IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~214~~ 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

REPLY BRIEF FOR PETITIONERS

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Argument

The respondents in the lower courts in this case succeeded in reducing Title VII to dealing only with situations where there is a showing of racial animus and they continue to pursue that notion in their briefs here. This approach has been rejected by the vast majority of District Courts and Courts of Appeals, which have made it clear that the focus must be on the impact and effect of practices rather than merely the motivation behind those practices. Where an apparently neutral practice has a serious discriminatory impact and effect, it has repeatedly been held to violate Title VII unless a continuation of the practice is necessitated by the employer's job performance needs. These cases involved seniority, nepotism, and use of arrest rec-

ords, as well as tests, and they make it clear that to knowingly and consciously persist in a practice having discriminatory impact and not necessitated by job performance needs is to engage in discrimination within the meaning of Title VII. (See the discussion at pp. 25-28 of brief for Petitioner.)

Two important new decisions, released after the filing of our main brief, reaffirm and expand this body of authority supporting petitioners. First, in *Parham* v. *Southwestern Bell Telephone Co.*, 3 CCH Emp. Prac. Dec. ¶ 8021 (8th Cir. Oct. 28, 1970), the Court of Appeals reversed a District Court decision strongly relied upon in Brief for Respondent (p. 44-45). The District Court had supported the employer's use of a high school diploma requirement; but the Court of Appeals pointed out that the record contained insufficient data to rule on this point. 3 CCH Emp. Prac. Dec. at p. 6051. The Court of Appeals went on to hold that the recruitment system of the employer which appeared racially neutral was unlawful because of its statistical impact and effect. 3 CCH Emp. Prac. Dec. at p. 6050-51. The second new decision, *Hicks* v. *Crown Zellerbach Corp.*, 3 CCH Emp. Prac. Dec. ¶ 8037 (E.D. La. Nov. 6, 1970), is even more on point. The *Crown Zellerbach* case involved a use of the same Wonderlic and Bennett tests used by defendant Duke Power Co. here. The court plainly held that such tests could not be used unless justified by business necessity established after full study and evaluation. The court explained:

> "Without such study, no employer can have any confidence in the reasonableness or validity of his tests; and he therefore cannot in good faith assert that business necessity demands that these tests of unknown value be used. *Title VII does not permit an employer to engage in unsubstantiated speculation at the expense of Negro workers.*

> Since it is clear that Crown Zellerbach has engaged in no significant study to support its testing program, the program is unlawful." 3 CCH Emp. Prac. Dec. at p. 6108

Precisely the same analysis should be controlling here. In the present case, the discriminatory impact of the test/diploma requirement is clear and incontrovertible. The only justification for this requirement advanced by respondents is their wishful thinking, wholly unsubstantiated and, if anything, contradicted by the record. The decision below can be affirmed only if Title VII is to be narrowly limited to precluding only racially motivated practices—which as Judge Sobeloff, dissenting below, warns, would reduce the law to "mellifluous but hollow rhetoric."

The Brief for Respondent attempts to develop three arguments in support of its position: (I) that the test/diploma requirement is based upon "legitimate business purpose," (II) that the company's tests are privileged under §703(h) of Title VII, and (III) that legal precedents do not support petitioner's position. As already explained in petitioner's main brief, each of these arguments is unfounded. However, we will briefly reply here to each of these arguments in the order set out by respondents.

I. *The record does not substantiate, and, if anything, contradicts respondent's claim that the test/diploma requirement is necessitated by its business needs.*

First, contrary to respondent's claim, their expert witness, Dr. Dannie Moffie, did *not* participate in establishing either the diploma or test requirement and he offered no conclusion that either of these requirements were necessitated by the company's job performance needs. (See Brief for Respondent at pp. 15-16, 18)

As to the high school diploma requirement, Dr. Moffie testified only that "the assumption is" that the requirement is job-related, not that he had verified or even supported the assumption (A. 181a). This is understandable since Dr. Moffie did not participate in establishing the requirement in the mid-1950's (A. 177a) and was never asked to ratify it. He was qualified as an expert only in "Industrial and Personnel Testing" (A. 164a). He was asked on direct examination to testify only to the appropriateness of the tests used by the company (R. 162a-175a). Respondents have tried to read an endorsement of their diploma requirement into Dr. Moffie's testimony, but he clearly did not give such endorsement. See Brief for Petitioner at page 42 n. 51.

As to the test requirement, on which Dr. Moffie did testify specifically, even the respondents are not able to claim that Dr. Moffie endorsed the requirement as being required by job performance needs. Rather, Dr. Moffie testified only that the test was a reasonable substitute for the diploma requirement (A. 180a-182a). He rendered no judgment on the reasonableness of the test as an independent requirement. This was a relatively easy judgment to make since test scores correlate well with academic level, as compared to their poor correlation with industrial job potential. Dr. Moffie could not responsibly comment on the test as an independent requirement in relation to job performance needs because of insufficient study and evaluation. See Brief for Petitioner at pp. 31-37.

Second, although the respondents make much of the fact that "minimum occupational scores in the utility industry" on the Wonderlic test generally coincide with the score required by the company, see Brief for Respondent at p. 18, this claim is fully nonsensical. These so-called "minimum occupational scores" are merely the "number of questions

correctly in 12 minutes reported by one or more companies participating in the study" (A. 138b). Since the Duke Power Co. participated in the study (A. 169a), these minimum scores may only be confirming what Duke itself reported. It is difficult to imagine a more obvious case of attempting to lift oneself by one's own bootstraps.

Thus, the only thing in the record truly offering any support for the company's diploma/test requirement is the testimony of its official, Mr. A. C. Theis.

As to the diploma requirement, Mr. Theis merely testified that the Company had found in the past that certain employees were unable to progress in certain jobs because of the limited reading and reasoning abilities. "This," he said, "was why we embraced the High School education as a requirement" (A. 93a). This fond hope was, and still is, unsupported by any study, evaluation, or substantiation. Mr. Theis did not even determine that the poor employees were non-high school graduates. The record indicates, if anything, that non-high school graduates are able to progress just as well and perform just as well in the jobs at the Duke Power Co. as high school graduates. See data cited in Brief for Petitioner at p. 37 n.47 and Brief for the United States as Amicus Curiae at p. 20 n.22. This data confirms findings made in numerous professional studies that requirements like that of a high school diploma bear no significant relationship to job success. See Brief for Petitioner at p. 37. As to the test requirement, the testimony of Mr. Theis is even weaker. He said only that he adopted these tests "because the white employees that happened to be in Coal Handling at the time, were requesting some way that they could get from Coal Handling into the Plant jobs. . . ." (A. 200a).

There may be other times and other places where the use of a diploma/test requirement can be justified despite its

gross discriminatory impact on black employees. However, it is intolerable that unsubstantiated speculation which is inconsistent with the facts in the record and which is based on a desire to help some white employees, should be accepted as a sufficient basis of justification.

The unreasonableness of permitting these requirements to stand in this case is further compounded by the fact that the primary effect of the requirements here is to deny black employees their only opportunity for good paying jobs. The good paying jobs which petitioners seek in the coal handling department are ones staffed primarily with non-high school graduates. These jobs were traditionally reserved for whites under the Duke Power Company's prior practice of naked racial segregation of jobs. Each of the petitioners has worked for many years for Duke in the traditionally black category of "semi-skilled laborer," performing a wide variety of mechanical and industrial tasks which are analogous to duties in the coal handling department. See Brief for Petitioner at pp. 39-41. The diploma/test requirement is the only thing standing between these blacks and a decent job opportunity. On the other hand, no white employee in the plant is cut off from a good paying job by the diploma/test requirement since all white employees are in departments which lead to well paying jobs. See Brief for Petitioner at pp. 4-7.[1]

[1] Respondents argue that the number of Negroes affected by the test requirement was not disproportionately greater than the number of whites so affected, because the requirement applied to 11 Negroes and 9 whites. Brief for Respondent at p. 23. Respondent neglects to note, however, that all of the whites were in the coal handling department where they were eligible for promotion to jobs paying as much as $3.31 per hour even if they failed to meet the diploma/test requirement, while all of the Negroes were in the labor department where they could expect to earn no more than $1.895 per hour unless they met the diploma/test requirement (A. 72b). (The foreman job in the labor department is reserved for high school graduates (A. 63b). Thus the burden of the re-

II. *The respondents' tests are not given a privileged status by §703(h) of Title VII.*

Our view of the legislative history of the §703(h) is fully developed in our main brief (pp. 46-50), as well as in the brief for the United States as Amicus Curiae (pp. 21-30), the brief of the Attorney General of the State of New York as Amicus Curiae in Support of Reversal (pp. 15-20), and Judge Sobeloff's dissenting opinion below. We believe that this legislative history clearly shows that §703(h) was not intended to offer any protection for tests which are not justified by job performance needs. At the very least, however, the legislative history can be said to be conflicting and uncertain as to the precise nature of the justification required for test use. In such a situation, a subsidiary clause like §703(h) must be harmonized with the overall purpose of the statute and cannot be read to undercut that overall purpose as respondents suggest.

The one thing that is undisputably clear about §703(h) is that it was directed at the problem raised by the Motorola-Illinois FEPC case. This case involved a situation where tests were struck down because of their adverse impact on black applicants without considering whether in fact that adverse impact was related to Motorola's job performance needs. The question raised by that case was very different from that raised by this case where petitioners concede that job performance needs are a reasonable and acceptable justification for test use. Because of ambiguous draftsmanship, §703(h) could be read to apply to the problem

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quirement on the black employees is of a much different magnitude than that imposed on white employees. Moreover, even putting aside this differential burden, the imposition of a requirement which would adversely affect 11 blacks and 9 whites is disproportionately affecting the Negroes in the context of a plant with only 14 black employees and 81 white employees.

presented in this case, but to do so would take the provision out of its legislative context and cause a result which was not really being considered or focused upon by Congress in its consideration of §703(h). We submit that it would be a distortion of §703(h) to apply it to create a privileged status for the tests used in this case.

Subsequent legislative developments bear out petitioner's view of §703(h). The respondents have attempted to buttress their argument by referring to the fact that a May, 1968, amendment to Title VII requiring that tests be job-related was not enacted. Brief for Respondent at p. 35. Respondents' reliance is misplaced. First, the May, 1968 amendment was not defeated, as respondents claim, but rather was not acted upon by Congress. Since the amendment was only a minor part of a larger bill designed to give the Equal Employment Opportunity Commission cease and desist powers, the fact that the bill died without Congressional action can hardly be read to say much about the test amendment. Subsequently, on August 21, 1970 (after the filing of our main brief), the Senate Committee on Labor and Public Welfare reported out a new bill giving cease and desist powers to the Equal Employment Opportunity Commission. See S. Rep. No. 91-1137, 91st Cong., 2d Sess. (1970). The Committee report makes it clear that this new bill is directed at precisely the kind of problem raised in this case.

> "In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially 'human' problem, and that litigation would be necessary only on an occasional

basis in the event of determined recalcitrance. This view has not been borne out by experience.

"Employment discrimination, viewed today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effects of pre-act discriminatory practices through various institutional devices, and *testing and validation requirements.* In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful."

The Committee report goes on to explain that this recognition of the scope of discrimination requires the creation of an expert commission with cease and desist powers. However, and this is the crucial point for us, the Committee did not think it necessary to include any significant amendment in the substantive violation provisions of Title VII in order to enable this commission to accomplish its purposes. *In other words, the Senate Committee believed that discriminatory "systems" and "effects" were already covered by the substantive provisions of the Act.* The bill proposed by this Committee report was passed by the whole Senate in September, 1970. —— Cong. Rec. —— (daily ed. September, 1970).

A similar bill has also been reported out of Committee in the House of Representatives. The House bill specifically requires that tests be "directly related to the determination of bona fide occupational qualifications reasonably necessary

to perform the normal duties of the particular position concerned." H. R. Rep. No. 91-1434, 91st Cong., 2d Sess. 23 (1970). *The House Committee report makes it clear that the present language of Title VII already requires that tests be related to job performance needs, but that this amendment is necessary to legislatively overrule the misinterpretation given the statute by the Court of Appeals in this case below. Id. at* 10-11. At this date, the House bill is pending in the Rules Committee. Because of the vagaries of the legislative process, the eventual outcome of this legislation giving cease and desist powers to the EEOC will have to await further developments. Whatever the outcome, however, the crucial lesson for this case is that the substantive committees of both houses of Congress and the entire Senate are on record as supporting the interpretation of Title VII being advanced by petitioners in this case. If subsequent legislative developments are ever to cast any light on the proper interpretation of a statute, it is clear that this case presents the strongest possible instance of such subsequent legislative development supporting the petitioners' position.

III. *The legal precedents support the petitioner's position.*

First, contrary to respondents' claim, it is clear that the Equal Employment Opportunity Commission opposes the imposition of tests and/or diploma requirements under circumstances such as those presented here. This is made clear in the Amicus brief filed by the Solicitor General on behalf of the EEOC. Moreover, the EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (Aug. 1, 1970) are unmistakeable in this regard. The EEOC guidelines cover both tests and educational requirements. See *id.* at §1609.2. In this regard, the EEOC is fully supported by the Office of Federal Contract Compliance in its

order covering Validation of Tests by Contractors and Subcontractors, 33 Fed. Reg. 14392 (1968).

Furthermore, it is clear that the decisions in numerous analagous cases below affirm the correctness of petitioners' interpretation of Title VII. On the specific question of tests, the decisions in *Hicks* v. *Crown Zellerbach Corp.,* 3 CCH Emp. Prac. Dec. ¶8037 (E.D. La. Nov. 6, 1970) (discussed at p. 2 *supra*) and *Arrington* v. *Massachusetts Bay Transportation Authority,* 306 F. Supp. 355 (D. C. Mass. 1969), are foursquare in requiring substantial study and evaluation to justify use of tests having a discriminatory impact. To the same effect is *Dobbins* v. *Electrical Workers Local 212,* 292 F. Supp. 413 (S. D. Ohio 1968). Respondents attempted to distinguish *Dobbins* on the ground that the purpose of the tests there was to discriminate. However, among the things held unlawful in *Dobbins* was a test which the court acknowledged to be "objectively fair and objectively fairly graded" on the ground that it was unnecessarily difficult. *Id.* at 433-34. That of course is the precise problem here: the test is unnecessarily and unreasonably difficult in relation to many, if not all, of the jobs to which it applies. It is also clear that numerous cases involving analogous practices, rather than tests as such, support petitioners' position. Thus, in striking down the use of arrest records as a hiring criterion, the court in *Gregory* v. *Litton Systems, Inc.,* 63 Lab. Cas. ¶9485 held:

> "In a situation of this kind, good faith in the origination or application of the policy is not a defense. An intent to discriminate is not required to be shown so long as the discrimination shown is not accidental or inadvertent. The intentional use of a policy which in fact discriminates between applicants of different races and can reasonably be seen so to discriminate, is interdicted by the statute, unless the employer can show

> a business necessity for it. In this context, 'business necessity' means that the practice or policy is essential to the safe and efficient operation of the business. *Papermakers Local 189* v. *United States* [416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970)] As previously stated, no such justification or necessity has been shown for the policy involved in this case."

Similarly, in cases involving seniority and nepotism the courts have found that the particular practices involved were adopted innocently by the employer and bore some relationship to the employer's business. However, requirements were struck down under Title VII because the employer's business interests could be adequately protected by excluding unqualified employees without the imposition of an arbitrary requirement which had a great discriminatory impact on black workers. See Local 189, *United Papermakers and Paper Workers* v. *United States,* 416 F. 2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970); *United States* v. *Sheetmetal Workers, Local 36,* 416 F.2d 123 (8th Cir. 1969). This point is more fully described and documented in our main brief at pp. 22-29.

CONCLUSION

Respondent's brief persists in misconceiving the issue raised by this case. The company believes that we seek to "attribute to the respondent a base motive and sinister intent to discriminate against its Negro employees." Brief for Respondent at p. 54. As we have tried to make clear, that is not our purpose. It would serve the interests of no one if Title VII were reduced to a statute requiring claims of malice and sinister intent to be established. Rather, it is petitioners' position that respondents have taken a set of requirements which are neutral on their face and may be

reasonably applied in certain situations, and misapplied those requirements to the disadvantage of its black workers in the Labor Department. This misapplication of a neutral practice, whether maliciously intended or not, has the effect of and does discriminate within the meaning of Title VII. It has *denied* petitioners the opportunity which Title VII extends to every man and woman—the right to be judged on his or her own individual merits rather than under arbitrary and discriminatory requirements. It should be declared unlawful.

Respectfully submitted,

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