory Substitute For Determining Whether Employees Have General Intelligence And Overall Mechanical Comprehension Level of Average High School Graduate.*

The passing score on the Wonderlic Test (20), which measures general intelligence, is nearly 2 points lower than the score of the average high school graduate. The passing score on the Bennett Mechanical Test is 39, which is the exact 50th percentile score of high school graduates who have taken the test. Both tests are widely used. Based on this, the Company's expert witness, Doctor Moffie, was of the opinion that the tests were a reasonably satisfactory substitute for determining whether an employee had the general intelligence and overall mechanical comprehension level of the average high school graduate. The Court below so concluded.

II

THE TESTS USED BY THE COMPANY ARE PROFESSIONALLY DEVELOPED ABILITY TESTS WITHIN THE MEANING OF SECTION 703(h) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND ARE NOT ADMINISTERED, SCORED, DESIGNED, INTENDED, OR USED TO DISCRIMINATE BECAUSE OF RACE OR COLOR.

A. *The Evidence.*

The Company's expert witness testified that in his opinion the tests were professionally developed while Petitioners' expert testified on direct examination that he did not know how the term "Professionally Developed Tests" was used in the statute. Nothing but the arguments of counsel which constitute incompetent evidence would support Petitioners' contention that the tests were discriminatory simply because the Company did not study, evaluate and validate the tests for job performance needs. The subject of psychological testing is a difficult one. For one thing it is relatively new. For another, it is something about which a great deal of disagreement exists. The bald fact that the Company did not study, evaluate and validate the tests in and of itself does not show discriminatory treatment of Blacks.

The tests provided the Blacks involved here with a short-cut to promotional consideration and were designed to include not exclude them. Section 703(h) requires that the Petitioners make an evidentiary showing that the Company intended or used the tests to discriminate. There is no such evidence in this record. Instead, the competent, material and substantial evidence in view of the entire

record as a whole impels the conclusion that the tests were "designed" to determine a person's general level of intelligence and overall mechanical comprehension; and that the tests were "used" as a substitute for a high school education to determine if an individual had the overall general intelligence and mechanical comprehension level of the average high school graduate with no "intent" to discriminate on the basis of race, creed, color or national origin. The trial court found and the majority below agreed that the tests were "professionally developed ability tests" within the meaning of Section 703(h) of the statute and not "designed, intended, or used" to discriminate against the Petitioners.

B. *Legislative History.*

The language of Section 703(h) was forged in the crucible of Senate debate. Senator Tower's test amendment [Section 703(h)] was enacted in response to a decision of a hearing examiner for the Illinois Fair Employment Practices Commission which ordered that an employer discontinue the use of a general intelligence test because Negroes were "culturally deprived" and, therefore, placed at a "competitive disadvantage." Supporters of the Tower amendment insisted that Title VII contain explicit provisions which would insure that general intelligence tests could be used. Nowhere in the Act is there a requirement that an employer use only those tests which measure ability or skill required by a specific job or group of jobs. The legislative history unerringly points to the congressional intention that an employer would be permitted to use general intelligence and ability tests. The trial court so found and, notwithstanding the interpretation of the Equal Employment Opportunity Com-

mission (EEOC), the majority below agreed with the District Court that tests do not have to be job-related in order to be valid under Section 703(h). This decision is fortified by the fact that an amendment to Title VII requiring a "direct relation" between tests and a "particular position" was proposed in May of 1968 and defeated.

III

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

A. *High School Education Requirement.*

The legislative history of the Act clearly shows that an employer's *right* to determine job qualifications was not affected by Title VII. Even though the 1960 Census showed that more Whites than Blacks in North Carolina had a high school education, it must be presumed that Congress *knew* this when it enacted legislation to become effective five years later. If Congress had intended to preclude use of educational requirements, it would have done so in plain language. The General Counsel of the EEOC has issued an opinion stating that discrimination based on educational qualifications does not violate Title VII. One Federal District Court has held that a high school education requirement is not inherently discriminatory under the Act if adopted in good faith and ". . . for what reasonably appear *to him* to be valid reasons. . . ."

B. *Tests.*

Petitioners cite and rely on five District Court cases in support of their contention that tests be job-related in order to be valid. In those cases, Section 703(h) was not before the Court for interpretation.

In one District Court case, however, Section 703(h) was before the Court for interpretation and the trial judge stated that the legislative history of the Act demonstrated a congressional intent that general intelligence and ability tests were permitted under Title VII. The Court said that, even if job-related tests were required by Section 703(h), there was great difficulty in precisely defining job-relatedness and held that *if job-relatedness was required by law* the tests in use met the requirement. The District Court also noted that in office, sales, *technical* or professional jobs a demonstration of general intelligence would be most desirable.

The Circuit Court cases 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 effect of past discrimination. The Court below expressly approved the decisions of the Fifth and Eighth Circuits.

The Petitioners also cite and rely on cases decided by this Court in support of their contentions. All the cases cited involve voting, schooling or jury service, and this Court in those cases determined that it could be presumed or assumed that a significant number of the group involved had 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. None of the cases cited by Petitioners in this context are even remotely connected with employment practices under Title VII.

Petitioners also rely on utterances of the Office of Federal Contracts Compliance (OFCC). This is a Title VII case and must be decided within the framework thereof. Interpretations of the EEOC and the OFCC are not binding on the courts, especially where they are clearly contrary to compelling legislative history.

Petitioners and the Solicitor General are unable to cite a single case or convincing legislative history which supports their contention that Section 703(h) *requires* that tests used by private employers be specifically job-related. In addition, they are unable to point to any legally established facts from which the Court could draw an inference that the tests are designed, used, or intended to discriminate against the four Black employees involved in this case.

C. *Findings of Courts Below.*

Rule 52(a) of *Federal Rules of Civil Procedure* provide that the trial court's findings should not be set aside unless "clearly erroneous." This Court has held that where the findings of the trial court and the court of appeals are concurrent and supported by the evidence of record they should be accepted by the Supreme Court without reexamination. This is especially so when questions before the Court are concerned with determining the intent of an employer. This is a case wherein Petitioners want this Court to set aside the trial court's findings as being "clear-

ly erroneous," but they are unable to point out any evidentiary basis to warrant it.

The Petitioners argue that the Company's educational/test requirements have ". . . a vast discriminatory potential." (Pet. Brief p. 18) This contention is simply not valid since the lower court carefully guarded against a broad approval of all educational and testing requirements and restricted its decision *solely to the facts of this case.*

ARGUMENT

I

THE HIGH SCHOOL EDUCATION REQUIREMENT WAS ADOPTED IN GOOD FAITH TO SERVE A LEGITIMATE BUSINESS PURPOSE AND MINIMUM TEST SCORES BASED ON HIGH SCHOOL NORMS CONSTITUTE A REASONABLY SATISFACTORY SUBSTITUTE FOR DETERMINING WHETHER EMPLOYEES HAVE THE GENERAL INTELLIGENCE AND OVERALL MECHANICAL COMPREHENSION LEVEL OF THE AVERAGE HIGH SCHOOL GRADUATE.

A. *Legitimate Business Purpose.*

The legitimate business purpose served by the Company's requirement that incumbent employees have a high school education to be eligible for promotion into the higher skilled classifications is well supported by this record. The Company found from experience that some individuals without a high school education who entered into the higher skilled lines of progression could not progress all the way through. (A. pp. 86a, 87a) Their failure

to progress and being blocked off in the lower level of the higher skilled classifications, interfered with the Company's promotion plans.[1] (A. pp. 93a, 94a)

Mr. Thies testified:

"Your Honor, we've had some experiences. The nature of our business is becoming more complex all the time. We have got seven or eight computers on order. We are moving rapidly into the nuclear power area with our Leconia (Oconee) Station. We use our existing Power Stations as a nucleus pool from which to draw man power with the *skills required to move into new Stations—new locations, and they form the nucleus of the experienced people, into moving into these more complex areas. Many years ago, we found that we had people who, due to their inability to grasp situations, to read, to reason, to have a general intelligence level high enough to be able to progress in jobs—that we were—that we were getting some road blocks in our classifications in our Power Stations, and this was why we embraced the High School education as a requirement.* There is nothing magic about it, and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up, but we felt that this was a *reasonable requirement that would have a good chance of success in getting us the type of people that are required to operate the more complex things that we are faced with all the time, and this was the reason behind this.* Now, the reason that we offered the test, was an effort on my part that backfired. I was trying to help people who didn't have this, to some way get around going

[1]cf. *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, 2161 (N. D. Ala. 1968).

through all this schooling—to take English and Spanish and all this other stuff, which really didn't bother me too much. If they had the intelligence to do the job, that's all I was interested in, but I didn't want to break my policy because then, I would have to take people in that *I knew didn't have the skills to do this, and they would have a hard time with it. This was the background behind it.*" (A. pp. 93a, 94a)

The Company has had poor experience with employees without a high school education in higher skilled jobs and some of the incumbents have refused to accept promotions when vacancies occurred because they felt they were unable to do the job. (A. pp. 96a, 102a-104a)

Mr. Thies further testified that employees in coal handling must be able to read manuals relating to complex machinery, operate such machinery, and *understand* orders relating thereto; and that in order to progress through the department, it was absolutely necessary to have these skills. (A. p. 105a)

The Company's expert witness, Doctor Moffie, testified that he spent a full day at Dan River actually observing personnel in the performance of jobs; that he had studied the written summary of job duties; and had spent several days with Company representatives discussing job content, including jobs at Dan River. (A. pp. 169a, 175a-180a) After doing so, he concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skilled classifications. (A. p. 181a) In so testifying, he expressed the importance of controls, logging, and "the tremendous amount of money that is involved in terms of the generators that they've

got and the necessity in maintaining these." (A. pp. 184a-186a)

The summary of job-duties in the higher skilled classifications (A. pp. 37b-71b) without more would support the Company's high school requirement as a matter of good business judgment. In addition, the Respondent's determination that it is necessary and desirable that an employee have the general intelligence level of a normal high school graduate in order to perform jobs in the higher skilled classifications is fully justified because *the minimum occupational scores in the utility industry for those jobs into which Petitioners could have been promoted generally coincide with the scores of the 50th percentile of high school graduates for both tests.* (A. pp. 168a-171a, 138b)

The evidence referred to above is uncontroverted in this record, and demonstrates that the high school requirement has a genuine business purpose and the adoption of it was in the context of good faith. As noted by the Court below, this conclusion is not only supported but actually compelled by the evidence of record. (A. pp. 216a-218a)

Petitioners failed to adduce any evidence showing that the high school requirement did not serve a legitimate business purpose. Their only witness, Doctor Barrett, was unable to testify that the educaional/test requirement adopted by Duke did not serve a legitimate business purpose.

Petitioners contend that white employees without a high school education entered and progressed in higher classifications and Negroes similarly situated could do

likewise. The fact that some few white incumbents without a high school education had the ability to enter and progress in the higher skilled classifications does not necessarily mean that each of the four Negroes involved here has the same ability, and could likewise progress.[2]

The District Court found that ". . . jobs within each department require skills which differ in degree and kind from the skills required in the performance of jobs in other departments"; that the high school requirement was ". . . intended to eventually upgrade the quality of its entire work force"; and, therefore, the Company had ". . . legitimate reasons for its educational and intelligence standards and for applying those standards to its departmental structure." (A. pp. 33a, 34a, 36a) These findings should not be set aside unless "clearly erroneous."[3]

B. *Tests Are Reasonably Satisfactory Substitute For Determining Whether Employees Have General Intelligence And Overall Mechanical Comprehension Level Of Average High School Graduate.*

In July, 1965, there were some employees who could not progress into the higher skilled classifications because of the high school requirement. Acting within the spirit and intent of the Act, the Company relaxed its promotion and transfer policy by providing that incumbent employees could meet the high school education requirement by tak-

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[2]*Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 69 LRRM 2312, at pp. 2337, 2338 (S. D. Ohio 1968), especially where Judge Hogan said: "There is no such thing as an 'Instant Electrician'—by Court decree or otherwise." (footnote 15) See also *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, 2148, 2149 (N. D. Ala. 1968).

[3]See pp. 53-55, *infra*.

ing and passing the Wonderlic and Bennett Mechanical tests. (A. p. 137b)

The minimum acceptable scores utilized by the defendant are Wonderlic-20 and Bennett Mechanical-39. The score of the average high school graduate, i. e., the 50th percentile is 21.9 for the Wonderlic or nearly 2 points higher than the Company's minimum acceptable score. (A. p. 168a) For the mechanical test, the score of the average high school graduate is 39. (A. p. 171a) *The minimum occupational scores in the utility industry for jobs into which Petitioners could have been promoted were* ". . . very much in line. . ." with the Company's minimum scores on both tests. (A. pp. 168a-171a, 138b) In addition, when these tests were adopted by Duke, they were being used by other utility companies. (A. pp. 176a, 177a) Petitioners quote from the Wonderlic Manual which states that norms must be established for each situation in order to render it valuable. (Pet. Brief, p. 37) The foregoing shows that this is precisely what the Company did.

Based on this, the Company's expert was of the opinion that a reasonably satisfactory substitute for a high school education was to accept minimum test scores based on high school norms. (A. pp. 171a-173a) As a matter of fact, the Company "leaned over backwards" in accepting minimum test scores as a substitute for the high school requirement.[4] (A. p. 186a)

The Company determined that the abilities, training and skills of the average high school graduate were necessary and desirable in order for employees to perform and

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[4]cf. *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, at page 2153, where the employer's psychologist testified: "In your zeal to be fair and nondiscriminating you have perhaps lowered your test standards too much."

progress in the higher skilled classifications. Surely, the *fairest way* to determine whether or not a non-high school graduate has these attributes is to test him and see if he can make the same or nearly the same scores as 50 percent of the high school graduates do on the same tests.

Respondent submits that the Court below correctly concluded that "(T)he minimum acceptable scores used by the Company are approxixmately those achieved by the average high school graduate, which fact indicates that the tests are accepted (acceptable) as a substitute for a high school education." (A. p. 219a)

II

THE TESTS USED BY THE COMPANY ARE PROFESSIONALLY DEVELOPED ABILITY TESTS WITHIN THE MEANING OF SECTION 703(h) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND ARE NOT ADMINISTERED, SCORED, DESIGNED, INTENDED, OR USED TO DISCRIMINATE BECAUSE OF RACE OR COLOR.

A. *The Evidence.*

The employer's expert, Dr. D. J. Moffie, testified that he was familiar with the Wonderlic, a widely used general intelligence test, and the Bennett Mechanical, a test which measures mechanical comprehension; that in his opinion, the tests are "professionally developed" because they meet the criteria of reliability and validity; that for the purpose of administration, these are the lowest level tests and can be given by nonpsychologists; that at Dan River, the tests are given by Mr. Richard Lemons, a graduate in mechanical engineering from North Carolina State University who has had special training in the administration

of these tests; and that in preparing for this case he examined the testing facilities at Dan River and found that they met all necessary requirements of ventilation, lighting, seating arrangements, etc. (A. pp. 166a-168a)

The Petitioners' expert, Doctor Richard Barrett, testified on *direct* examination that he did not know how the phrase "Professionally Developed Test" was used in the statute. (A. pp. 139a-140a) On cross-examination, Doctor Barrett admitted that he had only read a summary of job duties and was otherwise unfamiliar with the jobs performed at Dan River, and that, except for what he learned from reading depositions, he knew nothing about how the tests used by Duke were administered, scored, or acted upon. (A. pp. 153a, 154a) He also testified on cross-examination: "Since each employer faces a situation that is in some respects unique, *he and he alone* is in a position to develop . . . tests and . . . procedures which will help him hire from the available labor force, the best employees, *regardless of race.*" (A. p. 153a)

There is no evidence of record showing any difference or distinction as between incumbent Negroes and whites in the tests used or in the administration and scoring of such tests. In fact, the evidence shows that both white and Negro incumbents have taken the tests and failed.[5] (A. p. 91a)

On pages 19 and 20 of their brief, Petitioners point out three questions on the Wonderlic test and argue that the ability to answer such questions is related to "formal schooling" and "cultural background" which Negroes have been denied. There are also 47 other questions of which

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[5]cf. *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, 2157.

a testee must answer less than half, i. e., twenty.[6] Petitioners mount a broadside attack on the Company's educational/test requirement, contending it is discriminatory because there is no evidence that the Company studied, evaluated or validated the requirement for job performance needs.[7] They are unable to cite legislative history or case law in support of their contention. Instead, they cite statistics, sociological treatises, studies, textbooks, magazine articles, and proceedings and hearings before Federal agencies, none of which were introduced into evidence for exposure to the light of cross-examination. Indeed, Respondent submits that such evidence would have been incompetent, inadmissible, and prejudicial unless the authors of same were presented for cross-examination by the Company. Based on their argument alone, they ask this Court to strike down the use of tests which the uncontradicted evidence of record shows to be professionally developed and not administered, scored, designed, intended or used to discriminate because of race or color within

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[6]Does it take "formal schooling" or "cultural background" to know that November is the eleventh month of the year (Question No. 1) or that chew is related to teeth as smell is to nose (Question No. 7) or that if 3 lemons sell at 15 cents, one and one-half dozen would cost 90 cents (Question No 12)? (A. p. 102b)

[7]cf. *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, at p. 2156, where judge Allgood said: "The courts must decide the cases which come before them on the evidence and not on abstract propositions. For a court to find racial discrimination in the use of aptitude tests which have not been validated, there should be at least some evidence that the use of an aptitude test which has not been validated has resulted in discrimination and not merely the abstract proposition that test validation is desirable." At page 2157, he further stated: "On the record in this case, the sum and substance of the matter is that the plaintiff would have the court enter a finding of racial discrimination on the basis, without more, of the hypothetical proposition that the use of aptitude tests without validation necessarily equals discrimination, and this the court cannot properly do."

the meaning of Section 703(h) of the Act. As noted by Judge Allgood in *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, at page 2148: " . . . the arguments of counsel, no matter how compelling, are not acceptable substitutes for evidence."

The entire testimony of Doctor Barrett indicates the inherent difficulties and the nebulous nature of testing in general.[8] With respect to validation, for example, Doctor Barrett testified that it should be undertaken "where possible"; that it wasn't "essential"; and that tests could be validated in ways other than job relatedness. (A. pp. 133a, 149a-151a) One Federal District Court recently noted the difficulties associated with testing.[9]

Petitioners claim that an "intent" to screen out Blacks can be inferred from the *timing* of the Company's decision to install tests. This inference is totally unwarranted.[10] The tests were used as a substitute for or in lieu of the high school education requirement *which was adopted before the four black workers involved here were even em-*

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[8]See also Petitioners' Brief pp. 33-36.

[9]On the general subject of testing, Judge Smith in *Colbert v. H-K Corporation*, — F. Supp. —, 2 FEP Cases 951 (N. D. Ga. 1970) at page 955 said: "The profession of psychological testing is relatively new and no certain standard for validating tests has been proscribed. With considerable 'jargon' the psychologists themselves disagree. Without the immense task and considerable expense of tailor-made tests, the average small employer is relegated to the use of standardized tests."

[10]cf. *U. S. v. H. K. Porter Co., supra,* at page 2160, where Judge Allgood stated: "It is a reasonable assumption that there is more than one employer in this country which began using aptitude tests at the time that jobs were integrated or at the time that Title VII was enacted. However, that could hardly be said to constitute discrimination in and of itself, particularly in light of the amendment which was adopted in the Senate to authorize the non-discriminatory use of professionally developed ability tests."

ployed by Duke. How can they possibly complain that the Company *intended* to screen out Blacks by adopting a test requirement which provided them an alternative not previously available as an additional route to promotional consideration?

In this connection, Petitioners further argue that the burden of the test requirement fell *primarily* on Negroes in the Labor Department and the Company knew it. If Petitioners had sufficiently plumbed the record, it would have been easy enough to ascertain that at the time the Company agreed to accept minimum test scores as a substitute for the high school requirement there were eleven (11) Negroes and nine (9) white employees without a high school education affected by the change in policy.[11] (A. pp. 126b, 127b, 104b-109b) The number of Negroes affected was *not* disproportionately greater than the number of whites so affected. The practice was made equally applicable to all employees similarly situated. There is no showing in this record that the intent of accepting minimum test scores in lieu of the high school education requirement was to discriminate against Negroes because of race or color. In fact, the *Petitioners' own evidence* shows that the testing policy "was designed to include rather than exclude" *all* employees without a high school education who were employed prior to September, 1965. (A. pp. 130a, 21b) The *Petitioners' own evidence* further shows that there are ". . . three (3) standardized non-

[11]The Court below ordered relief for six Negro employees hired prior to adoption of the high school requirement. Willie Boyd completed a course accepted and recognized by the Company as a high school equivalent. On December 8, 1969, he was promoted to a supervisory position as foreman of the Labor Department. See A. pp. 210a, 226a. This leaves only four (4) Blacks without a high school education affected by the educational/test requirement.

discriminatory alternatives . . ."—(1) high school education, (2) minimum test scores in lieu of high school education and (3) Tuition Refund Program which can be used to obtain a high school education or its equivalent —by which any employee, Negro or white, can qualify for consideration for promotion into the higher skilled classifications. (A. pp. 20b-21b) Even though the District Court found that at sometime prior to the effective date of the Act Negroes were relegated to the Labor Department, it also found that since the effective date of the Act the high school-test requirement was fairly and equally administered and that the requirement was made applicable ". . . to a departmentalized work force without any *intention or design* to discriminate against Negro employees." (A. pp. 34a)

Petitioners argue that the language of Sections 703(a)-(2) and 703 (c)(2) of Title VII which define unlawful employment practices as those which "tend to deprive" or "adversely affect" employees because of race, without reference to the employer's reasons for such practices, means that Congress declared unlawful all employment practices which *result* in discrimination; and that if such a result occurs the employer's intent is immaterial. In his minority views on page 26 of Senate Report No. 1111 (May 8, 1968), Senator Fannin had this to say with respect to Section 703(h):

> "Despite this language and the clear legislative intent appearing in the debates, the Commission decided in a recent case that the phrase 'intention to discriminate' did not really mean what it appeared to say. What was important was the result."

The Company does not agree that the employer's intent under Sections 703(a)(2) and 703(c)(2) is immaterial,

but even if it is assumed *arguendo* that it is correct with respect to those sections, it is obviously erroneous with respect to Section 703(h). Section 703(h) provides that "*(N)otwithstanding any other provision of this title*" employers may use *any* professionally developed ability test so long as it is not "designed, intended, or used" to discriminate on the basis of race, color, religion, sex or national origin. The fact that Sections 703(a)(2) and 703(c)(2) *may* be susceptible of an interpretation that Congress intended to emphasize *result rather than motive* is not determinative as to 703(h) because the plain language of 703(h) removes it from concomitant consideration with any other section of the title and makes it an island unto itself. A general intelligence or ability test might well result in discrimination against employees who are "culturally deprived" which fact is clearly recognized by the legislative history approving the use of such tests. (See pp. 27-40, *infra*) The crucial inquiry is whether the employer "designed, intended, or used" such tests to discriminate on the basis of race, color, etc. To hold an employer liable for giving and acting upon the results of such tests, the claimaint must at the very least adduce some evidence which shows, either directly or inferentially, that the employer "designed, intended, or used" the tests to discriminate on the basis of race, color, etc. This record contains no such evidence.

Petitioners further contend that tests are "used" to discriminate against the four Blacks involved in this case who do not have a high school education. These employees and the dates hired are as follows: David Hatchett (6-24-57); Eddie Broadnax (2-13-61); Willie Griggs (3-11-63); and C. E. Purcell (6-3-63). (A. pp. 109b, 126b, 127b) Surely, they cannot expect to be transferred

to a department into which the Company would not have initially hired them and the education/test requirement is not discriminatory as to them. (See A. pp. 26a, 27a) They were hired as laborers because they could not qualify for jobs in other departments. Every Negro in the Labor Department is therefore not relegated to said department because of race or color. The tests were adopted to give these incumbent employees a short-cut to promotional consideration—an additional chance (others being the Tuition Refund Program and the GED equivalent) that had not been previously available to them.

In ordering relief for the six Negroes without a high school education who were hired before adoption of the educational requirement, the Court below held that in fashioning a remedial decree the District Court should order that seniority rights of these six employees should be considered on a plant-wide rather than a departmental basis. (A. p. 225a) As previously indicated, there are nine white employees without a high school education who were also affected by the educational requirement. All those employees have longer plant-wide seniority than the four Blacks involved here. (A. pp. 104b-109b, 126b, 127b) Therefore, a waiver of the educational/test requirement and application of plant-wide rather than departmental seniority with respect to the four Blacks would be of no force and effect. Under the relief contemplated by the Court below, each of the white employees affected by the educational/test requirement in relation to the four Blacks would have first choice when vacancies occurred in the "inside jobs" because all the whites have longer plant-wide seniority. The Company submits that it is *factually impossible* to "use" the tests to discriminate against the four Blacks involved here.

Based on the evidence of record, the trial court found that the tests were "professionally developed" to determine whether a person has a general intelligence and overall mechanical comprehension level; that the Company used the tests to determine whether an employee has the general intelligence and overall mechanical comprehension of the average high school graduate regardless of race, color, religion, sex or national origin; and that the tests were therefore in compliance with the Act. (A. p. 38a) There is absolutely no evidence in this record which would support a finding that the Company designed, intended, or used the test to discriminate on the basis of race, color, religion, national origin or sex. Instead, the competent, material and substantial evidence in view of the entire record as a whole impels the conclusion that the tests were "designed" to determine a person's general level of intelligence and overall mechanical comprehension; and that the tests were "used" as a substitute for a high school education to determine if an individual had the overall general intelligence and mechanical comprehension level of the average high school graduate with no "intent" to discriminate on the basis of race, creed, color, national origin or sex.

B. *Legislative History.*

Petitioners contend that the educational/test requirement violates Title VII because it unequally excludes Blacks from employment opportunities and therefore Title VII requires that it be job-related. The legislative history of the Act undermines the very foundation of their argument.

On February 26, 1964, a hearing examiner for the Illinois Fair Emploment Practices Commission ordered an

employer, Motorola, Inc., to discontinue the use of a preemployment general intelligence test.[12] The test had been given to a Negro applicant for a job as analyzer and phaser and the examiner found that use of such a test was a denial of equal employment opportunity because Negroes were "culturally deprived" and therefore placed at a "competitive disadvantage." The test involved in the *Motorola* case measured verbal comprehension and simple reasoning ability as does the Wonderlic.[13]

On April 8, 1964, Senators Clark and Case, floor managers for the bill, introduced into the Congressional Record an *interpretative* memorandum (hereafter Clark-Case Memorandum), prepared by the Justice Department, which provides, in part, as follows:

> "This exception must not be confused with the right which all employers would have to hire and fire on the basis of *general qualifications for the job, such as skill or intelligence.*"
>
> * * *
>
> "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.*"
>
> * * *
>
> *"There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of*

[12]Decision reprinted at 110 Cong. Rec. 5662-5664, March 24, 1964.

[13]110 Cong. Rec. 13494, 13495, June 11, 1964.

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."[14]

Early in the Senate debate on the House-approved bill (H. R. 7152), Senator Dirksen submitted a memorandum questioning numerous provisions in the bill. On April 8, 1964, Senator Clark had printed into the Congressional Record his response to those questions which stated, in part:

"Objection: The language of the statute is vague and unclear. It may interfere with the employers' *right* to select on the basis of qualifications.

"Answer: Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act, for even a longer period. To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex or national origin); any other criteria or qualification is untouched by this bill."

* * *

"Objection: The bill would make it unlawful for an employer to use *qualification tests based upon verbal skills and other factors which may relate to the environmental conditioning of the applicant. In other words, all*

[14]110 Cong. Rec. 7213, April 8, 1964. (Emphasis added)

applicants must be treated as if they came from low-income, deprived communities in order to equate environmental inequalities of the culturally deprived group.

"Answer: *The employer may set his qualifications as high as he likes, and may hire, assign, and promote on the basis of test performance.*"[15]

The House version of the Civil Rights Act of 1964 did not contain any reference whatsoever to tests. The test amendment, Section 703(h), was added during extended debate on the Senate floor.

On May 19, 1964, Senator Tower sponsored his original amendment (No. 605) which provided:

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—"

* * *

"(2) in the case of any individual who is an employee of such employer, *such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer within such business or enterprise,* and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin."[16]

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[15]110 Cong. Rec. 7218, April 8, 1964 (Emphasis added).

[16]110 Cong. Rec. 11251, May 19, 1964 (Emphasis added).

Prior to introducing his original amendment, Senator Tower said:

"This amendment arises out of my concern about the ramifications of the Motorola-Illinois FEPC case. I have discussed that case in great detail for the Senate and will not repeat myself here.

"Let me only say that it is indicated by the Motorola case that an Equal Employment Opportunities Commission operating under title VII of the civil rights bill might attempt to regulate the use of tests by employers.

"You will recall that in the Motorola case an FEPC examiner found the test used to select employees to be discriminatory to culturally disadvantaged groups."[17]

When Senator Tower called up his original amendment (No. 605) on June 11, 1964, he stated:

"It is an effort to protect the system whereby employers give general ability and intelligence tests to determine the trainability of prospective employees. The amendment arises from my concern about what happened in the Motorola FEPC case. . . ."

* * *

"Let me say, only, in view of the findings in the Motorola case, that the Equal Employment Opportunity Commission, which would be set up by the act, operating in pursuance of title VII, might attempt to regulate the use of tests by employers."

* * *

"If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of

[17]110 Cong. Rec. 11251, May 19, 1964.

various kinds of employees by both private business and Government *to determine the professional competence or ability or trainability or suitability of a person to do a job.*"[18]

In the Senate debate that ensued, Senator Case also complained that the amendment as proposed would allow an employer to give discriminatory tests so long as they were professionally designed.[19] Apparently, those Senators in favor of Title VII thought that the Clark-Case Memorandum and the Clark response to the Dirksen questionnaire should have laid to rest all concern about the *Motorola* case and insisted that the amendment was redundant and unnecessary because such tests were already "legal."[20]

During the debate, Senator Lausche asked Senator Humphrey:

> "Will the Senator from Minnesota read the language in title VII that would make these tests valid and not subject to the charge of being discriminatory against applicants for jobs and applicants for promotions?"[21]

Receiving no direct answer to his question, Senator Lausche once again asked:

> "If title VII contains no provision declaring under what circumstances such tests shall be valid, where in the bill are there provisions to make these tests valid, if the Senator can answer that question?"[22]

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[18]110 Cong. Rec. 13492, June 11, 1964 (Emphasis added).

[19]110 Cong. Rec. 13504, June 11, 1964.

[20]*id.*

[21]*id.*

[22]*id.*

Still unable to refer to a specific provision of the Act which allowed an employer to give general intelligence tests, Senator Humphrey responded that such tests were legal under the Act simply because they had not been declared invalid. Thereafter, the colloquy[23] between Senators Miller and Humphrey indicated that supporters of the bill thought that the use of general intelligence tests was permitted by the *present* provision of Section 703(h) which provides that it is not an unlawful employment practice to apply different standards of employment pursuant to ". . . a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production. . . . "

Still not satisfied and intent on pressing his point, Senator Lausche queried once again:

> "Where in the bill are there provisions to insure that tests *such as the one in the Motorola case are allowed?*"[24]

Neither Senator Miller nor Senator Humphrey could point to language in the bill which expressly allowed the use of tests ". . . such as the one in the Motorola case."

There is little doubt that those who opposed as well as those who supported the bill shared a common, genuine concern over the decision of the hearing examiner in the *Motorola* case, and did not want to enact legislation which might sire such a result. In fact, Senator Case said that the Senate leadership's vote against Senator Tower's *first* amendment did not mean ". . . approval of the Motorola case or that the bill embodies anything like the action

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[23]*id.*

[24]*id.* (Emphasis added)

taken by the examiner in that case. It is not necessary to have this amendment adopted in order to permit that result. *Nothing in the bill authorizes such action as in the Motorola case.*"[25]

The foregoing debate took place on Thursday, June 11, 1964. So far as Respondent can determine, nothing concerning the Tower amendment appears in the Congressional Record of June 12, 1964. On Saturday, June 13, 1964, Senator Tower called up his amendment No. 952 which was a modified version of his original amendment. Upon calling the modified amendment, the following colloquy took place between Senator Tower and Senator Humphrey, the principal floor leader in support of the Act:

> "Mr. TOWER. * * * It is my understanding that the present language has been cleared through the Attorney General, the leadership, and the proponents of the bill.
>
> "I therefore urge its adoption. I ask for the yeas and nays."
>
> * * *
>
> "Mr. HUMPHREY. Mr. President, I think it should be noted that the Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title.
>
> "I do not think there is any need for a roll call. We can expedite it. *The Senator has won his point.*

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[25] *id.* (Emphasis added)

"I concur in the amendment and ask for its adoption." 110 Congressional Record 13724, June 13, 1964. (Emphasis added)

The "point" won by Senator Tower and acknowledged by Senator Humphrey was the insertion in Title VII of language which clearly evinced a Congressional intent that general ability and intelligence tests were lawful under the Act. Prior to the Tower amendment, Title VII did not contain a single reference to tests. Supporters of the Tower amendment, despite assurances of the proponents of Title VII, insisted that the bill contain explicit provisions whch would *insure* that an employer could lawfully use tests such as the one in the *Motorola* case. Apparently, Senators on both sides of the aisle saw Senator Tower's "point" and agreed with him.

In May, 1968, an amendment requiring that tests be job-related was proposed and defeated.[26] The principal purpose of the bill was to give the EEOC authority to issue judicially enforceable cease and desist orders. It was referred to the Senate Committee on Labor and Public Welfare where it underwent several changes, one of which was the foregoing amendment. In explaining the changes made by the Committee, it was stated that the bill would amend present Section 703(h) governing the "permissible" use of ability tests so that an employer could use such tests "only" if "directly related" to the "position concerned."[27] In stating his minority views, Senator Fannin noted that the EEOC's interpretation of the test pro-

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

[27]*id.*, at pages 10, 53.

vision was contrary to the legislative history.[28] In concluding his views, Senator Fannin agreed that discrimination in employment could not be tolerated and stated in effect that the bill would "abolish ability testing." The enactment of the legislation, he said, would "erode the orderly foundations essential to business enterprise and weaken the economic structure of this country."[29] The rejection of this amendment *requiring* that tests be job-related clearly demonstrates that Congress never intended to impose such a requirement in the first place.[30]

In support of Petitioners, the Solicitor General as *amicus curiae* also takes the position that the legislative history of 703(h) prohibits the use of all tests unless they are job-related. In support of this contention, he cites the Clark-Case Memorandum and statements of Senators Ervin,

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[28]*id.*, at page 25: "In furtherance of this policy and guided by the above interpretation, the Commission has taken the position that employment or ability tests are unlawful unless 'culturally validated.' This—despite section 703(h) of the Civil Rights Act which specifically provides that an employer may act upon the result of *any* 'professionally developed ability test' and despite the clear legislative history." (Emphasis added)

[29]*id.* at page 41.

[30]cf. *Western Union Telegraph Company v. Lenroot*, 323 U. S. 490, 508, 509, 89 L. Ed. 414, where Mr. Justice Jackson, speaking for this Court, said: "But had it determined to reach this employment, we do not think it would have done so by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process. After all, this law was passed as the rule by which employers and workmen must order their daily lives. To translate this Act by a process of interpretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation. Declining that, we cannot sustain the Government's bill of complaint."

Smathers, Holland, Hill, Tower, Talmadge, Fulbright and Ellender. (Brief of United States, pp. 23-25) All those Senators were opposed to Title VII in principle and wanted it stricken from the Civil Rights Act of 1964 in its entirety. Those statements were made in that context between March 14, 1964 and April 29, 1964—long before Senator Tower even introduced his first amendment on May 19, 1964, and enactment of the modified version on June 13, 1964.

Preceding the quoted remark on page 25 of the United States' brief, Senator Fulbright had said:

> "I cannot imagine anything more idiotic than to say that an aptitude test is not a legitimate way for a Company to determine those who are fitted for employment in that Company."[31]

The colloquy between Senators Tower and Talmadge are taken out of context. The major thrust of their discussion was the threat posed by the bill which was, they believed, the unleashing of unbridled authority in a Federal Commission to meddle in and eventually control the relationship of *private* employers and their employees. This was a major concern of all those Senators opposed to Title VII. At any rate, a careful reading of that memorandum and statements of those Senators reveal that they were directed not to the proposition of requiring the use of job-related tests, but rather to *the right of an employer to determine job qualifications for himself*. To be sure Section 703(h) permits employers to insist on job-related tests, but nowhere in the legislative history does there appear a requirement that employers must use only those tests which are job-related. If Congress had so intended, it could have

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[31]110 Cong. Rec. 9600, April 29, 1964.

easily inserted language making such intent clear and unmistakable.

Senator Tower's first amendment cannot be read as requiring that tests be job-related as suggested by the Solicitor General and Petitioners. (Brief of United States p. 29; Pet. Brief p. 50) *The amendment relates to the business or enterprise, not to specific jobs.* Moreover, the stated purpose of the amendment was ". . . to protect the system whereby employers give *general ability and intelligence tests to determine the trainability of employees.*"[32] As stated by Senator Tower, it was "not an effort to weaken the bill" or to allow the use of discriminatory tests. Nothing in the amendment prevents an employer from using job-related tests. It is one thing to say that 703(h) *permits* the use of job-related tests but quite a different thing to say Congress *required* the use of such tests.

Respondent submits that this summary of the legislative history is distorted and the inference drawn therefrom is therefore totally unwarranted.

The Solicitor General also argues that Senator Tower's substitute amendment was adopted after persuading the bill's sponsors that the redraft would require job-related tests. (Brief of United States p. 29) Senator Tower's first amendment was called up on June 11, 1964, and the second amendment was enacted on June 13, 1964. The Congressional Record of June 12, 1964, does not show that Senator Tower made any representation whatsoever to supporters of the bill that his modified amendment *required* that tests be job-related. Indeed, use of the words *"any* professionally developed ability

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[32]110 Cong. Rec. 13492, June 11, 1964 (Emphasis added).

tests" indicates that Congress intended that the employer should have the broadest possible range of selection in determining what tests he should use so long as it was not "designed, intended or used" to discriminate.

Prior to the vote on the original amendment, Senator Tower stated: "My amendment would not legalize discriminatory tests. It would not make discriminatory tests permissive."[33] To clear this up, Senator Tower's second amendment, which was ". . . *cleared through the Attorney General, the leadership and proponents of the bill*"[34] allowed the use of general intelligence and ability tests so long as the tests were not "designed, intended or used" to discriminate on any of the prohibited bases.

When the modified amendment was called up, Senator Tower said:

> "This is similar to an amendment which I offered a day or two ago, and which was, I believe, agreed upon in principle. But the language was not drawn as carefully as it should have been."[35]

Under the original amendment, a test could be "designed" to test for general intelligence and ability, but then "used" with the "intent" to discriminate. This is what Senator Tower was referring to when he said the language was not drawn as carefully as it should have been. The "principle" that had been agreed upon was that general intelligence and ability tests were permissible under the Act and the amendment was needed to clarify the intent of Congress in that regard.

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[33]110 Cong. Rec. 13504, June 11, 1964.

[34]110 Cong. Rec. 13724, June 13, 1964 (Emphasis added).

[35]*id.*

In view of the foregoing, Respondent respectfully submits that Congress clearly intended that employers could lawfully use general intelligence tests such as those involved in this case provided they are not intended, designed or used to discriminate. Supporters of the bill claimed that general intelligence and ability tests were allowed under the Act *even without Senator Tower's amendment*. Moreover, there is simply no evidence in this record which would support a finding that the tests involved here were intended, designed, or used to discriminate. *A fortiori,* the uncontradicted evidence of record is that they were not. (See pp. 19-27 *supra;* A. pp. 216a-219a)

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:

> "At no place in the Act or in its legislative history does there appear a requirement that employers may utilize only those tests which measure the ability and skill required by a specific job or group of jobs. In fact, the legislative history would seem to indicate clearly that Congress was actually trying to guard against such a result." (A. pp. 222a, 223a)

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, May 8, 1968. In view of such clearly compelling legislative history, it would have been patent error for the Court to conclude otherwise.

III

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

Petitioners contend that where testing and educational requirements are not specifically related to a particular job or group of jobs the employer cannot have legitimate business reasons for adopting such requirements. 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 specifically related to the particular job or class of jobs to be performed. Once a private employer makes such a determination and the evidence supports that 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.

A. *High School Education Requirement.*

The court below concluded that six Negro employees who were hired prior to adoption of the high school education requirement were discriminated against because their white *counterparts* without a high school education had entered and progressed in the higher skilled classifications. Four Negroes without a high school education were hired

as laborers *after* that requirement was adopted by the Company. (A. pp. 104b-109b, 126b, 127b). *The Four Negroes hired after adoption of the high school requirement have no white counterparts* because the Company has not hired a single white person without a high school education for employment in the higher skilled classifications since the requirement was adopted. (A. pp. 104b-109b, 126b, 127b). Had it done so, the four Negroes involved here might logically contend that they were victims of discrimination and as to them the Court below correctly concluded that:

> "These employees were hired subject to the educational requirement; each accepted a position in the Labor Department with his eyes wide open. Under this valid educational requirement these four plaintiffs could have been hired only in the Labor Department and could not have been promoted or advanced into any other department, irrespective of race, since they could not meet the requirement. Consequently, it could not be said that they have been discriminated against. Furthermore, since the testing requirement is being applied to white and Negro employees alike as an approximate equivalent to a high school education for advancement purposes, neither is it racially discriminatory." (A. pp. 223a, 224a)

The legislative history shows that discrimination based on educational qualifications does not violate Title VII of the Act.

On March 26, 1964, Senator Case, one of the Act's leading sponsors, had printed into the Congressional Record a memorandum (intended to clear up any "misconceptions") which unequivocally stated that Title VII was in no way intended to interfere with the employer's "right"

to determine his own job qualifications.[36] In commenting on that memorandum on April 8, 1964, Senator Case said that the bill "expressly protects the employer's *right* to insist that any applicant meet the applicable job qualifications. That is expressly provided for in Title VII."[37] The Clark-Case Memorandum made it crystal clear that an employer has the unqualified *right* to determine job qualifications and to hire and promote employees based on those qualifications. (See pp. 29, 30, *supra*) In addition, Senator Humphrey said during the Senate debate on June 9, 1964: "The Employer will outline the qualifications to be met for the job. *The employer, not the Government, will establish the standards.*"[38]

Petitioners' brief is completely devoid of any legislative history which would support their position that the Company's high school education requirement constitutes a violation of Title VII. In support of their position, they cite the fact that the 1960 census reveals that only 12 percent of North Carolina Negro males completed high school as compared to 34 percent of North Carolina white males. (Pet. Brief page 20) It must be presumed that Congress knew of the 1960 census when it passed this legislation which was to become effective on July 2, 1965, more than five years later.[39] Had Congress intended to preclude the use of educational requirements by employers, it could have easily done so in clear and unmistakable language.

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[36]110 Cong. Rec. 6416, March 26, 1964.

[37]110 Cong. Rec. 7246, April 8, 1964. (Emphasis added)

[38]110 Cong. Rec. 13088, June 9, 1964 (Emphasis added).

[39]2 U. S. C. §2(a) directs the President to transmit to Congress decennially a statement showing the whole number of persons in each state so that Congress can perform its constitutional duty to reapportion the House of Representatives.

Respondent submits that Congress intended to preserve management's prerogative to determine job qualifications; and, therefore, made it clear that an employer can set his qualifications, educational or otherwise, as high as he likes without violating Title VII of the Act so long as they are applied without discrimination. The Petitioners should address themselves to Congress, not this Court, for the result they seek.

On October 2, 1965, the General Counsel of the Equal Employment Opportunity Commission (EEOC) issued an opinion stating that discrimination based on educational qualifications does not violate Title VII of the Act (A. 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, (Pet. Brief, App. p. 3) as holding that unless educational requirements are related to job performance they violate Title VII of the Act. 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.

Petitioners cite *Parham v. Southwestern Bell Telephone Co.*, —— F. Supp. ——, 2 FEP Cases 40 (E. D. Ark. 1969) for the proposition that since tests were not operating unfairly as a barrier to Black employment the Court saw no necessity of inquiring into the job-relatedness of the tests. (Pet. Brief, p. 24, footnote 18) Petitioners failed to point out that the District Court in that case also held that the employer's requirement of a high school education was not inherently discriminatory as *tending* to disqualify Negroes. In this regard, Chief Judge Henley said at page 46:

"It is urged that defendant's requirement that all of its employees must have completed a high school education is irrelevant to the needs of defendant's business and bears more heavily upon Negroes than upon whites. . . .

"The Court cannot accept those arguments. In the last analysis those arguments amount to a contention that an employment criterion is inherently discriminatory and unlawful if in it's operation it bears more heavily on an underprivileged ethnic or racial group than it bears on members of race or group which is dominant in the society, even though it may disqualify some members of the latter group. It is said that more Negroes drop out of school for socioeconomic reasons than do white students. . . .

"That argument may be interesting sociologically, but this Court is not willing to read into the Act any requirement that an employer tailor his hiring requirements to meet the needs of deprived minorities. If he adopts his criteria in good faith and for what reasonably appear to him to be valid reasons, and if the criteria are not themselves based on race, the Court does not think that they are prohibited by the Act merely because many Negroes on account of cultural and economic deprivations may not be able to meet them."

Insofar as Respondent can determine, *Parham* is the only judicial determination that a high school education requirement does not violate Title VII.

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

B. *Tests.*

Petitioners cite the following 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: *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 355, 2 FEP Cases 371 (D. C. Mass. 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 69 LRRM 2313 (S. D. Ohio 1968); *U. S. v. H. K. Porter Co., supra*; *Penn v. Stumpf*, 308 F. Supp. 1238, 2 FEP Cases 391 (N. D. Calif. 1970); *Colbert v. H-K Corporation*, ——F. Supp. ——, 2 FEP Cases 951 (N. D. Ga. 1970) appeal noticed August 3, 1970; *Gregory v. Litton Systems, Inc.*, —— F. Supp. ——, 2 FEP Cases 821; and *Hobson v. Hansen*, 296 F. Supp. 401 (1967). In each instance their claim is unfounded.

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, which is not true in this case. (A. p. 219a)

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 and the quote from that case in Petitioners' Brief at page 24 is appropriately termed "dictum."

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 Petitioners' contention that Section 703(h) of Title VII requires that tests used by *private* employers must be related to specific jobs. In addition, *Penn* was before the Court on Plaintiffs motion to dismiss and *Arrington* came to the Court on Plaintiff's motion for preliminary injunction. Neither case has been decided on its merits.

In *Gregory* the policy under which the plaintiff was denied employment was that of excluding applicants who had been arrested a number of times even though there were no convictions. The Court held that such policy was discriminatory under Title VII because there was no *showing* that the policy had a legitimate business purpose. There the Court *found* no business reason for the policy while in the case at bar the trial court found that Duke had legitimate business reasons for the educational/test requirement.

In *Hobson v. Hansen, supra,* the Court found as a fact that standard aptitude tests accurately measured the ability of white middle class children but that such tests were less precise in measuring the ability of Negro children who were disadvantaged because of impoverished circumstances. This was a school segregation case in which the issues raised and legal conclusions reached were bottomed on constitutional principles. Even if the trial court made such a finding in this case, it could and should declare that the tests in use here are lawful under the Act because the legislative history clearly shows that Congress intended that general intelligence and ability tests were permitted under Title VII even though because of differences in background and education some groups are able to perform better on the tests than members of other groups. (See pp. 27-40, *supra*)

In *Colbert v. H-K Corporation, supra,* Section 703(h) was before the Court for interpretation. The employer was using a general intelligence test which the plaintiff contended violated Section 703(h) because it was not job-related. The trial court noted that while the typing test which was given plaintiff was job-related under any theory, the use of intelligence and aptitude tests was far more complicated. The trial judge also stated that in any contest between the wording of the statute and the EEOC guidelines the Court would "opt(s)" for the construction placed on Section 703(h) by the Fourth Circuit in the case at bar. The Court noted that *Arrington* held that general intelligence tests must be job-related to specific skills required and then stated at 2 FEP Cases p. 954:

> *"If such principle is accepted in its ultimate so as to provide that any tests (other than mechanical ones) on which Negroes perform less well than whites because of a previous disadvantaged education may not be used as hiring or promotion criteria, then all educational, intelli-*

gence, personality, or general aptitude tests might be invalidated. From the legislative history, this was not the intent of the Act.

"Even if the premise of job-related tests is accepted, the difficulty lies in a precise definition of job-relationship. It is one thing to say that such general tests may not bear a reasonable reationship to the position of a driver or collector as in Arrington or woodyard worker as in Local 189, or essentially manual jobs as in United States v. H. K. Porter Company, 296 F. Supp. 40, 1 FEP Cases 515, 70 LRRM 2131 (N. D. Ala. 1968). It is conceivable that it may be demonstrated not to bear a reasonable relationship to the position of policeman when evidence is presented in the case of Penn v. Stumpf, 308 F. Supp. 128, 2 FEP Cases 391 (N. D. Calif. 1970) (On Motion to Dismiss). It is quite another to say that they bear no reasonable relationship to office, sales, technical or professional jobs. To the contrary, some such general aptitudes would seem to be most desirable in many of these positions, especially where, as here, the job calls for a variety of talents. At the least, high scores in such tests would indicate that the applicant would do well in this type job." (Emphasis added)

In *Colbert,* the District Court held that the general intelligence tests in question were professionally developed within the meaning of the statute and ". . . *if required by law,* are reasonably related to performance in the jobs sought to be filled by plaintiff."

The Circuit Court cases[40] cited by Petitioners in this connection hold only that where a *seniority system*, which

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[40]*United States v. Local 189*, 416 F. 2d 980 (5th Cir. 1969), *cert. denied* 397 U. S. 919 (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).

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 (A. p. 212a) 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. (A. p. 225a) None of the Circuit Court cases cited by Petitioners involve tests or educational requirements.

In *U. S. v. Local 189*, 416 F. 2d 980 (5th Cir. 1969) *cert den.*, 397 U. S. 919 (1970), the evidence *showed* that the employer's job seniority system did not provide the only safe or efficient system for governing promotions and the Court therefore held that "(T)he record supports the district court's holding that job seniority is not essential to the safe, and efficient operation of Crown's Mill." Petitioners argue that *Local 189* "plainly" overrules *Porter* (Pet. brief, p. 26, footnote 23). Their argument is totally erroneous because Judge Wisdom, speaking for the Court at page 993 said:

> "In other words, the record in that case, as the district court viewed it, showed that safety and efficiency, the component factors of business necessity, would not allow relaxation of the job seniority system. We see no necessary conflict between *Porter's* holding on this point and our holding in the present case."

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

In *Guinn v. United States,* 238 U. S. 347, 59 L. Ed. 1340 (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, 83 L. Ed. 1281 (1939), 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 curiam* 389 U. S. 471 (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 (decided by this Court) 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 class involved at Dan River have the qualifications to perform jobs in the higher skilled classifications. At least two District Courts agree in principle.[41]

Petitioners cite and rely on interpretations and utterances of the Office of Federal Contracts Compliance (OFCC). This is a Title VII action and must be tried within the framework thereof. An OFCC interpretation of the validity of tests and educational requirements under

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[41]*U. S. v. H. K. Porter, supra,* at 70 LRRM 2131, 2148; and *Dobbins v. Local 212, IBEW, supra,* at 69 LRRM 2313, 2337, 2338.

the President's Executive Order is not binding on this Court.[42] This is especially true in view of Senator Humphrey's comment that Title VII is of "much less stringent language and much less in coverage than what was provided by the executive order."[43]

Petitioners argue that the Court should defer to the expertise of the EEOC and adopt that agency's interpretation that tests must be job-related in order to be valid. In support thereof, they cite several cases decided by this Court. (Pet. Brief p. 29, footnote 27) As noted by the Court below (A. p. 220a), none of those cases hold that the EEOC interpretation is binding on the Courts.

Petitioners and the Solicitor General are unable to cite a single case or convincing legislative history which supports their contention that Section 703(h) *requires* that tests used by private employers be job-related. In addition, they are unable to point to any legally established facts from which the Court could draw an inference that the tests are designed, used, or intended to discriminate against the four Blacks involved in this case.

C. *Findings of Courts Below.*

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. (A. p. 36a) The Circuit Court agreed. (A. pp. 216a-218a) 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

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[42]*U. S. v. H. K. Porter Co., supra,* at 2139, 2140.

[43]110 Cong. Rec. 13088, June 9, 1964.

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 (1949).

Findings of fact supported by substantial evidence and affirmed by a Circuit Court of Appeals should be accepted without reexamination of the evidence.

This Court stated the principle in *Alabama Power Co. v. Ickes*, 302 U. S. 464, 82 L. Ed. 374 (1938), where Mr. Justice Sutherland stated at page 477 (377):

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

The Court repeated this in *Allen v. Trust Company of Georgia*, 326 U. S. 630, 90 L. Ed. 367 (1946), at page 636 (370), where it said:

> "Those findings, being concurrent findings of the two lower courts, will be accepted here without re-examination of the evidence."

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 primarly 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.* (A. p. 34a, 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's 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 (1950), Mr. Justice Douglas 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. The trial court's findings of fact and approval thereof by the court below are well supported, indeed compelled, by the competent, material, and substantial evidence of record.

CONCLUSION

If the Company had merely gone along requiring a high school education, it is improbable that this action would have been instituted. Although the Tuition Refund Program was in effect and available to Petitioners for the purpose of acquiring a high school diploma, Respondent went one step further and agreed to accept minimum test scores as a substitute or in lieu of a high school education. Thereupon, Petitioners seized upon Section 703(h) which provides that it is not an unlawful employment practice to give and act upon the results of any "professionally developed ability test" and brought this action claiming tests being used by the Company failed to meet the criteria of that Section. The Company took this action to allow Negroes and whites without a high school diploma to lift themselves up by their own bootstraps. It backfired. As a result, the Company finds itself embroiled in an expensive and time-consuming suit which has now reached the highest court in this nation.

Respondent has done its best to comply with the provisions of Title VII. The Petitioners choose to ignore the legitimate purpose of the high school requirement which the evidence of record shows to be a good faith, prudent business judgment not motivated by bad faith or

discrimination in any form. They seek instead to turn back the clock and thereby gain preferential treatment in promotions and interdepartmental transfers without regard to the qualifications the Company has determined necessary to perform the higher skilled jobs. The test requirement is a fair and reasonable substitute for the high school education requirement and is the minimum assurance with which the Company can safely and efficiently operate its Dan River plant for the production of electric energy.

The decision of the majority below is amply supported by the record, the legislative history of the Act and the applicable decisional law. With respect to the four black employees involved here, the Petitioners have failed to shoulder the burden of proving that the Company is intentionally engaged in unlawful employment practices proscribed by the Act and the Respondent, Duke Power Company, respectfully submits that the decision of the Court below should, therefore, be affirmed.

Respectfully submitted,

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