Supreme Court, U.S.
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, ~~1969~~ 1970

No. ~~1405~~ 124

WILLIE S. GRIGGS, ET AL.,
PETITIONERS

vs.

DUKE POWER COMPANY, A CORPORATION,
RESPONDENT.

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

PETITION FOR CERTIORARI FILED APRIL 9, 1970
CERTIORARI GRANTED JUNE 29, 1970

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Defendant's Additional Answers to Interrogatories Numbered 8, 13, 14, 17, 20, 21 and 35 filed 20 March 1967 (Also Plaintiffs' Exhibit Number 11).

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PART II

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Complaint

(Filed October 20, 1966)

IN THE

UNITED STATES DISTRICT COURT

FOR THE

MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

CIVIL ACTION
No. C-210-G-66

WILLIE S. GRIGGS; JAMES S. TUCKER; HERMAN E. MARTIN; WILLIAM C. PURCELL; CLARENCE M. JACKSON; ROBERT A. JUMPER; LEWIS H. HAIRSTON, JR.; WILLIE R. BOYD; JUNIOR BLACKSTOCK; JOHN D. HATCHETT; CLARENCE C. PURCELL; EDDIE GALLOWAY; and EDDIE W. BROADNAX,

Plaintiffs,

v.

DUKE POWER COMPANY, a corporation,

Defendant.

I.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1343 (4) and 42 U. S. C. §2000e-5(f). This is a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000e et seq. Jurisdiction of this Court is invoked to secure the protection of and redress the deprivation of rights secured by 42 U. S. C. §§2000e et seq., providing for in-

junctive and other relief against racial discrimination in employment.

II.

Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated who are employed by defendant Duke Power Company at its Draper, North Carolina plant, pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negroes of the class who are and have been limited, classified and discriminated against in ways which deprive and which tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought and the interests of the class are adequately represented by plaintiffs.

III.

This is a proceeding for injunctive relief, restraining defendant from maintaining any policy, practice, custom or usage of: discriminating against plaintiffs and others of their class because of race with respect to compensations, terms, conditions and privileges of employment and limiting, segregating and classifying employees of defendant in ways which deprive plaintiffs and other Negro persons similarly situated of employment opportunities and otherwise adversely affect their status as employees because of race and color.

IV.

Plaintiffs Willie S. Griggs, James S. Tucker, Herman E. Martin, William C. Purcell, Clarence M. Jackson, Robert

A. Jumper, Lewis H. Hairston, Willie R. Boyd, Junior Blackstock, John D. Hatchett, Clarence C. Purcell, Eddie Galloway, and Eddie W. Broadnax are Negro citizens of the United States, residing in Rockingham County, North Carolina. Plaintiffs and the class they represent are presently employed by defendant.

V.

Defendant Duke Power Company is a corporation incorporated and doing business pursuant to the laws of the State of North Carolina. The defendant operates and maintains plants and other facilities located in Draper and other cities of North Carolina. The defendant is an employer within the meaning of 42 U. S. C. §2000e-(b) in that the Company is engaged in an industry affecting commerce and employs more than 100 persons.

VI.

Defendant has pursued and is presently pursuing a policy, practice, custom and usage of discriminating against and limiting the employment and promotional opportunities of plaintiffs and other Negro employees of defendant solely because of race or color.

A. Defendant has followed and is presently following a policy and practice of hiring and limiting its Negro employees to menial and low paying jobs and paying them less wages than white employees performing the same or similar work.

B. All Negro employees are limited primarily to the coal handling department and are classified as semi-skilled or common laborers. As such, they are not allowed or permitted, by Company rules, to bid on job openings in

or to be advanced to other job classifications carrying better conditions, wages, terms and privileges of employment. All other jobs, held only by white employees of defendant, including that of watchmen, are classified above the semi-skilled and common laborer titles and only white employees are eligible for job-progression in these classifications.

C. Defendant refuses its Negro employees the opportunity for overtime on the same basis as such opportunities are provided for white employees.

D. Defendant maintains separate facilities, including shower rooms, locker rooms, drinking fountains and other facilities for its Negro and white employees.

VII.

The defendant has instituted a test requirement which Negro employees must take and pass before they are considered for job vacancies or classified in positions heretofore limited to white employees. Plaintiffs believe and allege that the test is not professionally developed as required under 42 U. S. C. §2000e-2(h) and that the test, the administration and action upon the results are intended to discriminate against Negro employees because of race and color.

VIII.

The defendant's discriminatory policies and practices herein set forth were intended to and have and will have the effect of discriminating against plaintiffs and others of their class with respect to terms, wages, conditions, advantages, and opportunities of employment solely because of their race and color in violation of their rights

to equal employment opportunities secured to them by Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000(e) et seq.

IX.

Neither the State of North Carolina nor the County of Rockingham nor the City of Draper has a law prohibiting the unlawful practices alleged herein. On March 15, 1966, plaintiffs filed a complaint with the Equal Employment Opportunity Commission alleging violation by the defendant of plaintiffs' rights under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000(e) et seq. On or about September 24, 1966, plaintiffs were advised that the Commission found reasonable cause to believe that violation of the Act had occurred and that the Commission had been unable to achieve voluntary compliance by defendant through conciliations as provided by the Act. Plaintiffs were further advised that they were entitled to initiate a civil action in the United States District Court as provided by 42 U. S. C. §2000e-5(f) of the Act.

X.

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for injunctive relief is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injuries from defendant's policies, practices, customs and usage as set forth herein unless and until enjoined by the Court.

Wherefore, plaintiffs respectfully pray the Court advance this cause on the docket, order a speedy hearing at

the earliest practicable date, cause this matter to be in every way expedited and upon such hearing to:

(1) Grant plaintiffs and the class they represent, injunctive relief, enjoining the defendant, Duke Power Company, its agents, successors, employees, attorneys and those acting in concert and participation with them and at their direction, from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiffs and others of their class to equal employment opportunities as secured by Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000e et seq.

(2) Grant plaintiffs and the class they represent injunctive relief enjoining the defendant, its agents, successors, employees, attorneys and those acting in concert and participation with them and at their direction, from maintaining, sanctioning and authorizing a policy or practice of hiring or limiting Negro employees to certain positions and job classifications and maintaining separate lines or job-progressions of advancement or otherwise limiting the rights of Negro employees to be advanced to other job classifications and positions or imposing conditions for such advancement upon Negro employees not required of white employees similarly situated, solely because of race or color.

(3) Grant plaintiffs and the class they represent injunctive relief enjoining the defendant, its agents, employees, successors, attorneys and those acting in concert and participation with them and at their direction from continuing or maintaining any policy, practice, custom or usage of paying Negroes less wages than white employees performing the same or similar work.

(4) Grant plaintiffs and the class they represent injunctive relief enjoining the defendant, its agents, successors, employees, attorneys and those acting in concert and participation with them and at their direction from continuing or maintaining racially segregated employee facilities, including shower rooms, locker rooms, drinking fountains and other facilities.

(5) Allow plaintiffs their cost herein, including reasonable attorneys' fees and such other additional relief as may appear to the Court equitable and just.

Defendant's Answer

(Filed November 14, 1966)

[Caption Omitted]

Answering the allegations of the Complaint, the Defendant says:

1. The allegations of paragraph I are denied.

2. The allegations of paragraph II are denied.

3. Answering the allegations of paragraph III, the Defendant admits that this is a proceeding for injunctive relief. The remainder of the allegations of paragraph III are denied.

4. Answering the allegations of paragraph IV, it is admitted that the named Plaintiffs are citizens of the United States, that they reside in Rockingham County, and that they are employed by Defendant. The other allegations of paragraph IV are denied.

5. The allegations of paragraph V are admitted.

6. The allegations contained in paragraph VI and in each subsection thereof are denied.

7. The allegations of paragraph VII are denied. The Defendant alleges that any tests instituted at its Dan River Station are equally applicable to all employees similarly situated, regardless of race or color.

8. The allegations of paragraph VIII are denied.

9. Answering the allegations of paragraph IX, the Defendant admits that neither Rockingham County, the City

of Draper, nor the State of North Carolina has a law prohibiting the unlawful employment practices herein alleged, but denies that it is engaged in such practices. As to the remainder of the allegations contained in paragraph IX, the Defendant alleges that they are improper because Section 706(a) of Title VII of the Civil Rights Act of 1964 provides that nothing said or done during and as a part of conciliation endeavors by the Equal Employment Opportunity Commission may be used as evidence in a subsequent proceeding.

10. The Defendant denies the allegations of paragraph X.

First Defense

The Complaint fails to state a claim against Defendant upon which relief can be granted.

Second Defense

The employment and promotion policies and practices of the Defendant at its Dan River Steam Station which are in conformity with, and which were adopted in good faith and in reliance upon written interpretations of the office of the General Counsel of the Equal Employment Opportunity Commission, are and have been followed in good faith by the Defendant.

Wherefore, Defendant prays that the relief sought by Plaintiffs be denied; that this action be dismissed; and for such other and furthere relief as the Court may deem just and equitable.

Plaintiffs' Motion for Leave to Amend Complaint

(Filed April 7, 1967)

[Caption Omitted]

Come now the plaintiffs, by their undersigned counsel, and respectfully move the Court for leave to amend their complaint in the above-styled cause, and, as grounds therefor, show the following:

1. This cause was initially filed by plaintiffs on October 20, 1966, seeking injunctive and other relief against further racially discriminatory practices by defendant Duke Power Company, pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000e et seq. Plaintiffs seek relief by this action, for themselves, individually and for members of their class, presently employed or who might subsequently seek employment at defendant's Draper, North Carolina plant.

2. By its answer and subsequent pleadings, defendant has challenged the right of plaintiffs to proceed as a class.

3. To more clearly set forth the members of the class on behalf of whom plaintiffs seek to maintain this action, plaintiffs respectfully pray the Court for leave to amend paragraph II of their complaint as follows:

> Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated who are now employed or who may subsequently seek employment by defendant Duke Power Company at its Draper, North Carolina plant pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting

the rights of other Negroes of the class who are, have been and may be limited, classified and discriminated against in ways which deprive and which tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought and the interests of the class are adequately represented by plaintiffs.

Wherefore, plaintiffs pray the Court that leave be granted for them to amend their complaint as prayed herein.

Order Allowing Amendment to Complaint

(Filed April 12, 1967)

[Caption Omitted]

This cause coming on to be heard before the undersigned District Judge upon motion of plaintiffs for leave to amend their complaint and it appearing to the Court that there is good cause therefor;

It Is, Therefore, Ordered, Adjudged and Decreed that the plaintiffs be and they are hereby allowed to amend paragraph II of their complaint as follows:

> Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated who are now employed or who may subsequently seek employment by defendant Duke Power Company at its Draper, North Carolina plant pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negroes of the class who are, have been and may be limited, classified and discriminated against in ways which deprive and which tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought and the interests of the class are adequately represented by plaintiffs.

It is further Ordered that the defendant shall file such answer or other response as it desires within twenty (20) days after service.

This 6th day of April, 1967.

/s/ Edwin M. Stanley
Judge, United States District Court

Answer to Amended Complaint

(Filed April 14, 1967)

[Caption Omitted]

Upon motion of plaintiffs for leave to amend their complaint, the Court on April 12, 1967, entered an order allowing plaintiffs to amend paragraph II of their complaint as follows:

> "Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated who are now employed or who may subsequently seek employment by defendant Duke Power Company at its Draper, North Carolina plant pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negroes of the class who are, have been and may be limited, classified and discriminated against in ways which deprive and which tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought and the interests of the class are adequately represented by plaintiffs."

Answering the allegations of paragraph II of the complaint as above amended, the defendant says:

"2. The allegations of paragraph II are denied."

Wherefore, the defendant prays that the relief sought by plaintiffs be denied; that this action be dismissed; and for such other and further relief as the Court may deem just and equitable.

Plaintiffs' Motion for Leave to Amend Complaint

(Filed June 13, 1967)

[Caption Omitted]

Come the plaintiffs, by their undersigned counsel, and respectfully move the Court for leave to amend their complaint to correctly set forth their job titles and positions at defendant's Dan River, Draper, North Carolina plant as follows:

Amending paragraph VI(B) to read as follows:

All Negro employees are limited primarily to the janitorial positions and are classified as semi-skilled or common laborers. As such, they are not allowed or permitted, by company rules, to bid on job openings in or to be advanced to other job classifications carrying better conditions, wages, terms and privileges of employment. All other jobs, held only by white employees of defendant, including that of watchmen. with the exception of one Negro employee recently promoted to the coal-handling department are classified above the semi-skilled and common laborer titles and only white employees are eligible for job-progression in these classifications.

Order Allowing Amendment to Complaint

(Filed June 21, 1967)

[Caption Omitted]

This cause coming on to be heard before the undersigned upon motion by plaintiffs for leave to amend their complaint and it appearing to the Court that there is good cause to allow the amendment;

It is, therefore, ordered, adjudged and decreed that the plaintiffs be and they are hereby allowed to amend paragraph VI(B) of their complaint so that the same will read:

> All Negro employees are limited primarily to the janitorial positions and are classified as semi-skilled or common laborers. As such, they are not allowed or permitted, by Company rules, to bid on job openings in or to be advanced to other job classifications carrying better conditions, wages, terms and privileges of employment. All other jobs, held only by white employees of defendant, including that of watchmen, with the exception of one Negro employee recently promoted to the coal-handling department, are classified above the semi-skilled and common laborer titles and only white employees are eligible for job-progression in these classifications.

/s/ Edwin M. Stanley
Chief Judge, United States District Court

Answer to Amended Complaint

(Filed July 6, 1967)

[Caption Omitted]

Upon motion of Plaintiffs for leave to amend their complaint, the Court on June 21, 1967, entered an order allowing the Plaintiffs to amend paragraph VI (B) of their complaint as follows:

> "All Negro employees are limited primarily to the janitorial positions and are classified as semi-skilled or common laborers. As such, they are not allowed or permitted, by Company rules, to bid on job openings in or to be advanced to other job classifications carrying better conditions, wages, terms and privileges of employment. All other jobs, held only by white employees of defendant, including that of watchmen, with the exception of one Negro employee recently promoted to the coal-handling department, are classified above the semi-skilled and common laborer titles and only white employees are eligible for job-progression in these classifications."

Answering the allegations of paragraph VI(B) of the complaint as above amended, the defendant says:

"6. It is admitted that thirteen Negroes employed at the Defendant's Dan River Steam Station are now classified as semi-skilled laborers and that one Negro is employed in the coal-handling section of the Defendant's Dan River Steam Station. As to the remainder of the allegations contained in this paragraph VI(B), they and each of them are denied."

WHEREFORE, the Defendant prays that the relief sought by plaintiffs be denied; that this action be dismissed; and for such other and further relief as the Court may deem just and equitable.

Order Allowing Class Action

(Filed June 19, 1967)

[Caption Omitted]

This matter was scheduled for conference with attorneys on May 26, 1967, to determine whether this action is maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure. After considering briefs and oral arguments of counsel and being fully advised in the premises, the Court was of the opinion that this action was maintainable as a class action and defined the class represented by plaintiffs;

It is therefore, ordered:

(1) That this action is maintainable as a class action only insofar as it seeks injunctive relief from the alleged discriminatory practices existing at any time since the effective date of Title VII of the Civil Rights Act of 1964, and the class plaintiffs represent are those Negroes presently employed as well as those who may subsequently be employed by defendant at its Dan River Steam Station, Draper, North Carolina; and that plaintiffs also represent all Negroes who might hereafter *seek* employment at defendant's Dan River Steam Station, Draper, North Carolina, provided that plaintiffs can show that at least one Negro plaintiff of that class has sought and been denied employment or limited in any way in *seeking* employment solely because of his race or color since the effective date of Title VII of the Civil Rights Act of 1964;

(2) That this action is not maintainable under Rule 23(b)(3) and, therefore, it is unnecessary to provide for notice to members of the class represented by plaintiffs;

(3) That this order does not establish any rule of relevancy or competency of evidence as to alleged discriminatory acts or practices which existed prior or subsequent to the effective date of Title VII of the Civil Rights Act of 1964, and the Court reserves judgment thereon until this cause comes on to be heard on the merits; and

(4) That, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, this order is conditional and may be altered or amended at any time prior to a decision on the merits.

/s/ Edwin M. Stanley
United States District Judge
6/19/67

Motion to Dismiss as a Class Action

(Filed May 15, 1968)

[Caption Omitted]

Defendant moves to dismiss this action as a class action on the following grounds:

(1) The class is not so numerous that joinder of all members is impracticable; and

(2) There are no questions of law or fact common to the class the plaintiffs seek to represent.

Affidavit of A. C. Thies

A. C. Thies, being duly sworn, deposes and says:

(1) I am Vice President, Production and Operation, of Duke Power Company and was such during all times herein mentioned. I have personal knowledge of the matters hereinafter referred to and make this affidavit in support of defendant's motion to dismiss this action as a class action.

(2) I am responsible for the personnel promotion policy at Dan River Station. Since the trial of this action was completed on February 9, 1968, the promotion and placements for training hereinafter set out have occurred at the Dan River Station.

(3) Jesse Martin is a Negro with a high school education and classified as a helper in coal handling operations. He is *not* one of the named plaintiffs. He was placed in training for utility operator on March 18, 1968, for promotion, if found qualified, to fill an anticipated vacancy. At the time Jesse Martin was placed in training for this position, there were in addition to Martin nine white employees in coal handling. Two of the white employees were high school graduates and, therefore, qualified for consideration. They declined to accept this transfer. Seven of the white employees were not high school graduates and all had been employed in coal handling at least ten years ago.

(4) On March 19, 1968, H. E. Martin, a Negro and one of the named plaintiffs having a high school education, began training for the position of watchman and was promoted from semi-skilled laborer to watchman effective April 1, 1968.

(5) R. A. Jumper is a Negro and one of the named plaintiffs. He has a high school education and is classified

Affidavit of A. C. Thies

as a watchman. On March 21, 1968, he began training to fill a test assistant's position. When he was unable to qualify for this position, he was moved to the shop on May 7, 1968, to train in mechanical work. At the time Jumper began this tour of training, there were in addition to Jumper two white employees classified as watchmen, both of whom had high school educations, and one white employee without a high school education who was employed more than ten years ago, i.e., prior to the adoption of the high school education requirement. Of those qualified, Jumper has the greatest length of service with the Company.

A. C. THIES
A. C. Thies

Motion to Dismiss

(Filed May 15, 1968)

[Caption Omitted]

At the trial of this action, defendant made a Motion to Dismiss on the ground that plaintiffs failed to shoulder the burden of proving that the defendant intentionally engaged in discriminatory and, therefore, unlawful employment practices as alleged in the complaint. (R. p. 246)

Defendant herein renews its Motion to Dismiss on the ground that upon the facts and the law plaintiffs have shown no right to relief. In support thereof, defendant shows the following:

(A) The plaintiffs' own evidence establishes that Negro employees are not limited to menial and low-paying jobs, are eligible for progression and have progressed into job classifications above that of laborer. The plaintiffs' evidence further shows that no vacancies existed in classifications into which plaintiffs could be promoted from July 2, 1965, until August 8, 1966. On August 8, 1966, Jesse Martin, the senior Negro with a high school education, was promoted to learner in coal handling. Subsequently, R. A. Jumper, the next senior Negro with a high school education was promoted from laborer to watchman.

(B) The plaintiffs' own evidence establishes that Negro employees do not perform the same or similar work as white employees and receive less wages therefor.

(C) Some of the plaintiffs themselves admit they are not refused overtime opportunities and plaintiffs' own evidence shows that they are afforded opportunities for scheduled overtime and emergency overtime on an equal basis with white employees. In addition, the evidence (Answer to

Interrogatory 34(a) and (b)) shows nearly equal allocation of overtime among the departments.

(D) The plaintiffs' expert testified he did not know the meaning of the phrase "professionally developed ability tests" as used in the Act. The plaintiffs' evidence, therefore, fails to make even a prima facie showing that the tests are not "professionally developed ability tests" within the meaning of Section 703(h) of the Act.

(E) The plaintiffs' own evidence establishes that the tests are equally applicable to white and Negro employees similarly situated.

(F) Education is *not* one of the proscribed bases of discrimination under Title VII of the Act. The plaintiffs' own evidence establishes that the high school education requirement is equally applicable to all employees similarly situated. The nondiscriminatory requirement is being applied in a nondiscriminatory manner.

(G) Title VII of the Civil Rights Act of 1964 has prospective effect. Plaintiffs have failed to show a single instance wherein a Negro with a high school education was denied a promotion into higher skilled classifications since July 2, 1965.

Memorandum Opinion

(Filed September 30, 1968)

[Caption Omitted]

Gordon, District Judge

Duke Power Company, the defendant in this action, is a corporation engaged in the generation, transmission, and distribution of electric power to the general public in North Carolina and South Carolina. The thirteen named plaintiffs are all Negroes and contend that the defendant has engaged in employment practices prohibited by Title VII of the 1964 Civil Rights Act, 20 U.S.C. § 2000 at its Dan River Station located in Draper, North Carolina (recently consolidated with the Towns of Leaksville and Spray and named Eden) and ask that such discriminatory practices be enjoined.

An order was entered on June 19, 1967, allowing the action to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure. The class was defined as those Negroes presently employed, and who subsequently may be employed, at the Dan River Steam Station and all Negroes who may hereafter seek employment at the Station. The Court has found no reason to alter the June 19 Order.

The evidence in this case establishes that due to the requirements for initial employment, Negroes who may subsequently be employed by defendant would not be subject to the restrictions on promotions which the named plaintiffs contend are violative of the Act. A high school education and satisfactory test scores are required for initial employment in all departments except labor. Plaintiffs certainly cannot contend that employees without those requisites who are hired for the labor department subsequent to the implementation of the requisites should be allowed to transfer

into other departments when they could not have been initially employed in those departments. This would be to deny the defendant the right to establish different standards for different types of employment. Further, the plaintiffs do not contend that the defendant's requirements for initial employment are discriminatory. Only fourteen Negroes are presently employed by the defendant, thirteen of whom are named plaintiffs.

The work force at Dan River is divided for operational purposes into the following departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. The jobs of watchman, clerk, and storekeeper are in a miscellaneous category.

Within each department specialized job classifications exist.[1] These classifications constitute a line of progression

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[1] Answer to Interrogatory No. 11:

POWER STATION OPERATORS
Control Operator
Pump Operator
Utility Operator
Learner

COAL AND MATERIAL HANDLING
Coal Handling Foreman
Coal Equipment Operator
Coal Handling Operator
Helper
Learner

MAINTENANCE
Machinist
Electrician-Welder
Mechanic A
Mechanic B
Repairman
Learner

TEST AND LABORATORY
Testman-Labman
Lab and Test Technician
Lab and Test Assistant

LABOR
Labor Foreman
Auxiliary Serviceman
Laborer (Semi-Skilled)
Laborer (Common)

MISCELLANEOUS
Watchman
Clerk
Chief Clerk
Storekeeper

SUPERVISORS
Superintendent
Assistant Superintendent
Plant Engineer
Assistant Plant Engineer
Chemist
Test Supervisor
Maintenance Supervisor
Assistant Maintenance Supervisor
Shift Supervisor
Junior Engineer

for purposes of employee advancement. The term "line of progression" is then synonymous with "department."

Approximately ten years ago,[2] the defendant initiated a policy making a high school education or its equivalent a prerequisite for employment in all departments except the labor department. The effect of the policy was that no new employees would be hired without a high school education (except in the labor department) and no old employees without a high school education could transfer to a department other than the labor department. The high school requirement was made applicable on a departmental level only, and was not made the basis for firing or demoting a person employed prior to its implementation.

In July of 1965 the defendant instituted a new policy for initial employment at the Dan River Station. A satisfactory score on the Revised Beta Test was the only requirement for initial employment in the labor department. In all other departments and classifications, applicants were required to have a high school education *and* make satisfactory scores on two tests, the E. F. Wonderlick Personnel Test and the Bennett Mechanical Comprehension Test, Form AA. The company's promotional policy was unchanged and a high school education remained the only prerequisite to a departmental transfer.

In September, 1965, at the instigation of employees in the coal-handling department, the defendant promulgated a policy by which employees in the coal-handling and labor departments and the watchman classification without a high school education could become eligible for considera-

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[2] At the trial of this case, objections by defendant to evidence of activities prior to July 2, 1965, were sustained and the evidence recorded. Upon a study of briefs subsequently submitted by the parties, the Court has for purposes of this case only, considered the evidence as competent and relevant.

tion for transfer to another department by attaining a satisfactory score on the two tests previously mentioned. This procedure was made available only to persons employed prior to September 1, 1965.

Applicable Provisions of the Act

Sections 703(a)(1) and (2) of Title VII of the 1964 Civil Rights Act provide:

> "Section 703(a), 42 U.S.C. § 2000e-2(a):
>
> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The mandates of those two sections is qualified by the following sections of the Act:

> "Section 703(h), 42 U.S.C. § 2000e-2(h):
>
> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation,

or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

"Section 703(j), 42 U.S.C. § 2000e-2(j):

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by an employment agency or labor or-

> ganization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Congress intended the Act to be given prospective application only. Any discriminatory employment practices occurring before the effective date of the Act, July 2, 1965, are not remedial under the Act.[3]

The plaintiffs first contend that they are restricted to the menial and low-paying jobs and are effectively denied an equal opportunity to advance to the more remunerative positions because of their race.

The evidence shows that there are approximately 95 employees at the Dan River Station, 14 of whom are Negroes. As of July 2, 1965, the 14 Negroes held jobs in the labor department which has a lower pay scale than any other department. On August 8, 1966, three months prior to the institution of this suit, Jesse Martin, the senior Negro laborer with a high school education was promoted to learner in the coal handling department. The 13 Negroes remaining in the labor department are the plaintiffs in this action. One of those, R. A. Jumper, the next senior Negro laborer with a high school education has since been promoted to the watchman position. Only one other Negro has a high school education. Actually, the high school and test-

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[3] Actually, the evidence places the number of defendant's employees between 90 and 95. The Act was not made applicable to employers with under 100 employees until July 2, 1966.

ing requirements which plaintiffs allege are violative of the Act affect only those plaintiffs without a high school education.

The evidence shows that only three of the nine white employees in the coal handling department have a high school education; only eight of the seventeen white employees in the maintenance department have a high school education; two white shift supervisors in the power plant have less than a high school education; the two coal handling foremen have less than a high school education; and the labor foreman has less than a high school education.

Although company officials testified that there has never been a company policy of hiring only Negroes in the labor department and only whites in the other departments, the evidence is sufficient to conclude that at some time prior to July 2, 1965, Negroes were relegated to the labor department and prevented access to other departments by reason of their race.

The plaintiffs contend that upon their initial employment they were placed in the low paying labor department and were denied access to the more desirable departments as a result of the defendant's discriminatory hiring and promotional policies. Since the discrimination occurred prior to July 2, 1965, it is not remedial under the 1964 Civil Rights Act. But the plaintiffs reason that in subsequently applying the high school education requirements on a departmental basis only, the initial discrimination was carried over and continues to the present. This result, they say, is demonstrated by the fact that white employees without a high school education are eligible for job openings in the more lucrative departments while Negro employees with the same or similar educational qualifications are restricted to job classifications in the lower paying labor department.

Under plaintiffs' theory, the departmental structure of defendant's work force is tainted by prior discriminatory practices and therefore cannot serve as a basis for applying educational or general intelligence standards as prerequisites to promotion. Plaintiffs contend that the present system continues the past discrimination and violates the Act.

The plaintiffs do not contend nor will the evidence support a finding that the division of defendant's work force into departments is an unreasonable system of classification. To the contrary, the evidence shows 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. Also, each department has a different function in the total operation of the plant.

The plaintiffs do not contend that discrimination on the basis of education is proscribed by the Act. But they do contend that a high school education requirement which of itself continues the inequities of prior racial discrimination is prohibited.

This theory brings into issue how Congress intended the Act to be applied.

The legislative history of the Act is replete with evidence of Congress' intention that the Act be applied prospectively and not retroactively. Clark-Case Memorandum, Bureau of Nat'l Affairs Operations Manual, The Civil Rights Act of 1964, p. 329; Justice Dept. Reply on Title VII, Bureau of Nat'l Affairs Operations Manual, The Civil Rights Act of 1964, p. 326.

In providing for prospective application only, Congress faced the cold hard fact of past discrimination and the resulting inequities. Congress also realized the practical impossibility of eradicating all the consequences of past dis-

crimination. The 1964 Act has as its purpose the abolition of the policies of discrimination which produced the inequities.

It is obvious that where discrimination existed in the past, the effects of it will be carried over into the present. But it is also clear that policies of discrimination which existed in the past cannot be continued into the present under the 1964 Act. Plaintiffs do labor under the inequities resulting from the past discriminatory promotional policies of the defendant, but the defendant discontinued those discriminatory practices. More than ten years ago it 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. It is important to remember that the departmental structure does not result in Negroes doing the same or similar work as white employees but receiving smaller wages. The past discrimination was in restricting Negroes to the menial and low paying jobs in the labor department. Had Negroes not been restricted in this fashion prior to the institution of the high school education requirement, there would be no question of the present legality of defendant's policies.

If the relief requested by plaintiffs is granted, the defendant will be denied the right to improve the general quality of its work force or in the alternative will be required to abandon its departmental system of classification

and freeze every employee without a high school education in his present job without hope of advancement. And these harsh results would be necessary, under plaintiffs' theory, because of discriminatory practices abandoned by the defendant over ten years ago.

It is improbable that any system of classification used by an employer who has discriminated prior to the effective date of the Act could escape condemnation if this theory prevailed, regardless of how fair and equal its present policies may be. This Court does not believe such application of the Act to have been contemplated by Congress. Otherwise, it would have been unnecessary to indicate an intention that the Act receive only prospective application.

The plaintiffs cite *Quarels* v. *Phillip Morris, Inc.*, an unreported decision in the Eastern District of Virginia. That case held that restrictions on departmental transfers where the departments had been organized on a racially segregated basis were violative of the Act. Interdepartmental transfers had been completely prohibited under the prior discriminatory practices. Provisions of two collective bargaining agreements negotiated in the fall of 1964 and effective over a three-year period from February 1, 1965, modified the previous no-transfer policy only to the extent that a limited number of employees from the previously all-Negro departments would be allowed to transfer to the previously all-white department. A "Memorandum of Understanding" executed on March 7, 1966, modified seniority and transfer provisions only in degree. These provisions, in effect, continued the old discriminatory no-transfer policies except that four Negroes were allowed to transfer every six months without effect on their seniority rights. These present practices retained the discriminatory flavor of the past and were held violative of the Act.

The restrictions on departmental transfers at Duke Power's Dan River Station are distinguishable from the restrictions of Phillip Morris, Inc., condemned in *Quarles.* The restrictions on interdepartmental transfers at Duke Power are based on education requirements whereas the policy at Phillip Morris represented only a relaxation of earlier restrictions based on race. Phillip Morris exhibited no business purpose or reason for its transfer restrictions, but as pointed out heretofore, Duke Power had legitimate reasons for its educational and intelligence standards and for applying those standards to its departmental structure.

If the decision in *Quarles* may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise. The text of the legislation redounds with the term "unlawful employment practice." There is no reference in the Act to "present consequences." Moreover, under no definition of the words therein can the terms "present consequences of past discrimination" and "unlawful employment practice" be given synonymous meanings.

This does not mean that a court cannot look beyond the effective date of the Act to determine whether present practices are discriminatory. That, in fact, was what the court did in the *Quarles* case.

Plaintiffs secondly contend that the defendant's policy of allowing passing marks on two general intelligence tests to substitute for a high school education in determining eligibility for departmental transfer is discriminatory and in violation of the Act.

The application of defendant's testing procedures on a departmental basis is not in violation of the Act for the same reasons expressed previously in the discussion of the high school requirement.

In light of this Court's holding that the defendant's policy of making a high school education a prerequisite to departmental transfers is non-discriminatory, it would appear to be in derogation of the plaintiffs' interests to abolish the use of test scores as a substitute for the high school requirement. But to the extent that the nature of the tests may be discriminatory, their validity under the Act must be examined.

Section 703(h), (42 U.S.C. § 2000-2(h)) of the Act provides that it shall not be

> "[A]n unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The clause was inserted by an amendment introduced by Sen. Tower (R. Tex.). It was designed to insure the employer's right to utilize ability tests in hiring and promoting employees which practice had been condemned by a hearing examiner for the Illinois Fair Employment Practices Commission.

The plaintiffs apparently read the section to allow tests only when they are developed to predict a person's ability to perform a *particular* job or group of jobs. That is, if the job requires only manual dexterity, then the Act requires an employer to utilize only a test that measures manual dexterity. Guidelines on employment testing procedures set out by the Equal Employment Opportunity Commission serve to fortify that appraisal of the Act:

> "The Commission accordingly interprets 'professionally developed ability test' to mean a test which

> fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs."

This Court cannot agree to this interpretation of § 703(h). Title VII of the 1964 Act has as its purpose the elimination of discriminatory employment practices. It precludes the use of ability tests which may be used to discriminate on the basis of race, color, religion, sex, or national origin. Nowhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs. Nowhere does the Act require the use of only one type of test to the exclusion of other non-discriminatory tests. A test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma. In fact, a general intelligence test is probably more accurate and uniform in application than is the high school education requirement.

The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available. Rather, they are intended to indicate whether the employee has the general intelligence and overall mechanical comprehension of the average high school graduate, regardless of race, color, religion, sex, or national origin. The evidence establishes that the tests were professionally developed to perform this function and therefore are in compliance with the Act.

The Act does not deny an employer the right to determine the qualities, skills, and abilities required of his

employees. But the Act does restrict the employer to the use of tests which are professionally developed to indicate the existence of the desired qualities and which do not discriminate on the basis of race, color, religion, sex, or national origin.

The defendant's expert testified that the Wonderlic Test was professionally developed to measure general intelligence, i.e., one's ability to understand, to think, to use good judgment. The Bennett Test was developed to measure mechanical understanding of the operation of simple machines. These qualities are general in nature and are not indicative of a person's ability to perform a particular task. Nevertheless, they are qualities which the defendant would logically want to find in his employees. The Act does not deprive him of the right to use a test which accurately, reliable, and validly measures the existence of those qualities in an applicant for initial employment or for promotion.

Plaintiffs lastly contend that the defendant discriminates on the basis of race in the allocation of overtime work at its Dan River Station.

Overtime work at Dan River is referred to as "scheduled overtime" or "emergency overtime." Every employee at the station is allotted eight hours of "scheduled overtime" every four weeks. All other overtime is "emergency overtime."

Between July 2, 1965, and February, 1967, employees in the coal-handling department worked approximately 10.39 per cent of their total working hours in overtime. The percentage of overtime worked by employees in other departments was as follows: maintenance, 7.84 per cent; operations, 5.39 per cent; labor, 5.22 per cent; and other, 5.19 per cent. The high percentage of overtime worked by employees in coal handling was due to erratic deliveries of

coal and the difficulty in handling frozen coal during winter months. As a general rule, overtime work is done by the employees of the department which would ordinarily do the work. But occasionally in coal handling, the work load becomes so great that employees from other departments are called in to help. The gist of plaintiffs' contention is that Negroes are denied overtime work in coal-handling and so are discriminated against in the allocation of overtime. The evidence does not support this contention.

The percentages of overtime worked in each department, with the exception of coal-handling, are very similar. The higher percentage in the maintenance department appears to have been due to overtime work in repairing equipment and not to overtime in the coal-handling operations. Further, the evidence is that Negroes in the labor department assigned to work in coal-handling do not work the same overtime as employees in the coal-handling department because of the danger involved in doing their work at night while the coal-handling operations are going on.

It is concluded that the difference between allocation of overtime to employees is not the result of discriminatory practices and is not in violation of the Act.

Conclusions of Law

1. This Court has jurisdiction over the parties and subject matter of this action, pursuant to the provisions of Section 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. By order of this Court dated June 19, 1967, this action was permitted to be maintained as a class action, but the order was made conditional in nature pursuant to the Federal Rules of Civil Procedure 23(c)(1). The order de-

fined the class plaintiffs sought to represent as all Negroes presently employed, all Negroes who may subsequently be employed, and all Negroes who may hereafter seek employment at the defendant's Dan River Steam Station in Draper, North Carolina.

3. The Court is of the opinion, finds, and concludes that the defendant's high school education requirement does not violate Title VII of the Act. It has a legitimate business purpose and is equally applicable to both Negro and white employees similarly situated.

4. The tests in use by the defendant at its Dan River Station are professionally developed ability tests within the meaning of Section 703(h) of the Act and are not administered, scored, designed, intended, or used to discriminate because of race or color.

5. Title VII of the Civil Rights Act of 1964 became effective July 2, 1965. The legislative history of the Act clearly shows that it is prospective and not retroactive in effect. Since the effective date of the Act, the defendant has not limited, classified, segregated, or discriminated against its employees in any way which has deprived or tended to deprive them of any employment opportunities because of race or color.

6. The defendant has not discriminated in the allocation of overtime on the basis of race or color and is not in violation of the Act.

7. The plaintiffs have failed to carry the burden of proving that the defendant has intentionally discriminated against them on the basis of race or color. There are no

legally established facts from which the Court could draw an inference that the defendant has so discriminated.

Accordingly, no relief is appropriate, and a judgment dismissing the complaint will be entered. Within ten (10) days of this date, counsel for the defendant will submit a proposed judgment, first submitting same to counsel for the plaintiffs for approval as to form.

/s/ Eugene A. Gordon
United States District Judge

September 30, 1968

Judgment

(Filed October 9, 1968)

[Caption Omitted]

This action came on for trial on February 6, 1968, and February 9, 1968, before the Honorable Eugene Gordon, United States Judge, without a jury, and the evidence adduced by the parties having been heard and the Court having made its findings of fact and conclusions of law as set forth in the Court's Memorandum Opinion dated September 30, 1968, it is hereby

ORDERED, ADJUDGED AND DECREED, that the plaintiffs, and the class they represent, are not entitled to relief in this action; that their complaint and this action is hereby dismissed on the merits; and that the defendant recover its costs.

/s/ EUGENE A. GORDON
United States Judge

Notice of Appeal

(Filed October 18, 1968)

[Caption Omitted]

Notice of Appeal and Designation of Record on Appeal

I

Notice is hereby given that Willie S. Griggs, et al., plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the final judgment and order entered in this action on the 9th of October, 1968 by the United States District Court for the Middle District of North Carolina, Greensboro Division, pursuant to the Memorandum Opinion of said Court on September 30, 1968.

II

Designation of Record on Appeal

Plaintiffs, by their undersigned attorney, pursuant to Rule 10 of the Federal Rules of Appellate Procedure for the United States Court of Appeals, hereby designate all the original files and the complete transcript of the evidence in the subject case for inclusion in the record on appeal, including all pleadings, exhibits, affidavits, testimony, orders, memorandum opinion, judgment, notice of appeal and this designation.

....

Attorney for Plaintiffs

Transcript of Hearing February 6, 9, 1968

Pursuant to notice, the above entitled case was heard in the United States Courtroom, Federal Building, Greensboro, North Carolina, commencing at 9:30 a.m. on the 6th day of February, 1968.

HONORABLE EUGENE A. GORDON, *Presiding*

APPEARANCES

For the Plaintiffs:

J. LEVONNE CHAMBERS, Esq.
DAVID DANSBY, Esq.
ROBERT BELTON, Esq.

For the Defendant:

GEORGE W. FERGUSON, Esq.
WILLIAM I. WARD, JR., Esq.

GRAHAM ERLACHER, *Official Court Reporter*

[8] * * *

Mr. Belton: First, we'd like to introduce and have marked for identification, Plaintiffs' Exhibit #1, which is the charge filed with the Equal Employment Opportunity Commission. I show Counsel for the Defendants a copy of the charge, and ask if he will be willing to stipulate that, that similar charges were filed by each of the named Plaintiffs in the Case?

Mr. Ferguson: No, sir. May it please the Court? On the 26th day of April, 1966, Mr. J. D. Knight, Superintendent of the Dan River Steam Station, is receipted for service of certain charges from the Equal Employment Opportunity Commission, made by the Plaintiffs in this Case. Upon examination of what Mr. Belton furnishes me and upon

examination of the charges for which we receipted service, I find a substantial difference, and moreover, we object to anything introduced into this proceeding in connection with the Equal [9] Opportunity Commission, relying on—in Section 706A of the Statute, which says that "nothing said or done during and as a part of such endeavor, referring to the Conciliation Persuasion, and so forth, may be made public by the Commission without the written consent of the Parties or used as evidence in a subsequent proceeding."

Mr. Belton: At this time, Your Honor, we'd like to introduce into evidence copies which the Plaintiffs—a copy of each of the charges filed with the Equal Employment Opportunity Commission. These are the charges that the Plaintiff filed and the ones that were given to us by the Plaintiffs.

The Court: But you say they were different from what you received?

Mr. Ferguson: Yes, sir.

The Court: I don't see why you couldn't resolve that difference between you. You know,—it was a written document, wasn't it?

Mr. Ferguson: Yes, sir.

The Court: How on earth could there be a difference in that? I don't understand.

Mr. Ferguson: Your Honor, it's in different type. The charges are different. They both allege discrimination, but regardless of the difference in the two [10] documents, we would moreover object on the ground that it is not admissible.

The Court: Get me—that's 42USCA2000.

Mr. Ferguson: Yes, sir.

Mr. Belton: May it please the Court on the point of whether the documents sought to be introduced, are admis-

sible, Counsel for the Defendant points to a Section pertaining to the confidentiality Section of the Statute. Plaintiffs contend that the correct reading of the Statute means that nothing shall be introduced into evidence that was talked about or discussed in the course of Conciliation, which means that Conciliation takes place after a charge has been filed,—after an investigation has been made, and after the Commission has rendered a decision, and we think a proper reading of the language in 706 shows that the documents sought to be introduced by the Plaintiff, do not come within the ambit of the purview of the confidentiality of the provision of that section.

The Court: Let me take a look at it. Of course, you've got to, before you have a right to bring this action, you have to show that you have filed with the Commission something. That's a condition preceding to this, isn't it?

Mr. Ferguson: That's quite true, Your Honor, but [11] we did not question jurisdiction of this matter.

Mr. Belton: The reason why we are seeking to introduce this, Your Honor, is because it does go to the question of one of the—for the prayer of relief on the complaints, to show that each of the main Plaintiffs have pursued their remedies for the—you see, since this is part of the Class action—

The Court: What do you say about this discrepancy about what they receipted for? What is your surmise of the difference there?

Mr. Belton: The only thing that I can surmise, Your Honor,—it would be just a—I guess, on my part is that what may have happened is that after the charge had been properly noted or after the copies which I have, had been received by the Commission, the Commission may have attempted to try to get the Parties to further explain the

basis of their charge and may have taken statements for them, in the course of their investigation. This is my surmise, Your Honor.

The Court: You might disagree with this. Just in what respects—have you seen what Mr. Ferguson has by way of what he says was filed with them? Were they receipted for? What I want to know, what is the essential difference? Maybe you can tell me, Mr. Ferguson.

[12] Mr. Ferguson: Your Honor, in this particular document, the one for which we gave a receipt, they talk about discrimination based on tests—that it was necessary to take a test to qualify for any job level different than the one they are working in. That's all it says, except a general broad allegation of discrimination.

The Court: Wasn't that in the one they filed?

Mr. Ferguson: No, sir. They had made a broad allegation to the same effect, partially, except that in the one that they now show me, it talks about maintenance of separate facilities and discrimination in rates and scales of pay. Nothing about tests at all, although their complaint alleges discrimination based on tests.

The Court: Let me read this, for just a moment. Well, I'm going to overrule the objection and let the record show that the Defendant objects to the introduction into the evidence of copies of the charges which Plaintiffs allege that they filed with the EEOC on March 15th.

Mr. Ferguson: Your Honor, it please the Court, mine says March the 15th, and this one says the 10th of August of '66. I don't know what's happened here. I raised this at the Pre-Trial Conference or prior to [13] the Pre-Trial Conference, when we were getting this Order together and for that reason, reserve my right to object to it at this time, and I pointed this out to them.

Colloquy

The Court: Well, I do not understand. I will allow you, if you desire, to introduce what you have there.

Mr. Ferguson: No, sir.

The Court: This is a non-jury matter.

Mr. Ferguson: Yes, sir.

The Court: The rules of evidence are, in my opinion, just as strict as they would be if it were a jury matter. However, the Courts have been rather liberal to us in assuming that when we start writing our decision about it, that we only consider that which is competent, and dismiss from our minds when we look at that which is not competent. So, having that rule in mind, I am a little more liberal with getting whatever is done and said about the matter. If I haven't so protected the Defendant, let it show that they object and except to the introduction of the copies into the evidence in this case.

(Plaintiffs' Exhibit #1 was received into evidence.)

Mr. Belton: At this time, I'd like to have marked [14] for identification Plaintiff's Exhibit #1, which is the charge of Clarence Jackson; Plaintiffs' Exhibit #2, which is the charge of James Tucker; Plaintiffs' Exhibit #3, which is the charge of Jumper and Hairston, each—H-a-i-r-s-t-o-n; Plaintiffs' Exhibit #4 is the charge of Clarence Purcell and Willie Griggs; Plaintiffs' Exhibit #5, which is charge of Hatchett—H-a-t-c-h-e-t-t; Plaintiffs' Exhibit #6, which is the charge of Herman Martin; Plaintiffs' Exhibit #7, which is the charge of Eddie Galloway and Junior Blackstock; and Plaintiffs' Exhibit #8, which is the charge of William C. Purcell—P-u-r-c-e-l-l—William Purcell.

The Court: What was that last number, Mr. Vaughn?

Clerk Vaughn: #8.

(Plaintiffs' Exhibit #1, #2, #3, #4, #5, #6, #7, and #8 were marked for identification.)

Mr. Belton: At this time, Plaintiffs would also like to introduce into evidence the decision of the EEOC, which accompanied the letter advising the named Plaintiffs of their right to proceed in Court.

The Court: Any objection by the Defendant?

Mr. Ferguson: Same objection, Your Honor.

The Court: All right. Let the record show that the objection is overruled and that the Defendant excepts to this ruling of the Court.

[16] * * *

Mr. Belton: We would like to introduce at this time, Plaintiffs' Exhibit #10, which is a copy of the letter sent to each Plaintiff advising them of their right to proceed in Court. At this time, I would like to ask if I could get a stipulation from Counsel that each of the named Plaintiffs received a copy of the letter, so that I won't have to introduce all of them?

Mr. Ferguson: As far as I am concerned, you may introduce that as representative of what was received by all the Plaintiffs.

The Court: All right.

(Plaintiffs' Exhibit #10 was marked for identification.)

Mr. Belton: We introduce a letter of Willie Boyd, as exemplifying the letter received by each of the named Plaintiffs. We'd also like to introduce at this time, Plaintiffs' Exhibit, and have marked for identification Plaintiffs' Exhibit

#11, which consists of answers to interrogatories, which were the interrogatories propounded to them. These were the answers [17] supplied in February of '67 and March of '67. I would like to ask the Court, since there is a copy of the interrogatories on file, if we might have the originals marked for an Exhibit, for the record?

The Court: You say, February and March of '67?

Mr. Belton: That's correct, Your Honor.

The Court: Yes, that will be all right.

* * * * *

[21] * * *

Mr. Belton: We would like at this time to have marked for identification and introduced into evidence, the Wonderlic—a copy of the Wonderlic Personnel Manual.

* * * * *

[22] * * *

The Court: All right, let the record show that the Exhibit #13 is received into the evidence.

(Plaintiffs' Exhibit #13 was marked for identifiation, and received into evidence.)

Mr. Belton: We'd like to introduce at this time and have marked for identification, the depositions in their entirety, of Kenneth Austin, who is the Vice-President of Personnel for the Company.

* * * * *

[26] (Plaintiffs' Exhibit #14 was marked for identification.)

Mr. Belton: We would like to have marked for identification at this time and introduce into evidence the depositions of Mr. J. D. Knight, who is the Superintendent in

charge of the Dan River Steam Station, a facility of the Company.

The Court: All right.

(Plaintiffs' Exhibit #15 was marked for identification.)

How about letting Mr. Belton go ahead with these depositions, and then you can, Mr. Ferguson, make whatever objections you want to make.

Mr. Ferguson: All right.

Mr. Belton: We'd like to have marked for identification and introduced at this time the deposition of Mr. Theis, who is a Vice-President of Production Operation of the Company.

(Plaintiffs' Exhibit #16 was marked for identification.)

Mr. Belton: We'd like to have marked for identification and introduced into evidence the depositions in their entirety of Mr. J. Dan Rhyne, who is the assistant to Mr. Knight at the Dan River Steam Station.

(Plaintiffs Exhibit #17 was marked for identification.)

[27] * * *

Mr. Belton: We'd like to have marked for identification as Exhibit #18 and introduced into evidence, the deposition in the entirety of Mr. Richard K. Lemons, * * *

* * * * *

[31] * * *

Mr. Belton: Those, Your Honor, are the depositions.

The Court: All right, Mr. Ferguson. On the depositions, starting with Exhibit #14, what objection if any, do you have to Exhibits #14 through #30?

Mr. Ferguson: Your Honor, we would have the same levity objection that we had to Mr. Kenneth Austin's [32] deposition, that I mentioned to you previously. I don't think there's any necessity in repeating it. We would—after we got a chance to look at the composite picture and other evidence to overcome what we think are inferences that are not properly drawn.

The Court: All right. To protect you on the record, let's state that you object to the introduction of Exhibits #14 through #30, and the objection is overruled, and Exhibits #14 through #30 are received into the evidence. Let the record show that actually, the Defendant only contends as to the deposition—that it should be allowed to amplify and explain some of the answers made in these depositions, and if so allowed, really indicates no objection to the deposition.

The Court had advised the Defendant that it would be given opportunity to give such additional explanation of the answers contained in these depositions as the rules of evidence allow. All right.

(Plaintiffs' Exhibits #14 through #30 were received into evidence.)

Mr. Belton: May it please the Court? We would like to have marked for identification and introduce into evidence at this time, Plaintiffs' Exhibit #31, which is the educational background of all employees of the Company as of April 29, 1966.

[33] The Court: Now, is that contained on just one sheet?

Mr. Belton: It consists of two sheets, Your Honor.

The Court: All right.

Mr. Ferguson: I am inquiring of Counsel if he represents that this is what I furnished him with my letter of September 15, 1967?

Mr. Belton: That's correct.

The Court: All right, let the record show that received into the evidence is Plaintiffs' Exhibit #31.

(Plaintiffs' Exhibit #31 was marked for identification and received as evidence.)

* * * * *

[43] * * *

Mr. Ferguson: Come around, Mr. Thies.

Whereupon, A. C. Thies was duly sworn and testified as follows:

Mr. Belton: Your Honor, before we get to the testimony of this witness, I would like to ask the Court to clarify for purposes of the record whether or not the Exhibits have to be introduced—Exhibits 5 through 12, if you will?—sought to be introduced? If you will receive in evidence, for clarification of the record?

The Court: Let the record show that the Exhibits offered by the Plaintiffs, being Exhibits #1 through #32, were received into evidence of the Court, subject to the objections made by the Defendant, which appear already on record. That takes them all, in case you've overlooked any.

(Plaintiffs Exhibits #5 through #13 were received into the evidence.)

Mr. Belton: Thank you.

[44] The Court: All right.

Direct Examination by Mr. Ferguson:

Q. For the record, please state your name. A. Austin C. Thies.

Q. Mr. Thies, what's your occupation? A. I'm Vice-President of Production and Operation for the Duke Power Company.

Q. What is your educational background, Mr. Thies? A. I have a BS Degree in Mechanical Engineering from Georgia Institute of Technology.

Q. Are you responsible for the operations at the Dan River Steam Station, subject to this proceeding? A. Yes, I am.

Q. Would you describe, please, sir, in a general way the operations that are conducted at the Dan River Station? A. At Dan River, we are in the process of converting the energy in coal into electrical energy for our customers, and in order to do this, we receive large quantities of coal from the mines. We weigh it; we sample it; we unload it; we distribute it to storage of the bunkers. It is fed from these bunkers through pulverizing mills into the boilers. From the boilers, the energy that's in the coal is turned into heat energy by burning, and this heat energy forms steam, and that steam is brought to the turbine generators [45] where the heat energy and the steam is turned into mechanical energy of the rotation of the machinery, and the rotational energy and the mechanical energy and the turbine drives of the generator, where that is changed into electrical energy, and then that electrical energy is taken out to the sub-station to step up the voltage for transmission over the power system. Now, this is an overall concept of the operations at Dan River.

Q. Thank you. Are the operations at Dan River divided departmentally? A. Yes, sir, they are.

Q. Would you name the departments, please, sir, and the functions of each? A. Well, I suppose we can follow the same general pattern that I followed in describing the

functions of the station. The coal is received by the Coal Handling Operations group, or Department, and these individuals are responsible for the weighing, the sampling, the unloading, the transporting of the coal, the operation of locomotors, the bulldozers, the crushers, the equipment in the coal handling operations, and this is that department's function. The Operating Department takes over next. They are responsible for safe and efficient and reliable operation of the equipment within the Power Station, and the equipment comes under their control. They operate the boilers, the turbines [46] and all of the auxiliaries and control equipment. They operate the electrical sub-station,—the inner connections with the other Power Companies, and the system. The Maintenance Department is in the Power Station, and it is responsible for all mechanical and electrical maintenance, and such things as welding and that sort of work. It's mechanical maintenance of all of the equipment—electrical maintenance of all of the equipment.

The Court: What exactly did you say—the first one you talked about—the handling of the coal? The second one was the Operating Department, and the third, Maintenance Department, and you said the first was concerned with the coal. What did you call that division?

The Witness: That is the Coal Handling Department—coal handling operation.

The Court: All right. All right.

The Witness: Then, we have, these are the three major divisions, I suppose, of the departments, of the organization. We have certain service departments. We have a Laboratory Department where

laboratory technicians are responsible for the analysis of boiler water to keep the boiler water pure enough to be suitable for use without damaging the boilers. They analyze the coal or BTU,—the ash moisture heat affusion and that sort of thing. They make chemical analysis of [47] various fluids and liquids, in their connection with the operation of the Power Station. They are responsible for making the de-mineralized water that goes into the boiler system. Then we have the Test Department, and this is the department that has technicians that are responsible for the performance of the Power Station, as well as the electrical—the Electronic Maintenance, on specialized control equipment,—the maintenance of the accuracy of the instruments and the gauges and the control devices in the Power Station. They are also responsible for testing the Power Station equipment to be sure that it is performing as it is designed to perform to give us the maximum efficiency overall from the Power Station. They use the results of the coal analysis to determine the overall efficiency of the operation of the station. Then, we have the Labor Department which is a service department of the station, really to all of the departments. In this group—this group is generally responsible for the janitorial services in the Plant. They do a number of miscellaneous labor jobs around the Plant. They will pick up the garbage with the truck. They will occasionally mix mortar in a trough with a hoe or they will help to put some boards up for a form in a boiler when we have an outage. They will clean bolts with a wire brush, when the turbine is down for inspection. They will do a lot of labor-

type work of this kind on special assignment, but generally, [48] their work is of the janitorial type. The other two groups that we have are the Security Department—they are the watchmen—then, we have a Clerical Group, and in the Superintendent's office is the Chief Clerk, or Clerical Supervisor, it is, and an assistant. I think this pretty well covers the Station organization.

By Mr. Ferguson:

Q. Mr. Thies, will you please state for us the Job Classifications and the lines of progression in each of the departments that you have mentioned? A. Yes, sir. In the Coal Handling Operation, a man would start out there as a Learner. He would progress as he learned, to Helper, and then if he was performing satisfactorily, he would be promoted to Coal Handling Operator, and after he had progressed through the Coal Handling Operator Classification, and if he was qualified to run every job in the Coal Handling Operation competently, then he would be considered for the Premium Pay Classification in Coal Handling, which we call Coal Equipment Operator. If he qualified for that and had progressed through the full range of the Coal Handling Operator Classification, then he would be promoted to the Coal Equipment Operator Classification. Now that is the end of the normal progression in the Coal Handling operation. In the Operating Department, a man would start in as a Learner. If he progressed satisfactorily and could do the work, he would go to Utility Operator. He [49] would progress through that job to the top of that classification. Now, he would not progress beyond the Utility Operator unless there was an opening ahead. There are a certain number of operators required

to operate the Station. This is the only department that has a certain number of men—minimum that is required. Then, he is, if there is an opening above, he is promoted to Pump Operator and progresses through that classification. If there are openings in the Control Operator Classification that pertain, he is moved to the Control Operator Classification. Now, this is the end of the normal progression through the Wage and Hour structure. Of course, we do promote from our Control Operator Classification into our Shift Supervisor Classification, occasionally, when we need a supervisor. This is the place that we would normally look for this man. This, I think, pretty well covers the Operating Department. In the Maintenance Department, a man would start out as a Learner; it would progress, if his work were satisfactory, from Repairman to Mechanic B; from Mechanic B to Mechanic A; he could branch out at that time to be either an Electrician, a Welder, or a Machinist. These are the three top classifications in the Maintenance Department, and in this department again, when we have an opening for an Assistant Maintenance Supervisor, we would normally look to the maintenance force to find a man that was qualified to be that Assistant Maintenance [50] Supervisor; so that would be a possible further progression, for him in the future, if he were qualified. In the Laboatory, a man would start out as a Lab Assistant, a Lab Technician, a Lab Man. These are the three progressive steps in the Laboratory. The same pertains in the Test Department. It is called Test Man, Test Assistant, and Test Technician; instead of the word, "Laboratory," it is the same type of progression in these two departments. The Clerk could normally progress only if there was a vacancy as Clerical Supervisor and he were qualified for that job. The Watchmen, if they had an in-

terest and were qualified, progress to either the Coal Handling Operations or could progress to one of the departments in the Plant, if they had the educational background, and the requirements. The Laborers in the Labor Department progress from Labor to Labor Semi-skills, and if they meet the qualifications, progress to either the Coal Handling Operations and go on through those, or they can progress into the Plant to feed various jobs in Maintenance or Operation, or they could progress on up to the Watchman Classification if there were an opening there, providing they meet the qualifications.

Q. Mr. Thies, when you were talking about the Coal Handling Operation Department, did you indicate that the lowest—that the entering classification, as it were, was Learner or Helper? [51] A. It's Learner.

Q. And Learner progresses to Helper within that classification and then on up? Is that right? A. Yes. This is the normal way it is done.

Q. Mr. Thies, are you familiar with the promotions that have been made at Dan River since July the 2nd, 1965? A. Yes, sir, in a general way.

Q. Would you state whether or not there have been any vacancies and promotions into those vacancies since July the 2nd, 1965? A. Yes, sir, there have.

The Court: The date is July 2nd?
Mr. Ferguson: Yes, sir.

By Mr. Ferguson:

Q. You say, there have been? A. Yes, sir.

Q. Vacancies and promotions into those vacancies? A. Yes, sir.

Q. State whether or not every promotion creates a vacancy? A. No, sir.

Q. Explain that to us, if you would. A. There could be vacancies created by promotions. In the Operating Group, for instance, when you promote—excuse me—when you promote a Control Operator to Shift Supervisor, that immediately leaves an opening for a Control [52] Operator, so that we must promote a man into that classification. There is a vacancy created that we must fill in order properly to man the controls of the Power Station, so we will promote a man, generally, from Pumper Operator to Control Operator to fill that vacancy. Now, that is a case where a promotion is made and a vacancy is created. There can also be a promotion made from Learner to Helper in the Shop. This would create no vacancy because the man would just be developing in his skills. I said, Learner to Helper; I meant Learner to Repairman, in the Shop, or if he were promoted from Repairman to Mechanic B, it wouldn't necessarily create a vacancy, because it may take only twenty or twenty-five men to do the full scale maintenance work at Dan River. So, even though these men are progressing in skills and are progressing up in the classification, it does not necessarily per se create an opening at the bottom of the list. Now, this is the two types; I hope that I have explained that satisfactorily.

Q. Yes, sir. What is the minimum number of employees that you need to satisfactorily operate the Dan River Steam Station? A. We have not determined a fixed minimum number of employees that we need to operate. We have determined that we needed certain operators in the Operating Department to satisfactorily operate the Station, and we knew by general [53] practice that within our Maintenance Group, we have about the right number of

people to stay up with the maintenance work that is done in the Power Station. I am sure that there is some flexibility there, that we could use an extra man or we could do with one less in the maintenance, and it wouldn't shut the Plant down. So there has not been a strict determination of the number in the maintenance number, for instance, and the same thing would apply to the Coal Handling Operations. We know generally that we need so many men to do the job, and if the foreman comes in and says the coal deliveries have been such—have been erratic, or we've had a lot of frozen coal, we really need another, and we really need another man, then I think it would be up to the Superintendent to discuss that with the foreman and they would come to some decision as to whether they needed to employ another man. It's determined really by the work situation, is what I'm saying.

The Court: In other words, this flexibility also, with what you are saying, would mean that a promotion by reason of the fact that you make provision, so that you are flexible and therefore, by reason of that fact, when you promote a person doesn't necessarily mean that you have a vacancy, because often you have more men than you need? Is that it?

The Witness: Yes, sir. And after the promotion [54] to a higher classification the man may be doing exactly the same work every day. He is just gaining skill, and he is paid more money because he is gaining skill, and he's classified higher, but he is doing the same kind of jobs that he was doing before.

The Court: All right.

The Witness: He can maybe be entrusted to some additional jobs or maybe take two of three men with

him, as sort of a lead man because he has a higher classification.

By Mr. Ferguson:

Q. Mr. Thies, the Plaintiffs in this case have offered into evidence, and it has been received into evidence, certain answers to interrogatories that the Defendant supplied to the Plaintiffs in February and March of 1967. Who signed those interrogatories? A. I signed them.

Q. Mr. Thies, this is an instrument or a document containing several columnar tabulations. It's marked 19-A Job Vacancy. It has Date, Name, Race, Date of Initial Employment, and Prior Job Classification. Is this what you submitted as answer to interrogatory #19?

If it please the Court, I will furnish you a copy, if you would like to see it at this time.

The Court: I would.

Te Witness: Yes, sir. It looks like it. It looks like a Xerox copy of it.

[55] The Court: It might be attached to the interrogatory.

Mr. Ferguson: It is. If the Clerk could just hand that up to the Court.

By Mr. Ferguson:

Q. I believe you testified, Mr. Thies, that that is the answer you supplied in response to Interrogatory #19? Is that correct? A. Yes, sir.

Q. Interrogatory #19 requests that the Defendant describe and designate each job vacancy and the date the vacancy occurred, which existed at the Company's Dan River Steam Station at any time between July the 2nd,

1965, and December 31, 1966, and further, the Name, Race, Date of Initial Employment, Prior Job Classification, if any, of each employee, who filled such vacancy. Does that answer 19A—purport to answer that question? A. Yes, sir.

Q. All right, sir. Now, using the answers to Interrogatory #19, would you please explain whether or not the promotions indicated thereon, created a vacancy into which others could have been promoted from a lower classification? A. You want me to go through this whole list, here?

Q. If you will, please. A. In the case of Mr. Sayars, the first man on the list, here,—that created—let's see, he was promoted to [56] take a Shirt Supervisor job, I believe, so a man was moved up from Pump Operator to fill Mr. Sayars place as Control Operator. Now, I might explain at this point that there were three more there—Pump Operator to Control Operator. At about this time, we decided that we needed a little bit more relief flexibility in the Operating Department of Dan River Station. We don't relieve upward people. We only relieve jobs with people who were in that classification or higher, so that in order to provide us more relief flexibility, we decided to provide a Control Operator on each shift to do relief work—an extra man. At the same time, we had two Pump Operators that were operating in the Pump Room of the Power Station for the three units, and by the addition of certain equipment there, and an analysis of the job which had been made over some years, we decided it was not necessary to have both of those men on that job, so we eliminated one of those jobs in the Pump Room, so we operate now with one man in the Pump Room at all times, instead of two, and we promoted those people up to the Control Operator Classification, who had been in the Pump Room, and eliminated

this extra job in the Pump Room. Now, of course, this need was brought about by the fact that our people were getting somewhat older. We have a real stable employment situation and they are entitled to more vacation and more holidays—not more holidays, but more vacation time, and it just made our [57] relief situation a little tighter in the Operating Room, so that was the reason for this increase in relief. Now that covers really the next three men there who were moved out of the Pump Room up to the Control Operator Classification, so these did not create any vacancy as such. The Pump Operator, I believe, is the next one who was promoted from Utility Operator, and he was promoted into a job,—I believe it was a Mr. Pratt who said he didn't want to be in the Pump Room any more. He had some family problem at home, and he didn't want to work shifts—something about his personal situation, so we could arrange it at that time for him to go on other jobs in helping with the maintenance and that sort of thing, and we let this McClung, we promoted him to Pump Operator. And therefore, that created no vacancy in this case, because he was a relief man. McClung was a relief man anyway. He was an extra man in the Pump Room—if you will—he was a Relief Operator, so we had moved these others up, so now we were covering the relief situation by having more all the way around, so we did not need him in the Pump Room. Now, there was no vacancy created there. One of the Pump Operators, the fourth one out of the Pump Room, and incidentally, on a rotating shift, we work twenty-four hours a day, seven days a week, and it's automatically rotated, and there are four positions filled for each classification. It takes four men to fill those positions, plus the relief situation. [58] You've got to have enough people to relieve, too, so any time you talk about

a promotion, you are talking about—there are four people in the Pump Room right now, for instance at Dan River. There will be one man on the shift, but there will be four people in the Station that will automatically relieve around —to fulfill the full manning situation, the relief has to be in addition to those people for things like sickness and holidays and vacations. But the Pump Operator, Clarence Amoriello—that's A-m-o-r-i-e-l-l-o, he had some interest in this job, so we at this time were losing a Clerk, so we transferred Mr. Amoriello from the Pump Room into the Clerk's Office. The two next men, were Helper and Learner. Now, they were employed in the Power Station in the Operating Department to do Operation, and they were performing duties—say, Utility Operators normally perform—when they first came on the job, they were in training, you might say, for Utility Operator, so when they had progressed and when there was a need for them to fulfill this whole job by themselves, they were made Utility Operators, so no vacancy was created by their promotion to Utility Operator, because they were already doing that similar job, but under more supervision than they would have to have when they were learning. Jesse C. Martin was a Semi-skilled Laborer, and he was promoted from Semi-skilled Laborer to the Coal Handling operation. Now, he is in line to progress right on up [59] to Coal Equipment Operator, and he in fact, since this answer was given, he has been promoted from Learner to Helper, but at this time, he had just been promoted to Learner, but he is progressing normally through the Coal Handling Operation. There was no vacancy as such created in the Semi-skilled Laborer category, by his promotion, because here again, the Labor Department can fluctuate a few men one way or the other, and the Superintendent just decided, "Well, I will try to

get along without him for awhile, and see how we get along. Maybe we can do without him for awhile—do without a Laborer in this area for this time." From Learner—the next one is Mr. Seigler and Mr. Clark from Learner to Repairman. Both of these men were employed as Maintenance Men and when they progressed through the Learner Classification, then they were promoted to Repairmen. They were qualified to move on. No vacancy was created in the Learner Classification by them moving into the Repairman Classification. Helper to Coal Handling Operator, James L. Williams,—that's a normal progression; after the man has learned enough and has worked as a Helper in the Coal Handling Operation to where he has progressed through the Helper Classification and understands and can perform the duties of the Coal Handling Operator, he is promoted, and there was no vacancy created by his promotion from Helper to Coal Handling Operator, because he is doing [60] essentially the same type of work as the Coal Handling Operations Helper, as he would as a Coal Handling Operator, except for the degrees of skill and the length of time it takes him to progress to the Helper's position, so no vacancy was created in Coal Handling per se, by his promotion. In Mechanic B series, two of those were promoted to Mechanic A—from Repairman to Mechanic B—here again, it's a normal progression. No vacancies were created because these people are doing mechanical maintenance work, and it was just a change in their pay and their classification, as their skills progressed.

Q. Are you saying by that, Mr. Thies, that a Mechanic B, when he is promoted to Mechanic A, still can do what the Mechanic B does, but he has just progressed through skills to a point—in other words, where no vacancy is created, the function is still being fulfilled? A. That is cor-

rect. Our policy is—in our Power Stations, we do not work a man up out of his classification. We will permit a higher classified man to do lower classified work but we don't permit a man, who is in a lower classification to work in a higher classification without paying him for that work or re-classifying him. That is a basic policy that we have.

Q. All right, sir. Please go ahead. A. Now, three promotions from Common Labor to Semi-skilled [61] Labor; these are again normal progressions, and normal learning of the individuals. They have progressed through the Common Labor Classification in the opinion of their Supervisor, and the Superintendent. They have learned enough to be classified as Semi-skilled Labor. They still doing possibly some of the same jobs or mostly the same job they were doing before, but they know how to do it better, and they know where the equipment is, and it is just a matter of normal progression up in the skills, so they have created no vacancy by their move. In Mechanic A to Welder is again where a man specialized in welding, and when we felt that he'd progressed far enough through Mechanic A and had demonstrated his ability to weld, he was promoted into the Welder Classification. Now, I believe maybe there is a little overlap in the pay of the two, but at any rate, that's immaterial. This is a normal progression into Welder, and would not create a vacancy as such.

Q. Would you summarize your conclusion with respect to this "19"? A. Yes, sir. There was one vacancy created by Mr. Sayars that was filled from persons already in that department, and the promotion of Mr. Sayar—

Q. Mr. Thies, I don't want you to go back through it. If you will just count up, if you will and state whether or not there were any vacancies created? [62] A. Yes, in the

case of—of Sayars—of Sayars, there was a vacancy created, and that's the only one I see on here.

Q. In the course of answering my questions concerning this answer, No. 19, or the answer to Interrogatory No. 19, you mentioned that there was a stable employment situation at Dan River. When was the last time that you hired somebody up there? A. We have hired a man fairly recently.

Q. Well, strike that and let me ask you this question. Have you hired anybody since July the 2nd, 1965 or tell us how many you have hired, if you have? A. Yes, we've hired one man.

Q. In the past three years—or two and a half years? A. Since the date you mentioned—July 2nd, 1965.

Q. All right, sir. Looking at this list, Mr. Thies, I notice Jesse C. Martin, whose race is listed as Negro, was promoted from Semi-skilled Labor to Helper in Coal Handling. Do you know what his education is? A. No. See—was he promoted to—he was promoted to a Learner. He has since been promoted to Helper. I believe he is progressing up—

Q. Do you know what his education is? A. Yes. He was the Senior Semi-skilled Laborer who had a High School education.

Q. Have any other Negroes been promoted from Laborer [63] into higher classifications since July the 2nd, 1965? A. Yes, sir. We've promoted one Semi-skilled Laborer to —to Watchman.

Q. What's his name? A. R. A. Jumper.

Q. Do you know his education? A. He was again the Senior Semi-skilled Laborer who had a High School education.

Q. Well, what created the vacancy into which he moved if there was a vacancy, Mr. Thies? A. In the case of Mr. Jumper?

Q. Yes, sir. A. We needed a Watchman. We had a Watchman retire. I don't remember his name or when he retired, but it was back last September, I think, and we needed a man back in there, so naturally, we offered it to the Senior man who had the qualifications, which is a High School education.

Q. Mr. Thies, the Plaintiffs, in their complaint allege that the Defendant pays less wages than to white employees performing the same or similar work. Would you state whether or not Negro and white employees at Dan River ever do the same or similar work, and explain your answer? A. They can do—on occasions, they can do this same or similar work, but a general statement would be going back to our policy. We do not work a man out of his classification [64] up. We will work him out of his classification down and continue to pay him as that, but basically, the employees that are—that are doing maintenance work, their job is maintenance, and that's what they normally do. Now, on occasion, the Mechanic A may pick up a broom and sweep out the Shop, and that's what I mean when I say that they occasionally do the same or similar work because that is normally the job for the Laborer—Labor Department, but if the Mechanic A is there and he's got chips in his way or what have you, or if he's got a little time on his hands and nothing to do, he may say, "Let's pitch in and clean up these chips in front of the Lathe a little bit", so to that extent only are these people doing the same or similar work. I can think of other occasions—for instance, when we had a boiler off the line. This is a real pressure time for us because any time a boiler is down, we have got capacity off the line, and we make every effort to use—we use planning to get our work done in a minimum time to get that equipment back in service to meet the load, so

everybody pitches in, and for Laborers, they will, as I mentioned before, they will occasionally maybe mix some mud, they call it,—it's a material they put in these Ash Hoppers—a Laborer may be in our—there may be a Mechanic in there mixing with a hoe at the same time, but that is not normally the Mechanic's work, but he is being used there because this is a real emergency situation [65] to get this thing back. The jobs that the laborers are doing under those conditions are Labor jobs. They are simple manual tasks that laborers do.

Q. Where the Mechanic is doing Laborer's work, what rate of pay would he be getting? A. He would be getting his regular rate of pay as a Mechanic.

Q. Mr. Thies, have you read the depositions of the Plaintiffs in this case? A. Yes, sir, I have read through them.

Q. If the Court would permit me, I'd like to lead him for just a minute so I can get the problem before him.

> The Court: Go ahead and ask your question. If the Plaintiff objects, we'll indicate it or we'll make a ruling.
>
> Mr. Ferguson: All right, sir.

By Mr. Ferguson:

Q. Some, or at least one of the Plaintiffs in this case, indicated in his deposition that at one time, he was knocking doors and that now—first of all, tell us what "knocking doors" is? A. On the coal cars that come in, they are unloaded from the bottom, and there are the large metal doors on the bottom that are held by rotating dogs and you take a hammer and tap this dog and it rotates out of the way and you do this on both sides of the car, and

the door just swings open [66] by gravity, and the coal runs out of the car.

Q. I see. Now, one of the Plaintiffs in his deposition, Mr. Thies, stated that he used to knock doors, but since that time, white employees are now knocking doors, and that they receive a higher rate of pay for doing that job than he did. Now, would you comment on that, and explain it to us, if there is any explanation?

Mr. Belton: Objection, Your Honor. It's leading and if he has read the deposition, he should identify the Party.

The Court: Can you identify the deposition, Mr. Thies? Do you recall?

The Witness: I don't remember which man.

The Court: Are you familiar with the deposition?

Mr. Ferguson: Yes, sir, I have notes here. It will take me a little while to look it up, Your Honor, but I can get it for you.

The Court: No, wait a minute. Do you recall in one of the depositions that testimony to that effect was given, Mr. Thies?

The Witness: Not word for word, but I remember that the man made such a statement—yes, Your Honor.

The Court: You do remember that one of the depositions—remember that in one of the depositions?

The Witness: Yes, sir.

[67] The Court: All right. Overruled.

The Witness: Some years ago,—many years ago, our Laborers came to us and said that they were doing this work of knocking these dogs loose on the bottom of the coal cars as they came in and that

they thought that was a Coal Handling Operator's work. Now, we didn't think so, and we still don't think so. We think it is Labor work. Knocking the dog loose to drop a door down is Labor work as far as we can see, and still feel that way, but at that time, the decision was made that we would make a point of it—we would make an issue of it; if it was making the employees in the Labor Group unhappy, we would just provide that the Coal Handling Operators would do this job, and so they were at their request taken off of this work because they said it wasn't something that Laborers should be doing. Now, we still feel that it was Labor work, but we didn't argue with them. We just agreed to it and let the Coal Handling Operators do it.

Mr. Ferguson: All right, sir. If you would bear with me just a minute. Your Honor—

The Court: In other words, you are saying, Mr. Thies,—is this right—that you were letting personnel from your Labor Division do the knocking of the doors, at one time, and then you changed that in view [68] of, shall we say, some contention about it, and you let those from the Coal Handling Department do the door knocking, and do I understand that from that, that I might surmise that those from the Labor Department who were doing that job, knocking doors, were paid less than those in the Coal Handling Department, who were knocking doors? Is that what I surmise out of this?

Mr. Belton: Your Honor, before you ask the question, I would like to raise something at this point, and I call your attention—well, let me state the point, first, that we have attempted to get informa-

tion both in the interrogatories and in depositions of the operations and facts pertaining to the operation, the promotion, and etcetera of the Company prior to July 2nd, 1965, which is the effective date of the Act and in particular, I call your attention to Deposition #11 which is the deposition that we took of Mr. Thies in which we posed such a question on Page 20. Now, we have no objection to going back, but we think that to the extent that the Defendant can go back and get these events that occurred prior to 1965, then, we should likewise be permitted to do so, and I raise that at this point because I'm quite sure we will have questions.

The Court: When has this happened?

[69] Mr. Ferguson: It has not been established, Your Honor.

The Court: Well, let's establish it, and it wouldn't be important back of July 2nd, '65.

Mr. Ferguson: All right, sir, I withdraw the question.

The Court: Or would it?

Mr. Belton: We have no objection to going back, Your Honor, but they have interposed and instructed their witness not to answer. In fact, they instructed this one not to answer a question pre-dating July 2nd, 1965. We take the position that some information as to the operation of the Company is relevant to what is going on now, notwithstanding the fact that the Act became effective July 2nd, 1965, because we think it's impossible to understand now, unless the Court has some appreciation of how the Company operated as to promotion and hiring.

The Court: Here was a law, and presumably, if they were doing something that was incorrect and here is a law that prohibited presumably—and I say presumably, they would amend whatever they are doing to comply with that law, so I am not exactly clear on the fact that what transpired before July 2nd, '65, would help to decide the issue as to whether they discriminated after [69] July 2nd, '65. I would rather think that what transpired before would have little bearing on the issue of what happened after the effective date of the Act, unless we can pose the old rule, "Something that is established is presumed to continue," or something like that, but I hate to do that in view of the Law. Well, let's keep it after July 2nd.

Mr. Ferguson: All right, sir.

The Court: If that's your question?

Mr. Ferguson: Your Honor, the reason for my asking that question was that this is so difficult to go through a set of depositions and interpose objections every time when you ask a question, and you don't specifically tie it to that date. Now, in this particular deposition—now, on occasions I did object to it and directed the witness not to answer, but as I look through this deposition, he hadn't tied it down to any particular date,—the witness, at the time, and I am perfectly willing to withdraw it, but I felt like that this was an area where we had to meet that proof because it is not tied down in his deposition as to whether that occurred before July the 2nd, '65, or after, and that's the only reason.

The Court: Can he tie it down?

Colloquy

Mr. Ferguson: Yes, sir, I think he can, but his [70] answer would probably be stricken.

The Court: You withdraw the question?

Mr. Ferguson: Yes, I withdraw the question.

Mr. Belton: Your Honor, I don't want to belabor the point. Well, we will meet this again, I am quite sure, at the time that we are given an opportunity to cross examine the witness.

The Court: That means, I'm not going to let you ask him about it prior to July 2nd, 1965.

Mr. Belton: We're precluded, Your Honor?

The Court: I'm not going to let you ask, and I'm certainly not going to open it up on cross examination. Isn't that the basis you all have taken these depositions on—that July the 2nd was the cut-off date?

Mr. Belton: No, sir, Your Honor. That has been a point of contention with respect to interrogatories, and it also has been a point of contention with respect to the depositions, and it has never been ruled upon because the Defendants take a position contrary to that of the Plaintiffs. We take the position that some information as to what transpired before July 2nd, '65, is relevant, and we have not been operating under—that we have been limited to that date. We feel that it is relevant.

The Court: I don't see that what transpired prior [71] to the Act—the effective date of the Act would be relevant on the issue—that you all really agree, you know. I have to answer in this as set out. You differ somewhat in the Final Pre-Trial Order. You break it down—Paragraph 16—the Plaintiffs do, but each time, in reference to Title 7 and the Civil Rights

Act of '64, and it is a fact that July 2nd, '65 is the date. There's no disagreement about that, is there?

Mr. Ferguson: No, sir.

Mr. Belton: Of the effective date, no, sir.

The Court: Well, you have a problem of how far you can go back, you know. I am ruling that the relevant evidence is that which is restricted to the events transpiring—the effective date of the acquisition, July 2nd, 1965— You may proceed.

Mr. Belton: Your Honor, on this point, as to what transpired on the date—

The Court: What did you say?

Mr. Belton: I'd like to proffer the evidence on what it might show.

The Court: You may offer the evidence, and I of course have indicated that I do not think that that would be competent, but certainly, I want to protect you on the record, and I will allow you to put it in, so that it might be examined in the event of an appeal. [72] Whether that would be all right—but I don't see how that would help you, because if I am in error on it and have not considered it, then it would have to come back, you know, for the Court to make some determination on it, and then go back again, but if you wish—you think that you would like to offer the evidence and then have it actually filed with the Court and show my ruling, you may do so.

Mr. Belton: What—just one of two more sentences, Your Honor. I would like to call the Court's attention to several cases that support the position that we are taking. These are titled, "Seven Cases That Have Been Decided on the Merits." I don't

have the citation on hand, but I can get them for you for the Court's perusal. One is, Bowe-Colgate, B-o-w-e-Colgate, in which the Court allowed the Parties to introduce evidence as to activities back to World War II. More in point is a recent case. This was a sex discrimination case under Title 7, more recently, Quarles vs. Phillip Morris, involving racial discrimination, in which the Court did allow the Parties to go back to at least 1959, if you will, in terms of the steps that were supposedly undertaken to eliminate the problem, and the bearing that they would have had on what the Defendant was doing presently under the Act. As I said, I don't want to [73] belabor the point.

The Court: Well I just simply can't see. If a fellow were speeding on January 10th, 1968, and he is apprehended, and I realize this is not a criminal case, and then, he is apprehended again on January 15th, I don't know—we all agree what took place on January 10th has no bearing on whether he was or was not speeding on January 15th. That seems rather elementary to me. I'd be interested in reading the case. Do you have the citations? During the recess, would you give them to Mr. Blanco?

Mr. Belton: Right. The other one I have is just a mimeographed copy. I can make a copy of it available to the Court.

The Court: All right. I'd like to see it.

Mr. Belton: And to Counsel for the Defendant.

The Court: I reserve the right to change my mind, if these cases will convince me that I should. All right.

Mr. Ferguson: I assume Your Honor is going to let me be heard at the time?

The Court: Yes.

Mr. Ferguson: All right, sir. Thank you.

By Mr. Ferguson:

Q. Mr. Thies, are you familiar with the Company's policy regarding overtime at the Dan [74] River Steam Station? A. Yes, sir.

Q. On what basis are overtime opportunities provided? A. There are two bases for overtime at Dan River. The first is what is called, "Scheduled Overtime." Each employee at the Power Station works an extra day every fourth week—one extra eight-hour day. He works a normal forty-hour five-day week, and every fourth week, he works six days or forty-eight hours that week. Now, that eight hours is at overtime rates. Now, this is called, "Scheduled Overtime." The other type of overtime is categorized as "Emergency Overtime," or "Call-out Overtime," if you will. This overtime is kept to an absolute minimum, consistent with the needs of the operation of this Power Station. I instruct the Superintendents to keep this as low as they can because this is a direct cost to the operation of the Station, above and beyond the normal pay of employees, and it adds to the Station's operating cost. So this is emergency operating time only, and we use it only in classifications where a man is necessary to be called out, and under emergency situations, where we have to have more man power than can be provided by the normal working hours of the employee. So these are the two types, really of overtime that we have at the Power Station.

Q. Mr. Thies, in answer to Interrogatory #34—[75] Interrogatory #34 requested the following information:

State the Name and Race of each employee who has worked overtime on any job at any time since July the 2nd, 1965, and with respect to each employee, indicated, A, the dates on which such employee worked overtime, and the job performed by working overtime. I hand to you an instrument that has a heading, 34A and B with the following columns, Date, OT hours, Name, Race, Job, OT hours. There are two columns there of the same thing, consisting of twenty-six pages, and ask you if that represents the answer that you gave to Interrogatory #34. A. Yes, sir. That appears to be a Zerox copy of it.

Q. Mr. Thies, have you made an analysis of these twenty-six pages and the overtime opportunities as were provided to employees listed on those twenty-six pages; that is, from July 2nd, 1965 until February, '67, or answers to interrogatories when they were supplied? A. Yes, we did.

Q. What did your analysis show, if anything? A. Well, we broke this list down by departments, within the Power Station, and we took the figures off of these sheets, as to the actual overtime hours that were worked by these employees, and we knew the straight time hours, and we came up with a figure by departments in the Station, that gave the percentage of overtime hours worked [76] to total hours worked by the employees, within these departments. It showed, for instance, that in the Coal Handling Department, the employees in Coal Handling Operations worked 10.39 per cent of their total working hours were overtime hours. In the Labor Department, 5.22 per cent of their hours were overtime hours. In the Operating Department of the Power Station, 5.39 per cent—very close to what the Laborers were—a little bit more than the Operating Group, were overtime hours. In Maintenance, 7.84 per cent of the total hours worked were overtime hours, and

in the other departments which we lumped together—the other departments, the Testing and the Laboratory and the Clerical and the Watchman, the lowest of all in the Power Station, was 5.19 per cent of their hours were overtime hours.

Q. I noted, Mr. Thies, that Coal Handling got 10.39 per cent of the overtime. Is there any reason for that? A. Yes, sir, for the period covered here, we had problems getting uniform delivery of coal. The coal market in this country was badly upset, and actually coal was hard to get and shipments were very erratic, and we would get slug—slug with many, many cars of coal, and then, there wouldn't be any cars for awhile, and this was the result—of working overtime hours—to prevent paying demurrage on such many cars of coal. Also, we had some frozen coal during this same period covered, which required working [77] overtime in the Coal Handling Operations to get that coal unloaded and into the bunkers for a continuous operation of the Power Station.

The Court: What do you mean by "frozen" coal?

The Witness: The coal actually freezes, and there's enough moisture that gets into the car, with it cold, and it freezes. Mostly, it freezes in from the sides, a foot or a foot and a half, and you can't unload it. It will come another car so we have to get in there and put—and put heat under the cars. We have to get in—we have to get in with car shakers, and shake these cars. We beat on the side of—sides of the cars with hammers, to try to break this up, and in many cases, we are unsuccessful, and we have to push these cars off down the track and let them stay in the sunshine, if it's sunny that day,

and let them thaw a little bit, and then bring them back, and it is more than you can do in eight hours time to get enough coal unloaded to get it into the bunkers to operate the Station.

By Mr. Ferguson:

Q. With respect to the frozen coal situation and other situations, where you have excess amounts of coal to unload, is this overtime work a voluntarily or involuntarily— A. Well, we ask our employees to stay over on [78] call-out, and in almost all cases, they cooperate with us very well. You might say, it is requested of the employees to work this overtime. If a man has a special situation that he has got to get off for, we give consideration to that; if he's got problems or something and can't work—work it, we make arrangements. We might even call out someone in another department to come in and help temporarily, if we didn't have enough men in that department to do the work. Now, there are some Laborers, who clean up, in Coal Handling, and under these overtime conditions in Coal Handling, in the case of the frozen coal, there's just not as much cleaning up to do, because we aren't unloading the coal at as rapid a rate. In addition to that, at night, it's rather dangerous to be in, cleaning up under these conveyor belts, in the condition at night where the darkness—and it isn't as light at night, and it isn't as safe to use clean-up people.

Mr. Ferguson: I believe His Honor had a question.

The Court: When you get to a point where it will interfere as little as possible in this examination, we will take our noon recess.

Mr. Ferguson: We're just about there, Your Honor.

The Court: Are you about to conclude your examination?

Mr. Ferguson: No, Your Honor, I think it would be [79] better if we adjourned for lunch until we got to the other area.

The Witness: I might say, in further reference to this analysis that we made,—to me, it illustrates very clearly that we call out only those skills that we need. For instance, the Maintenance people get 7.84 of their time as overtime hours, indicates for equipment break-downs, we had to call on their services on an emergency basis quite frequently, whereas, the Operating Personnel and the Laboratory and Test Personnel, we didn't need as much. In fact, we needed the Laboratory and Test Technicians, least of all, and so they weren't called out. They have a lower overtime, percentage-wise than any other group or department in the Plant, so we call out the people that we need as required by the job, and we limit this overtime as "Emergency Overtime," but everyone else gets the same amount of "Scheduled Overtime,"—all departments.

Mr. Ferguson: Your Honor, I believe this is a convenient place, if it's all right with you?

The Court: All right, Mr. Thies, you may come down.

(Witness excused.)

* * * * *

[80] Let's take a recess until 2:00 o'clock.

(Lunch recess was taken.)

The Court: Mr. Thies, I believe you were on the stand, sir. If you will please, come back.

(Witness resumes the stand.)

All right, you may proceed.

By Mr. Ferguson:

Q. Mr. Thies, when we recessed for lunch, you had finished stating what your analysis of the answer to Interrogatory #34 showed, and I believe you stated that Coal Handling had 10.39 per cent of the overtime total—that is a percentage of the overtime to straight time hours. I believe you further stated that this was attributed in part to the frozen coal situation that existed during this period of time at the Dan River Station. Would you state, please, sir, what is involved in the frozen coal situation—what kinds of jobs have to be done in connection with thawing the coal, if that is what is done? Explain that to us, please, sir. A. Well, I thought I had pretty well gone over the routine part, Mr. Ferguson. Now, maybe I didn't say that this part I explained was only an occasional circumstance, when the coal would be frozen, and is really only a small part of the total Coal Handling Operation. In other words, that's just preliminary, really, to the Coal Handling Operation as such. The unloading of the coal is just a preliminary [81] step, really.

Q. Now, Mr. Thies, as Vice-President of Production and Operation, you are responsible for the promotion policy at Dan River, are you not? A. Yes, sir.

Q. As of July 2nd, 1965, what was the promotion policy at Dan River? A. I will just put this in my own words. The promotion policy of Dan River was—was within the departments, to promote the senior man to any job vacancy

that comes open, if qualified,—the next senior man in the lower classification, if he's qualified. Now, that's within departments of the Power Station. Now, between departments of the Power Station, the policy is that any individual who is working in one of the so-called "outside" departments at the Power Station—outside of the Station, proper—

Q. Such as what? A. Such as Coal Handling or Labor or Watchman. In order to be qualified for a promotion to the higher skilled jobs within the Power Station, they must have a High School education or we would accept a GED equivalent of a High School education.

Q. What does "GED" mean? A. I think that is a General Education Equivalent that's issued, for instance, by the Armed Service people.

[82] Mr. Ferguson: I'd like to request that the Reporter mark this as "Defendant's Exhibit 1."

(Defendant's Exhibit 1 was marked for identification.)

Q. Mr. Thies, this is a document which has been marked for identification as the Defendant's Exhibit #1, and I show it to you and ask you if you recognize it? A. Yes, sir, I do.

Q. What is it? A. It is a letter that I wrote to all Power Station Superintendents on September 22nd, 1965, modifying our promotion policy as regards to the promotion of personnel from the outside departments into the Station.

Q. In what respects does it modify the policy? A. It sets forth the fact that I would accept a passing score on the two tests that are normally used for employment, as

satisfying or in lieu of the requirement that our policy has had for a number of years—that a man have a High School education to be considered for the more highly skilled jobs.

Q. Does this policy apply to everybody? A. Yes. I might tell you a little bit about how I got into this. The employees in Coal Handling Operations had for some years approached me as I made visits around, and asked me if there wasn't some way they couldn't get into [83] Maintenance, for instance. A man would say, "I think I can do Maintenance work." Well, if he didn't have a High School education, then he wasn't eligible to come into these higher skilled jobs, and this was because we had found from experience that we were getting individuals—before we had this requirement, we were getting individuals who couldn't progress through the classifications. They were limited, and they would stop. So, I felt like that, all right, on July the 2nd, we had put into effect some tests for employment that were designed to yield us a man of average intelligence to be a Duke Power employee, so I seized on these tests as being a possible way that I could free-up these men who were blocked off,—that they could use this means of showing me, "All right, I can do the job. I've got a general intelligence level that would permit me to have a reasonable chance of success in some of these higher jobs, even though I don't have a High School education for some reason." Now, there is no requirement that anybody take these tests. The letter just states that we will accept these in lieu of a High School education, and of course, the making of these two scores on these two tests is not mentally equivalent to a High School education. I just said that I would accept those scores as an indication that a man had enough intelligence to be reasonably assured of being suc-

cessful in the more skilled jobs in Operation and Maintenance, in these [84] sort of jobs.

Q. Now, in point of time, to whom was this requirement extended, or was this privilege extended? A. Now, I did not feel that we should offer this to new employees coming into the Plant, because they had to meet the established hiring practices which were to have a High School education and also, to have a passing grade on these two tests. That's the requirement for employment in other than the Labor Classification. Now, if a person wants to apply for a Labor Job only, then, he is permitted to take a very simple test, which I believe was introduced this morning—this Revised Data Test—and that only qualifies him to be a Laborer, but this test applies to all employees at the Station—Negro, white,—both alike.

Q. Does it apply to employees who are presently employed? A. Yes, it does. Now, all right, I lost the "train" there; just a minute. I didn't feel that it was right to extend this to the new employees, but everyone who was on the Pay Roll as of September 15, 1965, I said, could be covered, under this modification, or if you will, I liberalized the requirements a little bit to try to help folks qualified for these higher jobs.

Q. Is your testimony, then, Mr. Thies, that the policy is to accept minimum acceptable scores on the two [85] tests referred to in your letter, which are the Wonderlic and the Mechanical AA, to accept those scores in lieu of a High School education, and that policy is applicable only to those who were on the Pay Roll, as of September the 15th, 1965? A. Yes, sir.

Q. Is that the policy? A. Yes, sir.

Q. Now, Mr. Thies, what does the letter show—this Plaintiffs' Exhibit 1—as a minimum acceptable score on

the A. F. Wonderlic Test?—I'm sorry; that's Defendant's Exhibit 1. A. 20, on the Wonderlic.

Q. And what for the Mechanical AA? A. 39.

Q. Now, how were these scores determined, Mr. Thies? A. These scores were determined by the Personnel Department of Duke Power Company in consultation with Dr. Moffie, Consulting Psychologist, and were put into effect over the whole entire system for employment tests, to yield us the type of individual that we felt that we must have.

Q. Do you know what the 50th percentile of the High School graduates make on the Wonderlic Test? A. I believe it's 21.

Q. 21? [86] A. 21 or 22. Somewhere in between 21 and 22.

Q. And you have accepted 20? A. Yes, it's my understanding that—this is a level that is between 11th and 12th grade capability—somewhere along in there.

Q. State, if you know, Mr. Thies, what the 50th percentile of those having completed the 12th grade make—that is, what is the norm of the average High School graduate on the Bennett Mechanical AA? A. I believe it's this 39 that we have here.

Q. Now, is there any flexibility with respect to these minimum-acceptable scores? A. Yes. We have instructed our Personnel that administer these and grade them that if a man is one point over on the Wonderlic and one point under on the Mechanical AA, we would accept that and vice versa. I mean, we have said that we would take one point less on one test, if he's one point over on the other, but we have held to those limits.

Q. It has been stipulated, Mr. Thies, that Mr. Richard Lemons — that Lemons administers the tests at the Dan

River Station — do you know whether or not Mr. Lemons has any special training in the administration of tests?

* * * * *

[87] * * *

By Mr. Ferguson:

Q. Who administers the tests at Dan River? A. There are three people who are capable of it, so that our Mr. Richard Lemons has administered the tests at Dan River, and he has had training in this. He went to Charlotte and attended a training session, which explained to him along with others in the Company that would administer these tests, the method of administration—how to score the tests, how to provide the materials for the employee, and the use of the test manuals, and it's a fairly simple thing [88] to administer these tests. They have strict rules and time that you must go by, and generally it was instruction of the personnel that would administer the test, and how they were to be administered.

Q. Who conducted the training session? A. I'm not sure who conducted that session that he was in, but it was someone from the Personnel Department, I believe. I believe that Girard Davidson was in charge of the session. Mr. Austin was at the session. I'm not sure who conducted the session.

Q. Do you know whether or not Mr. Lemons also scores the tests? A. Yes, he does.

Q. Where are the tests administered? A. We have a Conference Room there that is a place that is a little smaller than this Courtroom, that has tables and chairs, and it's a quiet place, and it's free from disturbance and generally, this is where the tests are administered—in a

place where there wouldn't be—wouldn't be distractions to the person taking it.

Q. What, if anything, is your policy as to re-testing for failures? A. Well, we felt like that—a man could conceivably be nervous when he was first taking this test, and for some reason, feel bad, or make a poor score the first time, so I [89] instructed the folks to re-test again in six months; if the man did not pass and wished to take it again, we would give it to him again in six months.

The Court: Where is your Dan River Plant?

The Witness: It is close to Draper. It is between Leaksville and Spray—over in that area.

The Court: That's the general vicinity that it's in?

The Witness: Right.

By Mr. Ferguson:

Q. Is there any limitation on the number of times that an applicant may take the test? A. No, there is no limitation on this, and there's no requirement that he take the test. It is perfectly voluntary. We've had the requirement for years and years and years that you had to have a High School education, and this is just a way, if he didn't have a High School education,—that I would accept these scores in lieu of that.

Q. Does the Company have any other policy whereby an employee may get an education or may get a High School education, if he so desires? A. Yes, we do. In fact, I have encouraged the folks in this particular action, to take advantage of the Company's tuition refund. I talked personally to a number of them, and asked them to consider this at night or on their own time—that the Company would pay three-fourths of the [90] cost of

any expense, and that we would consider this type of training to get a High School equivalency certificate, as job related. So far, I believe only one has applied under Tuition Refund. I believe one man—

Q. Now, you say, "One man;" do you know what his name is? A. I forget which one he is.

Q. Is he one of the Plaintiffs? A. I believe he is, yes,—one of the Plaintiffs in the case. I believe he has applied under Tuition Refund, but this is a means by which they could meet this High School diploma requirement.

Q. Mr. Thies, have any Negro employees taken the test? A. Yes, sir, they have.

Q. Have any white employees taken the test? A. Yes, sir, they have.

Q. Do you know whether or not they passed or failed? A. None of the white or Negro; employees who have taken these two tests so far have passed both tests successfully. There are three who have taken them.

Mr. Ferguson: Your Honor, if I could just have a couple of minutes to get my things together here.

The Court: All right.

By Mr. Ferguson:

Q. Mr. Theis, this is a document [91] that is entitled, "Registration and Application for Tuition Refund, Duke Power Company." I previously asked you if you knew whether or not any of the Plaintiffs had made application under the Tuition Refund Program. Does this refresh your recollection? A. Yes, sir.

Q. What is the name? A. Willie R. Boyd, Semi-skilled Laborer.

Mr. Ferguson: Your Honor, at this time, I don't desire to enter into evidence the charge that we received from the Equal Employment Opportunity Commission for which we gave a receipt, in view of the position I have taken that the Statute rules such evidence incompetent. I would, however, like to ask Mr. Thies whether or not this is what he receipted for, or is this representative of what he receipted for, and I would like to go through it in that way, if I may?

The Court: It's up to you as to whether you want to introduce it or not. I'm not insisting that you do. Whatever the Commission has said about it is not going to have any bearing on me one way or the other, you know. Really, what they put in there—I will have to look at it from the evidence that's before me, to determine whether there is or is not.

Mr. Ferguson: All right, sir. That completes [92] my examination of this witness.

The Court: I'm learning about this case. You already know about it. You obviously require a High School education. You say, for years and years, you required a High School education in connection with some of your classifications and some of your jobs. In which jobs have you required a High School education or its equivalent, Mr. Thies?

The Witness: For over ten years, we have required a High School education for Watchman, Coal Handling Maintenance, Operating, Lab and Test jobs.

The Court: Well, maybe, if you will approach it from the other end? What didn't you require?

The Witness: Labor.

The Court: Just Labor?

The Witness: Right.

The Court: But if—

The Witness: 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 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 [93] 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 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 [94] this, and they would have a hard time with it. This was the background behind it.

The Court: I just wanted to be informed. I don't complain about your policy at all. I understand that the shoe manufacturing Company up in Wilkesboro, has the very same policy, even with janitorial help—that unless you have a High School education, why, they don't want you, because it does, as you say, interfere with their in-planned promotion, which sometimes brings on complications. All right. Mr. Belton, you may cross examine.

Cross Examination by Mr. Belton:

Q. I think, Mr. Thies, you testified at the beginning of your testimony as to the kinds of jobs that were performed by various employees in the respective categories that you have at Duke Power? Is that correct? A. Yes, sir.

Q. Let me ask you, do you have written job descriptions? A. We do not.

Q. On what basis do you determine what the job content of a particular job category would be? A. It's determined by practice and by many years of doing these jobs, and by an understanding between the Supervisor and the

man in any classification as to what his duties [95] are. It is explained to each man what his classification is. He knows from actual practice what his job requirements are, but these are not written out, as such.

Q. Have the job content in performing a job, has it changed over the years? A. Not appreciably, no.

Q. I think you testified, Mr. Theis—let me show you because I'll have reference to it. Mr. Theis, do you have before you Answer Interrogatory #12B which lists the job classifications? A. 12B?

Q. Yes. I think it was handed to you by Mr. Ferguson? A. I've got it in here somewhere. 12A and C, I've got. Let's see. Yes, here it is—12B.

Q. Referring to Answer 12B of the Interrogatories, is a listing of the job categories in the various departments. I think you testified that the normal way for a person to advance in any one particular category would be starting at the bottom—starting at the bottom lowest job and moving up to the next highest job? Now, is that correct? A. That's the normal way, yes, sir.

Q. My question is, have there been instances in the past five years in which an employee has not moved up the progression chart in the normal way that you referred to?

[96] Mr. Ferguson: Objection.

The Court: I will allow it, restricted to since July 2nd, 1965, the effective date of the Act.

The Witness: Your question is—if I understand it correctly—is are there any employees who have not moved up the progression scale in the normal way, when a vacancy was created above?

Mr. Belton: That's correct.

The Witness: Yes, there have been some. I'm sure whether it was prior to July 2nd or after, but I know in one case, we had two men in the Pump Room at the Power Station—the Pump Operators —that were not High School graduates, but had been there for many years, and when time came for promotion, they said, "We can't do the Control Operator's job, and we don't want to be promoted," so we moved around them, but I don't know of any other particular ones.

By Mr. Belton:

Q. Referring to Answer 12B again, and particularly the category of Laborer, how long have you had a job classification for Auxiliary Service Man? A. About— oh, a year and a half or a little less, maybe.

The Court: Now, what do you mean by Auxiliary Service people?

The Witness: An Auxiliary Service Man was a [97] classification which we created, and I'm not sure of the date, but it was a year or year and a half ago, into which—into which we could promote anyone in the Power Station, but particularly the semi-skilled Laborer who exhibited skills that were extraordinary. Maybe he could do a little bit of rough carpentry work or some brick work or something like that, or maybe he had other special skills that warranted a little bit more money even though he could not be promoted due to his lack of a High School education, into the higher classifications in the more skilled jobs—that this was a way to reward the man with a special skill that might come

along, and it was just a merit classification that we put in there. At the present time, there is no one in this at Dan River.

The Court: Let me ask you this, Gentlemen. I am going to call on you when this matter is completed, to give me proposed Findings of Fact and Conclusions of Law. Each of you, now, are you going to want a copy of the transcript in this case?

Mr. Ferguson: Yes, sir.

Mr. Belton: Yes, sir.

The Court: It has something to do with my note taking. I can listen better if I don't have to take notes. All right.

[98] *By Mr. Belton:*

Q. Looking again at 12B which you have before you, were the jobs performed—and I understand that you testify that you have no persons in the Auxiliary Service category—would the jobs performed by a person in the Auxiliary Service category, have been jobs which would have been performed by persons who,—in the Labor semi-skilled category? A. That's a little bit difficult to answer, but I will try from this standpoint. It's almost like the explanation I gave this morning—for a promotion from Mechanic B to Mechanic A. The man who received this promotion to Auxiliary Service Man, might have as his normal duties, doing janitorial work, say, in an area of the Power Station, and this still might be his normal duties, but he had the special skills that on occasion we called on him to exercise these special things that warranted his promotion to Auxiliary Service Man in the first place. Then, certainly he would be an Auxiliary Service Man, and he would still normally be doing his other job, but

he would also have these skills that had caused us to promote him in the first place to Auxiliary Service Man, so I don't know whether this answers your question or not, but he could be doing some of the same things he was doing before he was promoted. It is not—there is not a sharp line of demarcation, and it doesn't create a vacancy. He is not satisfied, and he [99] doesn't become a specialist, by any means, but he is still doing his regular job.

Q. Do you have any white employees in the Laborers Department in the job category of Laborer, referring again to your 12B? A. No, sir, we do not.

Q. Do you have any white job category Laborers, semi-skilled? A. No, we do not.

Q. Now, do you know whether the Labor Foreman is Negro or white? A. He's white.

Q. Do you know what his educational background is? A. He does not have a High School education, but I couldn't tell you just how far he got in school. I don't remember that detail.

Q. Do you know whether you have an Assistant Labor Foreman? A. No, we have no Assistant Labor Foreman.

Q. Now, my question is this,—did you have whites in the job categories below Labor Foreman prior to July 2nd, 1965?

Mr. Ferguson: Objection.

The Court: Sustained. I have read parts of this decision, and I see nothing—there was evidence that [100] went in prior to July 2nd, '65.

Mr. Belton: Your Honor, even though it's not demonstrated, in the opinion that you have before you—

The Court: It doesn't say whether it's objected to or not.

Mr. Belton: Right. As I am saying, and I am trying to explain the circumstances to which I have brought it to the Court's attention; the case was handled—persons held the same office, which associated—I know the same objections were raised.

The Court: Well, how far do we go back then? Do we go back to July 2nd, '64 or to July 2nd, '63, or just where do we go with this, then?

Mr. Belton: Your Honor, I think it depends on the particular line of evidence that is being developed. I think that under—in any area that the Party should be able to go back at least as far as July 2nd, 1964, which is the date that Title 7 was passed, along with other portions of the Civil Rights Bill. However, there is legislative history to indicate that the reason why Title 7 did not go into effect on July 2nd, '64, as did other provisions of the Act, was to allow a period of adjustment.

The Court: To allow a period for them to get in compliance—

[101] Mr. Belton: The question that we have before us now, your Honor, in this case is whether the Parties are in compliance, and in order to determine whether they are in compliance, we cannot focus specifically on the date in which they were supposed to have been in compliance, at least when they apply it to this, at this stage. Now, I think after the Act has been in effect maybe ten or twelve years, during the time, one needs to establish whether it is or not in compliance, need

not extend beyond—back beyond July 2nd, '65, but I think that at this stage, when the cases are being brought under Title 7, that they're being tried, that the Court needs this cross-section in order to make this determination.

The Court: I understand if you could show that this Company had a system of classifications—a classification that was discriminatory in June of '65, that I could assume from that, that they didn't correct it, by the effective date of this?

Mr. Belton: Your Honor, let me refer to the language at least in the Quarles opinion, which suggests that it's necessary to go back beyond the date —the question that is posed on Page 17 "is our present consequences of past discrimination covered by the Act?" Now, what the Court held in the Quarles case is that [102] as of January 1, 1966, Phillip Morris no longer discriminated. The Court also posed a problem, given a body of Negro problems, wherewith the Company prior to the effective date of the Act, who could not move—could not go into certain categories because of their race, are they denied benefit of Title 7? And this opinion says, "No," and the Order is addressed only to those persons who were employed prior to January, 1966, when the Court found that they were no longer discriminated, and says something has to be done with this category of people. I'm saying, in this case we have the same situation here, because no Negroes have been employed with the Company since the effective date of the Act, and that you have had Negro employees with the Company extending back fifteen and twenty years, and they've always been

in the category of Laborer, and that this is what we're trying to bring out and develop—this line.

The Court: Well, I will have to disagree with you with much respect, Mr. Belton, for your contention about it. I just simply cannot see how what transpired back of this time will help me decide whether after July 2nd, 1965, this Defendant discriminated or not. This suit was brought in October, of '66, some more than a year after this Act went into effect. Now, what [103] transpired back there until July of '65, is certainly, you know, important and pertinent, and if I start back of the effective date of the Act, there is no guide line as to how far you would go back. It just seems to me that it is like any other action,—that what happened on a different and separate time from the time that liability is talked about or responsibility is talked about—and I could be wrong about it—I want the record to show the exception of Counsel for the Plaintiffs, so that they can be protected in the event that I am in error, but this isn't a suit that started three days after the Act went into effect. This is a suit that started more than a year after the Act was effective. All right, you may proceed.

By Mr. Belton:

Q. Mr. Thies, do you have Answer #30 to the Interrogatories, which consists of the seniority list for the year 1966—1965, and 1967? A. Yes, I do.

Q. I think you testified that you have present qualifications for a High School education or an equivalency or successful—if you don't have the High School education or

the equivalency, the successful passing of the Wonderlic and the Mechanical Exam? Is that correct? A. For what purpose?

Q. To be promoted from either Coal Handling or the [104] Laborer's category to other jobs—to other jobs in Dan River? A. He has to be promoted from Coal Handling Operator into the Operating or Maintenance jobs in the Power Station, or to be promoted from a Laborer semi-skilled into the Coal Handling Operations or the Watchman jobs.

Q. Referring to Answer #30 seniority lists for 1967, let me ask you if all of the employees listed under Control Operators, have a High School education or equivalency? A. I do not think they do,—no.

Q. Looking at the Answer, Mr. Thies, do you recognize the name of an employee in the Control Operator's category who has been frozen by virtue of his inability to move because he does not have the High School education equivalency? A. I don't have to look at the names. We don't freeze anybody in these classifications that have been in there for over ten years. When this policy was established, we didn't go back and pull these people out of a block ten years ago, when this policy was established—ten years ago or over ten years ago—I don't remember the exact date; we said, "All right, everybody that's in here that can 'cut the mustard' can go ahead and be promoted within their department, but nobody else moves into these jobs at the bottom unless they meet this new policy qualification, and that's the reason you all find all through this organization, and I told you about these two that don't have a High School education in the Pump [105] Operator classification. That is an example of what I'm talking about; here is two men that just can't progress, and they have voluntarily said,

"We can't progress." Now, we have also had cases where a man would say, "I want to progress," and he'd get up there and we would have to tell him he couldn't do the job, but certainly you will find people all through our organization that don't have a High School education, because they've been in there for more than ten years—been in these departments for that long.

Q. Let me pose this question, Mr. Thies,—except for the Coal Handling—the Coal Handling Department and the Laborer's Department, if you will put those aside, if you will and let me pose the question,—looking at the seniority list which you have before you, do you recognize the name of any employee in any other department, who does not have a High School education, but who has demonstrated the ability to be promoted?

The Court: Let's wait a minute. Is that supposedly attached to this batch of papers?

Mr. Belton: I'm sorry, Your Honor. That is attached to Answer #30,—yes, it is.

The Court: While we are at this, Mr. Ferguson,—you and Mr. Belton—I saw you looking for this, supposedly thinking it was attached to this. Is there a copy of this attached to that?

[106] Clerk Vaughn: Yes, there is.

The Court: All right.

The Witness: Mr. Belton, in answer to your question, I am not familiar from sight with who in this organization does or does not have a High School education. I could get my list out and look at them, but I am perfectly willing to admit to you that there are people without a High School education, who are in the Operating jobs, for instance, at Dan River,

who have done a satisfactory job. I'm not denying that at all. I can't deny that because we certainly have them there who have done this job, who have been there for over ten years. I don't think there is anything magic about a High School education, but it was just something we felt years ago we had to start to get the kind of people that we needed, because the correlary to that is that we have had rather poor experience with some wo did not have a High School education. It is a balance sort of thing.

By Mr. Belton:

Q. Let me ask this question. Since July 2nd, 1965, have you undertaken to determine the qualifications of Negroes in the Labor Department, who do not have a High School education, who do not have a High School equivalency, who have not taken either of the exams—have you undertaken to determine their ability for promotion out of **[107]** the Labor Department, independent of this criteria? A. We have not, as it would violate the policy that we have that a man must have a High School education to be considered for these higher jobs. We have not violated that policy. We took an interest in whether they could go on up or not to the extent that we talked with them and encouraged them to take these tests to find out. We encouraged them to go to school, and we would help pay for it. In fact, I even asked Mr. Knight to check in the community to find areas where they could get this training and to pass that information along to them to encourage them in any way we could to do this. We have not specifically given any sort of tests or made any sort of determination of what skills these individuals have who are not qualified under our present policy, to be considered.

A. C. Thies—for Defendant—Cross

Q. Is it necessary for a person in the Laborer's Department who does not have a High School education or its equivalency to take—and he does not take advantage of the Company's program—my question is, is it necessary for him to take both the Wonderlic and the Mechanical to be considered for a promotion into jobs in Coal Handling? A. Yes, that's the policy we have set.

Q. I think you indicated, Mr. Thies, that you are beginning to get complicated machinery into the Plant just recently? [108] A. Well, over the whole Power System. See, I am looking over the whole System, too. The reason for this is the jobs even in Coal Handling, a man has to know how to operate diesel electric locomotives, to operate bull dozers and heavy machinery, and crushers and conveyor belts, and travelling trippers. It is a rather complex situation, even in Coal Handling, that he has got to be able to read, to understand orders, to read manuals, if you will, on how to do these things, to really be able to progress through Coal Handling satisfactorily. There is a need for more skilled people, that was felt over ten years ago. That's why we put this policy into effect.

Q. Realizing this need, Mr. Thies, how do you go about training your personnel for the various jobs in the Coal Handling Department, if you will? A. The principal means of doing this is while he is a Learner and also, after he has been promoted, he is given an opportunity to work in the various jobs in the Coal Handling under close supervision. To begin with, it is all explained to him. Generally, it would be categorized as "On The Job Training."

Q. Is this to say that you have a formalized training program? A. We have a training program, but it is not written out, as such.

[109] Q. I think you testified, Mr. Thies, that you do have several Negro foremen, who are working—who are doing work, not in the Department of Coal Handling, but who are doing work in the Coal Handling Department? Is that right? A. Not Negro foremen.

Q. Negro employees? A. Negro semi-skilled Laborers.

Q. All right. A. There are some semi-skilled Laborers who are normally assigned to clean up in Coal Handling, yes.

Q. Now, in the normal course of their work, would you know whether they would have an opportunity to observe the various jobs that have been performed by a person in Coal Handling? A. They would—they would of course be working around the Operators. They would be able to see what the Operator was doing. I think they would be able to observe what he was doing. Now, whether they know when he does it or why he does it, I don't know, but they could at least see his physical motions, yes.

Q. The opportunity would be extended for observation? Is that correct? A. Well, they are working around in Coal Handling, so to whatever extent they saw an Operator doing something, then, they would observe it, but there is no formal program [110] of the Laborers following an Operator around or anything of that kind.

Q. Now, let me ask you this. Would there be an opportunity for Laborers who are working with employees in the Maintenance Department to observe the jobs performed by personnel in that department? A. They don't normally work with Maintenance crews.

Q. Would they ever have the occasion to assist Maintenance Personnel? A. Well, tothe extent that I described this morning where you might be working on a turbine and you would need somebody to take a wire brush and brush

some threads out of the bolts or something of this kind, if you want to call that working with Maintenance people. They are on the same particular maintenance job, doing Laborer's work, but they don't work with the maintenance people, as such, no.

Q. Now, let me call your attention, back again, I should say, to Interrogatory #34, which lists—34A and B—which lists the overtime work by each employee since July 2nd, 1965? A. Yes, sir.

Q. I think you testified that you made an analysis of the percentage of overtime performed by persons in different departments? Is that correct? A. Yes, sir.

[111] Q. Did you make—in your analysis, did you make a determination of a total average of overtime work by white employees, as contrasted to the average—total average of overtime work by Negro employees? A. No, we did not, because we don't consider there's any difference. We don't make any distinction between our white and Negro employees. For instance, in the Coal Handling, we have got a Negro employee who is a Helper. He's a part of the Coal Handling Operation. We see no reason to pull him out of the Coal Handling Operation. He's a full part of it.

Q. So on the computation, of the overtime percentages, you included those Negro employees in Coal Handling in that computation? A. Let's not misunderstand. The only Negro employee in the Coal Handling Operating Department is the one who is classified as a Helper. The other—the other semi-skilled Laborers, who are in the general area of the Coal Handling Operation are in the general Labor force of the Plant, and they just clean up over there and occasionally drive a spike in the railroad or put some flash in bags or something of this kind, but they are not part of

the Coal Handling, if you will. They are not a part of the Coal Handling Department as such.

Q. Thank you. [112] A. You see what I mean? O. K.

Q. Did you finish your answer, because I was trying to clarify a point that I was a little confused on? A. Maybe I misunderstood you.

Q. Let me rephrase it, if you will, so we can understand each other. My question is that you did make an analysis of how much overtime was worked by employees in a certain department? Is that correct? A. Right.

Q. Now, my question is, realizing that you have some semi-skilled Laborers who work—when I say, in the Coal Department, I don't mean that they are employed in Coal. Of course, they do work in the physical location? Is that correct? A. (No answer.)

Q. Did you compute the overtime that they worked, into the percentage worked by employees in Coal Handling? A. No, we did not. They're in the Labor Group.

Q. Mr. Thies, do you know whether the Company has conducted validation studies for the Wonderlic Exam? A. For what purpose?

Q. For validation purposes? A. Validation of—for what?

Q. Let me pose this question. Do you know what validation is? [113] A. Yes, I do.

Q. Would you explain to us in the Court what validation means? A. Validation means, whether the tests as being applied yield valid results that it is designed to achieve. Now, I am asking you. I don't understand your question. You say, have they been validated, and I say, "Validated for what?" Employment, promotion, or what? I don't know what you mean.

Q. Let me say, have they been validated for promotion

purposes at Dan River? A. Tests are not required for promotion at Dan River.

Q. I'm not saying that they are required. I'm asking—you do have tests that you use at Dan River for promotion purposes? A. No. Not required for promotion purposes.

Q. I'm not saying that they are required. Let me see if I can get it this way, so maybe I can stop talking in circles. You indicated that if a person didn't have a High School education or equivalency, in order—and does not take advantage of the Company's Refund Tuition Program, that he could take both the Revised Beta and the Wonderlic? Is that correct? A. Yes, sir.

Q. Now, the purpose for which you give the Revised [114] Beta and the Wonderlic, is to determine his promotability? These are the factors— A. That's the Mechanical AA, I believe, isn't it?

Q. The Mechanical AA? A. And the Wonderlic.

Q. Yes. A. The purpose for this is that I have just said: All right, if you make the same score that anybody coming in the front door that asked for a job, makes, I will, so call, waive the High School education requirement, because this satisfies me, that you can do the job, that you have got enough basic intelligence level to do the job, and mechanical aptitude to do the job.

Q. My question now is, have the Wonderlic and Mechanical AA been validated for that purpose? A. There has been no attempt to make any validation of the use of these tests for this purpose. It's a good—in my opinion, it's a good bit lower requirement than a High School education, and I felt we were bending over backwards to accept this in lieu of the High School education, and no one has passed it, and there's been no opportunity to be any validation made of it because nobody has ever passed it and been pro-

moted into a job. I wish they had. I would be interested in this, but I don't think it's really pertinent, but maybe you do. I made no attempt to make any [115] validation because we haven't had anybody that's passed it and gone into a higher classification.

The Court: I believe you said you only had had three?

The Witness: Yes, sir.

* * * * *

[120b] * * *

Mr. Ferguson: The posture of this is now that the Plaintiffs' evidence, except its expert evidence, is in the record. The testimony of the expert is not. You realize as you indicated, that Mr. Thies testified out of turn?

The Court: Right.

Mr. Ferguson: Also, during the introduction of the Plaintiffs' Exhibits, His Honor allowed me to reserve the right to specifically object to answers to Interrogatories and depositions of the named Plaintiffs, as well as employees of the Defendant, Duke Power Company, and to put on evidence in connection therewith if I deem it necessary to amplify or explain away [121] inferences that might be drawn from that testimony. At this time, therefore, with respect to Exhibit 11, which is the Answer—the Answers to Interrogatories, and Exhibits 14 trohugh 32, which are the depositions of the named Plaintiffs, as well as the depositions of the Company employees, the Defendant objects to all questions posed by the Plaintiffs and moves to strike all answers in response thereto, as they relate to

any Pre-Statute activity, that is prior to July the 2nd, 1965, on the ground that it is irrelevant and immaterial, and the Act is prospective and not retroactive in application.

I believe, His Honor, with respect to Exhibit 12, which was the Revised Beta Examination, placed the burden on Counsel for the Defendant, to move to expunge from the record, Exhibit 12, which is the Revised Beta Examination. At this time, in view of the fact that there's an expert in the field of testing who is coming on to be heard, I don't wish to make that motion, because it may or may not be prejudicial to the Plaintiffs, and I am not asking His Honor to rule on that at this time.

Further, the Plaintiffs have failed to show that any Negro has sought and been denied employment at the Dan River Steam Station, solely because of his race or [122] color, and accordingly, the class represented by the Plaintiffs are those Negroes who are employed at the Dan River Steam Station as well as those who may subsequently be employed and not those who are seeking employment, because there is absolutely no representative of that class. They haven't shown that anybody had sought and been denied employment solely because of race or color. Now, based on this, we further object to all questions in Exhibit 11 and Exhibits 14 through 32 as they relate to hiring, recruiting, interviewing, and in other words, anything other than promotion, though we contend this is a promotion case and not a hiring case. The employment practices drawn into this controversy are promotion practices and not hiring practices, and we move to strike all an-

swers in response to questions that attempt to elicit that sort of information.

The Court: All right, now let me catch up with my ruling.

Mr. Ferguson: All right, sir.

The Court: Now, on that, I overrule your objection, and deny your motion to strike. Now, on your objection and motion to strike, relative to Exhibits 11 and Exhibits 14 through 32, I understand that objection to be, that as to those depositions [123] and the Answer to Interrogatories that really you are saying to the Court that the Court should only consider them as they relate to happenings since the effective date of the Act, and in that, I have previously ruled that it is my opinion that you are correct in that, and therefore, I will sustain your objection as to the consideration of those exhibits as they effect the period prior to the effective date of the Act, and allow the motion to strike. Now, you say on Exhibit 12, you are not making any motion at this time?

Mr. Ferguson: Not at this time, no, sir.

The Court: All right, do you have anything further?

Mr. Ferguson: Nothing except to advise the Court that at this time we don't intend to call any witness other than our expert witness. We don't intend to amplify or explain away any of the depositions or Answers to Interrogatories, and we are hopeful that we can conclude this matter today.

The Court: All right, Mr. Belton.

Mr. Belton: Your Honor, I don't want to go back and re-argue the point concerning evidence pertain-

ing to Pre-Statutory activity. I think in context of the ruling at the time, a witness for the Defendant was on the stand, and I am wondering, in light of the [124] preservation of Plaintiffs' exception with respect to the Judge's ruling, the testimony would extend to the ruling with respect to the depositions as just raised by Counsel for the Defendant, in terms of the Pre-Statutory activity?

The Court: I don't quite understand you, Mr. Belton. Of course, once you're protected on the record,—and I wanted to show, as I think we had before, that you object to that ruling, of the Court, and I note your exception now. Does that take care of that?

Mr. Belton: That's right.

The Court: All right. Now, Mr. Belton, you had brought up the question as to whether you could put in this evidence, so that if the Court is in error, it would be before the Court. Now, it is of course abundantly clear in the Interrogatories and in the depositions,—the evidence that you say that I should consider. Now, that would be before the Court on an Appeal. I am not ruling—if you want to put on some evidence about what happened before, I am not ruling you out. I say, I am not going to consider it in making up my decision, and the reason is—the effective date of this is July, '65; isn't that right?

Mr. Belton: That is correct, Your Honor.

[125] The Court: All right, the suit was brought in October of '66. Now, I can see if it was something that transpired in August of '65, that what went on before July of '65, could very well be pertinent, but

to hear over a year,—there's about sixteen months, you know, between the time this suit was filed and when this Act went into effect, and it just seems to me, improper that we go back beyond the date that this complaint really points to—that there would be ample time in sixteen months. I mean, whatever violations that transpired, that period would be sufficiently pointed out. Now, you go ahead, in the light of that ruling, why, you can fix the record as you see fit.

Mr. Belton: Thank you. Just one other point on this, Your Honor. I do recall at the time Mr. Thies was testifying, I called to the attention of the Court, a question which was propounded to Mr. Thies, during the deposition, concerning whether or not the Defendant had engaged in a practice of limiting the employment opportunities of Negroes prior to the effective date of the Act, and I think if I recall correctly, that an objection was interposed at the time, and the Court sustained the objection. Now, this is one question that we've been trying to get at, both in depositions and we had sought to get it through the testimony of [126] Mr. Thies, but we haven't thus far, from addressing ourselves to that particular question.

Mr. Ferguson: Plaintiffs' word opposed, Your Honor. He had a perfect right to ask them that. Aren't they competent to testify about the circumstances and conditions under which they were employed? It seems to me they are.

The Court: Did you take Mr. Thies' deposition?

Mr. Belton: We did take his deposition, Your Honor, and that precise question I raised, was ad-

dressed to Mr. Thies, and Counsel for the Defendant instructed the witness not to answer the question.

Mr. Ferguson: That is the reason, Your Honor, for my objection. It is so hard in taking depositions and answering Interrogatories to predicate every question on—prior to July 2nd, 1965, and you're going to find when you get into reading these things that it is just all mixed up. It is just senseless, I believe, to object every time to every Interrogatory when you have a stipulation, with respect to the depositions, rather, that every question is deemed objected to, and every motion or every answer is deemed to be susceptible to a motion to strike. It just seems senseless to do that every time, and that is the exact reason for my motion that the Court strike all answers with respect to hiring [127] and hiring practices. This is a promotion case. They don't have any representative. The answer to Interrogatory 14 clearly shows that there were no job openings, and this is our evidence. There was no job opening at the Dan River Steam Station since July the 2nd, 1965.

Mr. Ferguson: And they have not shown—

The Court: Is Mr. Thies here?

Mr. Ferguson: No, sir.

Mr. Belton: Your Honor, if I might just be heard on this question,—now, Counsel for the Defendant has raised a question in light of Judge Stanley's ruling as to the class action. Now, we are aware of that ruling, but our position is this as to the evidence, that evidence as to employment practices is relevant to the promotion practices, assuming that we are limited to this issue in the case. Now, bringing in

evidence as to the employment does not subvert in any way the ruling of Judge Stanley as to the designation of the class, and we are bringing this evidence in—well, our position is that the class should include it—well, apart from that issue, our position is, evidence related to the employment practices of the Company, inasmuch as we allege the policy and practice of discrimination would have some bearing independent of [128] the question of employment on the promotion practice of the Company, and I thought—

The Court: All right. Put your evidence on, and you all object to it and I'll rule on it.

Mr. Belton: Your Honor, in order to try to proceed with the matter, pursuant to the Court's Memorandum of Tuesday, when the Court was advised of the unavailability of the named expert witness that we did have, the Court, I think, indicated that the case would be continued to 9:30 this morning, and at this time, we could call here, the name of the person we indicated to the Court or in lieu thereof, a person to complete our case, and at this time, in conformance with the Court's ruling, we'd like to call Dr. Richard Barrett. Dr. Barrett is being used in place of our witness that could not be here this morning.

The Court: You all object to that?

Mr. Ferguson: Yes, we object to it. I just want the record to show, Your Honor, that we were advised of the change in the expert witness on Wednesday of this week. This morning, I am advised that Mr. Belton intends to put on a 100-page study or to offer into evidence, a 100-page study made by Dr. Barrett, as principal investigator for NYU, and I'm

not saying at this time that we can't proceed with the matter, but [129] I do want the Court to be aware that depending on what he says,—we will just have to see what he says before we can proceed with this case,—even the cross examination of it.

The Court: I recognize that this is entirely contrary to our rules, and that you are entitled to have the name of the witness and generally what he is going to say, unless there is surprise, and the rules say that where a witness cannot attend and there's some change, that you will be apprised of that immediately. Even so, let the witness be sworn, and I'll allow him to testify.

Whereupon, Richard S. Barrett was duly sworn, and testified as follows:

Direct Examination:

The Court: Before Mr. Barrett starts testifying, I want to state this is my view of what you say with reference to my ruling, on your question of Mr. Thies. Now, I have stated that I do not think what happened prior to July, '65, is competent. Therefore, any decision that I make will be done, absent of whatever might be in the record on that. Therefore, if the situation should be—the decision should result, and there should be an appeal, and my decision should be [130] adverse to you and the Circuit Court says I am wrong about that, they would have to send it back to be considered, you know, at that time, why, I take it that the case could be opened for whatever testimony that you desire to put on in that re-

spect, to make the record reflect whatever evidence you had, including that of Mr. Thies or other that you wish, because I would then in the event that it should develop, why, as I said, it would have to be sent back for consideration of that evidence. Therefore, I don't see how the failure to let him answer that and put it in the record, would be prejudicial.

Mr. Chambers: Your Honor?

The Court: Yes.

Mr. Chambers: Your Honor, would that then,—would the Court's ruling—would that satisfy the Plaintiffs' responsibility to proffer the evidence to show what the witness would have said, because there are, as I recall, in the depositions, several other questions of witnesses who are instructed by Counsel for the Defendant, not to answer that specific question or questions, related to pre-Act activities, in view of the Court's ruling now, that if this matter is appealed, and the Court decides that these are proper inquiries, we could then put that on, and that would [131] satisfy our obligation,—now, to show what the testimony would have been, so if it comes back, we could put this evidence on, if the Court decides that this is a matter that should have been inquired into.

The Court: Let me think about that. Go ahead with this witness. I don't take it. I realize that it's what the witness would say in a case that is objected to,—not the question itself and that in most instances, it would be to put the answer in so that it could be considered. Whether that is the situation here or not—let's go ahead with this witness.

Mr. Ferguson: Your Honor, let me just make one comment,—then I will sit down. It seems to me like that at this late date, they're asking to put on this evidence, and this matter is coming down to be heard on the merits. Now aren't they under some obligation to move the Court to make some sort of motion to compel answers to those Interrogatories before we got here? They put it into evidence with the full knowledge that they had been directed not to answer these questions. That's their case—the results of their discovery procedure.

The Court: I'm not proposing to open up all those Interrogatories and let them develop that question. That's not what's concerning me now—is the question [132] they asked Mr. Thies.

Mr. Ferguson: Which is the same question which is in the Interrogatory, so he said.

The Court: But nevertheless, he was on the stand.

Mr. Ferguson: Yes, sir.

The Court: And that question was asked, and you objected to it, and I ruled on it.

Mr. Ferguson: Yes, sir.

The Court: Is Mr. Thies available?

Mr. Ferguson: No, sir; I could get him here, maybe late this afternoon, but I can't promise it. I don't know what his schedule is, frankly, Your Honor. That's one reason we want to get him on, Tuesday, to let him complete some other commitments he had today. We will undertake to try, Your Honor, if you want to put him on.

The Court: How about sending someone out there, and let's get this record in shape. You don't want to string them out indefinitely, and if the matter goes

up, and the Circuit Court, you know, has a different view of it,—then we're back down here at the same old stand. New, let me say with you gentlemen, let's get this thing to a conclusion. You just want to ask Mr. Thies that question, and you want that to go into the record. I wouldn't open it up now for a full-scale [133] examination of Mr. Thies. You want to ask him the question about the policies before the effective date of the Act. Is that it?

Mr. Belton: That is it, Your Honor. I would not think that we would want to develop more than fifteen minutes along this line; that is, just posing the question itself, would open the inquiry not entirely, but at least to give the Court some feel for the position that we think—

The Court: See if you can't get Mr. Thies here. All right. Let's go. Wait just a minute.

Mr. Ferguson: Your Honor, he can go ahead. I can listen with one ear.

The Court: All right.

By Mr. Belton:

Q. Would you state your name, please? A. Richard S. Barrett.

Q. Would you state your present occupation? A. I am a Consultant with Case and Company, New York City.

Q. And would you describe for the Court what Case and Company does? A. Case and Company is a firm of Management Consultants in the fields of Psychology, Sociology, Engineering, Management, Finances, and so forth.

Q. Now, would you state, Dr. Barrett, your educational [134] background? A. I received a Bachelor of Science in Administrative Engineering at Cornell University, 1948;

a Master of Arts in Education from Syracuse University in 1951; a Dr. of Philosophy in Industrial Psychology from Western Reserve University in 1956.

Q. Would you describe for us—you said you did have a Ph.D. Is that correct? A. Right.

Q. Dr. Barrett, would you describe for us your work history? A. I started out in 1948 as an Industrial Engineer, for about a nine-month period and then decided to go back into the field of Psychology. I worked from 1951 to 1953 as a Professional Associate in Richardson, Bellows, Henry and Company, a firm of Psychological Consultants. I did some work as a graduate student from 1955 to 1958. I was the Vice-President of the Personnel Research and Development Corporation, a Psychological Consulting firm in Cleveland, Ohio, and my work included research contracts on selection with the Federal Government,—also on performance rating; from 1958 to 1965, I was Assistant and then Associate Professor of Management, Engineering and Psychology at New York University. During that time, I conducted some research in the area of Industrial Psychology, and I consulted on [135] selection problems with some Corporations in the New York City area, and in 1965, I moved to become Director of Materials Evaluation of Science Research Associates in Chicago. However, I retained a position with New York University as Research Associate Professor of Psychology, to be principle investigator of a study for the Ford Foundation, entitled "Differential Selection Among Applicants From Different Socioeconomic or Ethnic Backgrounds." That's it.

Q. Let me establish for the record, what is your profession? A. I am an Industrial Psychologist.

Q. And would you briefly describe for the Court what is involved in the profession of Industrial Psychology? A.

Industrial Psychology includes the aspects of human performance in business, industry, government, military services—the area that I specialize in has to do with the study of larger numbers of people, developing for example, Selection Programs, Rating Programs, Attitude Surveys, and other instruments that are designed to elicit information about the functioning of people in general. In addition, I have taken part in work where I am concerned with the individual,—perhaps interviewing one person or two persons and writing a report about their qualifications for a specific job or working with an individual who needs some counselling or training in order to improve his performance on [136] the job.

Q. Do you belong to any Professional Societies? A. I am a member of the American Psychological Association. I have been a member of a number of Regional Groups of Colonial Eastern Psychological Association, Midwestern Psychological Association, New York State Sociological Association of which I was member of the Board of Directors. I was also President of a local Psychological Association in New York City.

Q. Have you had the occasion to publish any works? A. Yes. I have—one of them of course, being a report of the study on "Differential Selection Among Applicants From Different Socioeconomic or Ethnic Backgrounds." I published an article in the Harvard Business Review on the election of minority groups. Prior to that, I had an article in the Harvard Business Review on testing in general, and a number of research publications in Industrial Psychology in general.

Q. Now, you listed one publication, I think, as the "Differential Selection Among Applicants From Different Socioeconomic or Ethnic Backgrounds"? A. Yes.

Q. Would you list just several others? A. Well, let's see,—"Exploration in Job Satisfaction and Performance Rating," "Performance Suitability in [137] Role Agreement," (r-o-l-e) as a theatrical role, "Job Satisfaction," "Job Performance," and "Situational Characteristics," "Comparison Programs and Conventional Instruction Methods," and so on.

Q. In your profession as an Industrial Psychologist, Dr. Barrett, have you had the occasion to consider the Wonderlic Examination? A. Yes, I have.

Q. Have you had the occasion to consider the Mechanical "A" Examination? A. Yes.

Q. Have you had the occasion to consider the Revised Beta? A. Yes, to a lesser extent.

Q. Now, when I say "Consider," would this be—would this fall within your area of specialization? A. Yes.

Mr. Belton: Your Honor, I offer Dr. Barrett as an expert witness on Tests and Measurements.

The Court: On what?

Mr. Belton: On Tests and Measurements.

The Court: Now, would you tell me what that is? He says he is an Industrial Psychologist. I've got to qualify him as an expert or I understand that I should, by Tests and Measurements, now—

[138] Mr. Belton: Might I address the question to Dr. Barrett, so that he can explain it to the Court, because it is technical?

Dr. Barrett, would you explain that to the Court?

The Witness: I think it's most appropriate to say that in this context, that I desire to be qualified as an expert in the use of Tests and other Selection Procedures for Employment or for Promotion and Upgrading.

Mr. Ferguson: I wonder if I could get that repeated?

The Witness: As an expert in the use of Tests and other Selection Procedures for Selection and Promotion in Employment.

The Court: I am proposing—

Mr. Ferguson: I'd like to take him on Voir Dire for just a couple of questions, if I may?

The Court: I think you have a right to question him before I make any entry.

Voir Dire

By Mr. Ferguson:

Q. Mr. Barrett, I understood from your examination so far, that you are Consultant with Case and Company in New York? A. That's right.

Q. I noticed that when you mentioned the areas in which that firm consult, there was no mention of testing? [139] Is that true? A. Well, when I talked about the hetero-sciences in general, testing was included. I didn't mention it specifically, but that's one thing.

Q. All right, sir. Have you ever been employed in industry? A. As an employee,—not in Industrial Psychology, no.

Q. You've been an Industrial Engineer, but you've never been employed in industry as an Industrial Psychologist, —is that correct? A. That's right, except as a Consultant.

Q. Do you characterize yourself as an Educational Psychologist? A. I have, in the last two years, worked in the field of Education. My primary experience has been in Industrial Psychology.

Q. But you have never been employed as an Industrial Psychologist in industry? A. No, the work of Science asso-

ciates—there's a little bit of work to do with Industrial Psychology, but not enough to, I think, be qualified.

Q. I believe you mentioned that you have considered the Wonderlic and the Bennett Mechanical "AA" Test, and you mentioned further that that falls within your area of study? A. Yes.

[140] Q. What do you mean by that? A. I mean that the—I mean that these are tests that rather routinely come up in studying jobs. In my doctoral dissertation, for example, the Wonderlic Test had been used as one of the tests on which reports were based regarding selection, and in looking at any kind of selection procedure, you look at a number of instruments and decide which one is most appropriate. On occasion, I would look at the Wonderlic or at the Bennett "AA."

> Mr. Ferguson: No further questions, Your Honor.
>
> The Court: All right, let the record show that the Court finds this witness an expert in the use of Tests and other Selection Procedures for selection in Promotion in Employment, and that the Defendant objects and ~~accepts~~ excepts to this ruling by the Court. All right.

Re-Direct Examination by Mr. Belton:

Q. Dr. Barrett, have you had the occasion to assist in determining in the selection of personnel for jobs? A. Yes, I have.

Q. Would you describe to the Court, Dr. Barrett, what you consider those criteria—you would consider in making a determination as to the selection process? A. The earliest step and one that continues throughout such a study, is to find out what the job requires. [141] It is

typically done by interviewing incumbents on the job,—supervisors of incumbents on the job, or someone who for some reason may be expert in what the jobs require. It is determined what is done. Simultaneously, it is also determined what sorts of skills are required,—whether the job requires a given level of command of English, manual dexterity, numerical calculation, judgment, ability to lead people or whatever it may be. Once it's understood what the job requires, the next step is to look around among the existing selection procedures to find whatever ones are available that might be used to determine whether someone has these requirements or not, and on occasion, to develop procedures for this purpose, if none that are satisfactory exist. Once you are satisfied that you have procedures which fit the situation, as well as they can, from your basis of the knowledge of the situation and the knowledge of the instruments, the next step in the procedure, is to try them out, and the trial may take several steps. The first step and the simplest one, is simply to administer the test to a number of people who are like the ones that are going to be selected or promoted. The purpose of doing this is to find out how hard the test is for this particular group. The reason for doing that, is that it has been shown over and over again, that even though a job may look the same, the kinds of applicants who appear will depend upon the recruiting [142] procedures, the labor pool at that time, geopraphical location, the level of education, and so forth. So, it's possible to make an educated guess as to whether the tests will be hard or easy, or appropriate or inappropriate. It is always sound procedure to try it out and see. If, in fact, people can take the test satisfactorily, then the next procedure is to validate the test—that is, to try it out on

people who are applicants or candidates for promotion, and to compare the test scores with their performance. Now, there are a number of ways of doing this, and I don't want to go into too much detail. One procedure is to take people who are new on the job, give them the test, develop some measure of their performance and compare the two. Another procedure is to give the test to a number of applicants, to accept them on the precision—perhaps not even using the test scores at this time in seeing how they work out on the job. There are a number of considerations in determining what is the standard performance that these people have achieved. One is whether a person has performed satisfactorily on the job for which he was employed. Another, is whether he performed satisfactorily over a period of time and progresses at a rate which is deemed satisfactory. Another possibility is simply to develop tests, the idea being to select those people who would stay on the job long enough so that the Company recoup its cost in putting them [143] on the job and training them, and so forth.

Q. Returning, if you will, to a consideration of job evaluation, would it be necessary to seek professional assistance in determining the job analysis? A. I think it is harder to find,—what professional assistance do you mean, —Industrial Psychologist as such, or some kind of professional person?

Q. Let me re-phrase the question. In trying to define the job description, what steps might be taken, if you would, in making this determination? A. Well, primarily, the best way to do it, are to 1. Get information directly, by interviewing people who are on the job, and to further interview supervisors of these people on the job so that you can arrive at some agreement between the supervisors

and the incumbents as to what the job consists of. It is often important, if you have an important job, to interview everybody on the job, and everybody who supervises the job. In some cases, if there are a lot of people on a very similar job, it is appropriate to interview a sample of each. 2. Another technique is to observe the individuals on the job, and observation really doesn't mean too much unless the person already has some idea of what the job consists of, because you really don't know very often, when a person does something with his hands or makes some decision, how complicated it is without knowing [144] the background. So that is useful, but not as useful as the interviewing. It is also feasible, in many cases, to talk to someone that already knows the jobs intimately. For example, in my case, I have learned about jobs by talking to other Industrial Psychologists and employment people who have been working with these jobs and with these people for a long time, and this way, just getting information which is required, on the job.

Q. Would it be necessary in determining the job descriptions to reduce the job analysis description to writing? A. I think it's a good practice, and it makes a useful record. I don't think it necessarily improves the quality of the work? It is not essential, no.

Q. Now, I think you spoke of a validation? A. Yes.

Q. I think at the time, you also attempted to define it for us? A. Yes.

Q. Would you in layman's terms, Dr. Barrett— A. O. K.

Q. Try to give the Court some appreciation of the term —by what is meant by validation? A. All right. Validation—a test of others' selection procedure is valid to the extent to which people who score high, perform well, and

people who score low, perform [145] poorly. The validation is typically expressed in terms of a validity coefficient, which is a correlation coefficient, which compares in a systematic and mathematically sensible way, the predictor's scores—the interviews, the test scores or whatever the particular may be, with the scores that have been derived on the performance of the individual through performance rating,—through his progression through job categories, through the kind of raises he's gotten, and so forth; and there is a number of complexities—I don't know how far you want me to go into this—one of them is that you have to decide early in the game what it is you want to predict and why. For example, on a job that requires very little training, it may be desirable to get people who are going to do well on the job fairly fast. You don't care how long they stay. Another circumstance of the training is that it is expensive, and errors made in the training process are expensive. Maybe the appropriate criterion that you are trying to predict is how long a person stays on the job, and in many situations where a Company looks towards career employees, it is appropriate to use as a standard, how well they have progressed, and this requires considerable thought, because very likely, the test that predicts one will not predict the other.

Q. Let me show you, Dr. Barrett, Plaintiffs' Exhibit #11, which is the answers to Interrogatories. [146] A. O. K.

Q. I direct your attention to Question #22,—or answer to Question #22. A. O. K.

Q. For the record, Dr. Barrett, would you read what that record is, and for the benefit of the Court? A. You want the whole question?

Q. The answer. A. "In the Company's Steam Production Department, an employee must have a High School

education or a certificate of completion of general education development, (GED) test, High School level, to be eligible for consideration for promotion from Watchman in Coal Handling Operator Classifications to other departments within the Station, and from the Laborer Classification to other departments within the Station. This requirement has been in existence for at least the past ten years. In order to give its employees in Coal Handling, Watchman, and Laborer Classifications without High School educations an opportunity to be considered for promotion to the higher-paying classifications, the Company provided that in lieu of the High School education, any person on its pay roll prior to September 1, 1965, who could pass the regular employment test, would be considered as having met the High School education requirement. This testing policy was designed to include, rather than exclude, [147] those employees without a High School education, who were employed prior to September, 1965, for consideration for promotion. In addition, employees without a High School education who did not desire to qualify for consideration for promotion through the testing procedure, were advised that they could take advantage of the Company's Tuition Refund Program in order to obtain a High School education. Thus, employees in the Coal Handling, Labor, or Watchman Classifications have three standardized non-discriminatory alternatives by which they can qualify for consideration for promotion. Neither alternative automatically qualifies an employee for promotion. In view of the foregoing explanation, Defendant is of the opinion that the tests are not per se a condition for promotion."—Do you want me to go on?

Q. No, we need not. Again, directing your attention to Plaintiffs' Exhibit #11, and specifically the answer given

to Question #12, which is a relatively short answer, would you read that, Dr. Barrett? A. "12A: Job descriptions or summaries of duties required of each, were not previously reduced to writing, and are not in Company records, but such descriptions are reduced to writing solely for the purpose of answering this Interrogatory, (see attachments.")—Shall I read B?

Q. No. A. O. K.

[148] Q. Assuming, Dr. Barrett, that tests were used on August 1st or instituted on August 1st, 1965, and assuming further that no job descriptions were available prior to that time, would you have an opinion as to whether this procedure would comport with that aspect of job evaluation which you indicated was a step in determining what criterion one would use for personnel's selection?

Mr. Ferguson: Objection.

The Court: Overruled.

The Witness: Provided that the information is not elsewhere available, I would say this is not good practice.

By Mr. Belton:

Q. Let me again refer you to Plaintiffs' Exhibit #11, and specifically to Question #22, which includes a copy of the Wonderlic and the Mechanical "AA." Do you have that? A. I don't have the test here,—or do I?

Q. I will give you this copy then. A. O. K.

Q. And at the same time, Dr. Barrett, referring you back again to Answer #22, given in the same Exhibit, in which is indicated that the cut-off score for the Wonderlic Examination as used at Duke Power, is 20, would you explain to the Court what that cut-off score means, and

to assist you, let me show you the Manuals, both for the Wonderlic and [149] the Mechanical "AA," which have already been introduced into evidence. A. Well, the score by the "20" on the Wonderlic, is one that is typically achieved among High School graduates, according to one norm table, by—let's see, now, where is it—and there are a number of norm tables. This is a problem.

Q. Isn't that the answer to the question? A. Pardon? The answer is, of High School students' four years of training, about 42.8 per cent, will achieve 20 correct answers,—somewhat less than half. So, what else do you want?

Q. Now, let me put this question—and again, referring to Answer #12, in which it is indicated that there is a cut-off score, under some circumstances, of 39, for mechanical comprehension. Would you explain to the Court what that means? A. Well, a score of 39, according to the norm tables provided by the publisher, can be achieved by 65 per cent of applicants. For Mechanic's Helper, 55 per cent of the people who are applying for unskilled jobs; 45 per cent of the people who are candidates for lead-men jobs, and so forth,—it's about that level of difficulty.

Q. About 55 per cent? A. Well, yes,—depending upon the norm groups— [150] around 55 or 60 per cent.

Q. Would you describe to the Court, Dr. Barrett, what procedure is used in the field of testing measurements to determine what a Company will select as a cut-off score in the administration of tests?

Mr. Ferguson Objection.

The Court: Overruled.

The Witness: The typical procedure involves, 1. A study of the labor market, to have some general

feel for the kind of people that can be expected to apply. Also, to note that the labor market changes, and that what changes in the labor market cut-off scores may necessarily change. Then, on the basis of trying the test out, if this is possible, to establish a cut-off score which will pass a sufficiently large pool of people, so that they can select enough people to keep their operation functional, and it is a matter of judgment and level of job and so forth, whether they are going to, from a given labor pool, want to get 50 per cent, 60 per cent, 30 per cent, or whatever—past this particular phase of the employment, so they can be considered on other bases as to whether they would be accepted. Now, the essential part of it however, is that these must be evaluated in terms of actual experience, with the tests, because this judgment is an [151] educated guess and it might be quite accurate and it may be inaccurate, and it is important to try it out and see how people actually perform.

By Mr. Belton:

Q. Now with respect to validation, Dr. Barrett, would you have an opinion as to whether validation of a test is an essential part in determining whether to use that particular test or not? A. Validation is something that I have always maintained is something that should be done where possible, and the "where possible" is the qualification that makes it difficult. It is not possible to validate a test unless there are enough people on similar jobs so that you can get some stability in your results. One swallow does not make a summer. You cannot determine whether a test works or not because of a predicted success on one

or two people. There is no stated number that you have to have, but the more people you have, the more sure you are of your results, but if you don't have enough people, you simply can't do it.

Q. Assuming, Dr. Barrett, that an employer wanted to use the Wonderlic examination, in that that employer had less than 100 employees,—would you expect, or would you have an opinion as to whether a validation study should be conducted by that employer? A. I think I have to ask you to re-phrase the question because it really depends on how many people are on [152] jobs that are sufficiently similar, so that you can consider them as one group. It could be a manufacturer's representative organization with nothing but salesmen working for it, doing the same thing, or you could conceivably have 50 different jobs, and no more than 3 or 4 people on any one, so what is essential is the number of people on a job.

Q. Let me again refer you, Dr. Barrett, to Plaintiffs' Exhibit #11, Question #30—the answer to #30 which consists of the seniority at Duke Power for the years 1967, '66 and '65. A. O. K.

Q. Referring simply to the seniority list for 1967, and looking at the category of Control Operators, assuming that you had no more than that number of employees which consists of twelve employees— A. Yeah.

Q. And you wanted to use a test instrument for whatever skills are involved, would you expect a validation study to be conducted with respect to that category? A. I would think in the ordinary circumstances, on close examination you would find out that it wasn't going to be enough. For one thing, you are likely to have in this group, people of varying ages, and length of experience. The tests have different meanings for people of different ages,

and that would be a very small number to use. What [153] you would probably find, on the basis of your study is that the tests don't work, when in fact, they may work, and they would prove it if you'd use a lot more cases.

Q. Again, referring to that list, Dr. Barrett in the category of the job description called, Coal Handling Operators,—assuming that you had no more than 10 employees in that category and you wanted to use a test instrument for the selection of employees for this category, would you expect a validation study to be conducted? A. Not counting the Learner, there's, let's see—1, 2—

Q. Well, counting the Learner— A. Well, there's 10 people altogether. I would say, that's not enough.

Q. Now, let me direct your attention, Dr. Barrett, if you would, to answer to Interrogatory #8, which is part of Exhibit #11. Assuming, Dr. Barrett, that in the total operation of a Company, that the total number of employees consisted of approximately 7,000 employees, and further assuming that of this number, approximately 1,000 were in the category of Coal Handlers;—would you expect a validation study to be conducted? A. I would expect—

Mr. Ferguson: Just a minute, please, sir. I don't see what reference this has at all. Maybe I just don't [154] understand the question.

The Court: Overruled.

The Witness: Well, the point is that looking at these raw figures and not knowing the detail about the nature of the Plants and the labor force, and so forth, there is an excellent opportunity to conduct a meaningful validation study and that it would be good business practice to do so.

The Court: Mr. Belton, I hope you won't get

too far afield in this examination. Some of these questions—you know, are a little bit foreign.

Mr. Belton: As I explained to the Court, Your Honor, I think it's necessary for the edification of Counsel and the Court, since we are under Title 7, that it is a major issue, and the question of validation does play a role in it. We designed these questions to try to give some light on just what the whole concept is.

The Court: I understand your contention.

Mr. Belton: —Assuming, Dr. Barrett, my last question, that a Company had a total enrollment of 7,000—approximately 7,000 employees, and of this 7,000, approximately 1,000 were in the category of Control Operator. Would you expect a Company to conduct a validation study?

Mr. Ferguson: Objection. There's no—objection. [155] There's no evidence that there are a 1,000 Control Operators in this case.

Mr. Belton: If I might be heard, Your Honor, an answer to Question #8, the Company did indicate the total enrollment of its entire system. We realize that the particular facility involved is the Dan River Steam Station, which has less than 100 employees, and what we are trying to show the Court is that the system could admit validation studies, and the institution of the tests which we are challenging.

Mr. Ferguson: My point is just this, Your Honor, he's assuming all sorts of facts that are not in evidence—these hypothetical questions.

The Court: You state your objection each time. Overruled. I think he, in a measure—that they are

correct; that your question assumes much. Overruled,—proceed.

The Witness: Let me answer. I would say that it is good practice. There are people who do not engage in good practice. I cannot say what I would expect. I think that is what should be done from a number of points of view. One of them is sheer economics. Probably they can make money or save money by doing a better job of selection, if they have that many people in one category.

[156] Mr. Belton: At this time, Your Honor, we would like to introduce into evidence—have identified and introduce into evidence, Plaintiffs' Exhibit #33, which is the Guideline of Employment Test Procedures by the—issued by the Equal Employment Opportunity Commission.

Mr. Ferguson: I have objection to that, Your Honor. I'd like to be heard on that.

The Court: All right.

Mr. Ferguson: May I be heard on it?

The Court: Yes.

Mr. Ferguson: Your Honor, this Guidelines on Employment Testing Procedures, issued by the Equal Employment Opportunity Commission, contains as a portion of it, a report by a panel of psychologists, none of whom has been cross examined in this matter. The qualifications aren't stated. It is replete with hearsay and opinion evidence. It is not competent. That is the report on the last pages—5, 6, 7, and 8. Now with respect to the Guidelines which are Pages 2, 3, and 4, I would have this to say—the test procedure that is becoming the controversy in this case, was insti-

tuted sometime in September of 1965. These Guidelines were published August the 24th, 1966. The complaint was filed October the 20th, 1966. Now in [157] view of all that, I don't see how this has any relevance to our intention of discriminating, if that is so, which we deny,—how this has any relevance on that issue whatsoever. When we adopted this test procedure, this document wasn't even a wink in the eye of the Chairman of the EEOC.

The Court: I would think you would be right, ordinarily, Mr. Ferguson, but I continue to be astonished at the rulings about matters of this type. It is contrary to my understanding of the rules of evidence, but I frankly do not understand why it would be competent either, but I should imagine that there has been established something, about the introduction of this.

Mr. Belton: If the Court pleases, Title 7 sets up the Equal Employment Opportunity Commission, which has the initial responsibility for determining whether an employee is engaged in an act prohibited by that Statute. Included in the Statute is a provision that it is not unlawful for an employee to act on a professionally developed test. The agency which has been given the responsibility for administering the Statute in response to questions addressed by a number of employees, has attempted to set up guidelines on testing, to guide employers in the use of tests as a selection [158] process. Again, I might say that Counsel for the Company argues that the guidelines were issued after the Company instituted its battery of tests, but in the same sense where the Legislature said you may, in

private discrimination and in private industry, discriminate up to 1965, you can no longer do it; so to the extent that these guidelines have a bearing on the practice of the Company in making a determination as to whether they are acceptable or not acceptable, the fact that they were published after the Company instituted this practice, is not controlling.

The Court: Have you marked it? Is it marked?

Clerk Vaughn: It's Exhibit 33.

The Court: Let the record show that the Court receives into the evidence, Plaintiffs' Exhibit 33, and that the Defendant objects and accepts to the Court's ruling.

(Plaintiffs' Exhibit #33, was identified and received into evidence.)

By Mr. Belton:

Q. Dr. Barrett, I show you Plaintiffs' Exhibit #33, and ask you if you are familiar with that document? A. Yes, I am.

Q. Directing your attention to Page 2 of that Exhibit, Paragraph 1, in which the statement concerning—well, the [159] first Paragraph, if you would. I would also like to ask you, Dr. Barrett, are you familiar or have you read Title 7 of the Civil Rights Act of '64 concerning employment? A. Yes.

Q. Are you familiar with the use of the word, "Professionally Developed Test" as used in that Statute? A. I couldn't pass the test on it.

Q. You could not pass the test on it? A. I don't remember exactly how it was used.

Q. My question is, Dr. Barrett, would there be anything in the field of tests and measurements which would be comparable to—let me re-phrase the question. Would the standards used in the field of test and measurement and the use and selection and selection and use of tests be comparable to a professionally developed test?

The Court: He said he did not know how that was used, Mr. Belton. Wait just a minute now. He said he didn't know about it, and now, we're going to develop that?

Mr. Belton: Your Honor, I thought he said he couldn't recall it from the Statute itself, but he was familiar with the document that he does have in which the same language is used.

The Court: Sustained.

By Mr. Belton:

Q. I have several more questions, [160] Dr. Barrett. In considering the process of validation of any test used in the selection of personnel, would you have an opinion as to whether the race of the testee should be considered? A. Would you state that again, please?

Q. I'm saying, in the validation process, or the selection process of a test, would you have an opinion as to whether the race of the testees should be considered? A. Speaking solely from the point of view of—solely from the professionally scientific aspects of the question, I believe that our study—the Ford Foundation study referred to before and other studies, indicate that test scores achieved by people of widely different socio and ethnic backgrounds do not predict in the same way for members of these

different groups, and that therefore, in order to develop a procedure which will assist in selecting qualified and satisfactory employees, it is desirable to consider major sub-groups independently, where it is possible to do so.

Mr. Belton: Your Honor, we would like to introduce at this time, Plaintiffs' Exhibit #34, which is a Differential Selection among applicants from different socioeconomic backgrounds, in which Dr. Barrett was a principal investigator for the study. Now, we did not list this document on the Final Pre-Trial Order because at the time, we were not aware of its existence, [161] and with that, we would like to introduce it as Plaintiffs' Exhibit #34, which bears on the question to which Dr. Barrett just addressed himself.

Mr. Ferguson: May it please the Court, we of course, object to the introduction of that on the ground that Mr. Belton has already stated, on the further ground that there has been no establishment that Dr. Barrett has his working papers with him—the basis of whether the sampling was done statistically or random sample. We just all of a sudden have this record burdened with a 100-page document which entitled, at least to be a sociological treatise, and it doesn't have any bearing on the issue in this case, in my opinion, as to the professional test. I think it is irrelevant and immaterial.

The Court: Are you people really insisting that this document is competent evidence in this situation, and do you genuinely and sincerely think that that is competent for a Court to consider, the way this is? Now, you are a lawyer. Now, tell me.

Mr. Belton: Yes, Your Honor. A short answer—

The Court: Tell me just why.

Mr. Belton: Because, Your Honor, I think—

The Court: There's been no foundation for it. You just bring it in here and say, "Here it is," now.

[162] Mr. Belton: That I can do, Your Honor. I can lay the foundation for it, and then, I can go on and address myself to your question.

The Court: To say nothing about a strict violation of the rule, that they haven't had an opportunity to see it, and of course, you would have a right to be up in arms, if they arrived here with a document for you, this morning, the first time—of how many pages?—to look through, and I frankly doubt that just on that basis alone, you know,— how can they cross examine him about it? Here, they are faced with it at whatever time that it was given this morning, and here in a short while, I expect to turn Dr. Barrett over to them for cross examination about what, about that document? They haven't had an opportunity to see it.

Mr. Belton: First of all, Your Honor, I would like to put it in and then address myself to the question. I would like to have it identified as Plaintiffs' Exhibit #34.

Mr. Ferguson: Now, one minute, if you please, Your Honor. Of course, Your Honor is going to rule on the admissibility of this evidence, but I might comment that at this point, that he is not qualified. You can accept him as an expert in the field of Tests and Measurements of something like that, and he can give his [163] opinion on these matters.

He can give his opinion as to the results of his study, but we still rather strenuously object to it. As a matter of fact, after we learned that Dr. Barrett was coming, I have one page, myself—just one short page that I want to introduce into evidence that they haven't seen yet, but it's nothing crucial, and it doesn't involve a 100 pages, like this thing does.

The Court: Well, Gentlemen, you mark it. I'm not going to allow that introduced, but mark it, so that you will be protected.

(Plaintiffs' Exhibit #34 was marked for identification.)

Mr. Chambers: May I make one comment, Your Honor.

The Court: Yes.

Mr. Chambers: We would concur with the Court that this matter was just brought to the attention of Counsel for the Defendant, and in all fairness to them and in terms of their cross examination, the matter might have been listed in the Final Pre-Trial Conference report or Order. However, the Court does permit one of Counsel to bring in an additional exhibit, if it comes to the attention of Counsel, subsequent to the Final Pre-Trial Conference. It is my understanding that this matter was brought to our attention on [164] Wednesday of this week, after the Court directed that we be here with the witness, if we wanted to present one on Friday, and at that time, we were unable to get it to Mr. Ferguson before this morning. However, I can also appreciate the Court's question of the

admissibility of this document on the other basis, but I would submit that it could be submitted as corroborative evidence, if for no other purpose.

The Court: Mr. Chambers, now in effect—you've got to remember that the shoe is on this foot now, but it could be running the other way, and to allow that—a 100-page document at this juncture, in effect, whomever it is admitted against is denied cross examination—

Mr. Chambers: That's correct, Your Honor, we would not be offering it then as direct evidence upon which the Court would draw, to form the opinion that the Court might render, but solely as corroborative evidence to what the witness might testify.

The Court: To the extent that it does corroborate?

Mr. Chambers: To the extent that it does corroborate, and on that basis, we submit that it would be—

The Court: Is this the report that you assisted in making? Is that right?

The Witness: The study was conducted under my [165] direction as principal investigator and the actual writing was done by other members of the staff. However, I went over the report, made changes and recommendations for corrections before it was put in this form.

The Court: All right. Mark it, "Plaintiffs' Exhibit #34" and the Court receives it into the evidence for consideration, only to the extent that it corroborates the testimony of Mr. Barrett, and for none other. The Defendant objects to this rule by the Court, and excepts. All right.

(Plaintiffs' Exhibit #34 was received into evidence.)

How about Mr. Thies? Have you been able to get him?

Mr. Ferguson: I was just conferring with Mr. Ward.

Mr. Ward: If Your Honor, please, he had a meeting of District Superintendents, and so forth—he had his day filled up. I told him—I took the liberty of telling him to finish his meeting of District Superintendents—to call me, so we'd know when he'd be here, and he expected to finish by 11:30. I hope I didn't say the wrong thing, but I thought that these experts would be here for some little time.

The Court: I hope that we can get him the first [166] thing in the afternoon.

Mr. Ward: He said he'd do it by 2:00 or 3:00 o'clock.

The Court: All right.

By Mr. Belton:

Q. Just one or two more questions. I now show you, Dr. Barrett, Plaintiffs' Exhibit #34. I ask you if you have seen a copy of that document before? A. I have.

Q. Did you assist in the preparation of the document? A. Yes, I did.

Q. Would you explain to the Court, Dr. Barrett, how this report came about? A. The Ford Foundation, responding to a proposal that I made when I was on the Faculty at NYU, gave a grant to NYU to conduct a study on the differential effects of selection procedures, depending on the minority groups that are involved. There had, at that time, been one previous study of which we were aware, in which it was found that tests from poll booth

collectors would predict success among negroes and not among whites, and in other tests, might predict among whites and not among negroes. This was a small study, and it included a course on the one-job category in the universe of all the job categories in the country so our proposal really was to extend this as far as we could and so, we went to organizations that met some standards [167] that we had set up. One was, that they had available preemployment test results in their files on people who are now in their employ; Two, that they had or could get some criterion measures—some performance standard measure on these people; and Three, that there were enough people of at least two ethnic groups to make it possible to compare the performance on the test and the performance on the job or each group independently and see if the test worked the same for both groups.

Q. Did you participate in their preparation of that? A. I developed the proposal, and I helped develop the specific research design which was then carried out, primarily by Dr. Kirkpatrick and some graduate assistants.

Q. Would you briefly explain the methodology for compiling the report? A. Well, we went to the cooperating organizations. We identified the people and the job category by race. We obtained description of the kind of work that was done, the kind of work, the performance standards that were expected. We then collected test results, and we collected, of course, the performance results, and we analyzed thes satistically for the separate groups to see how the test functioned.

Q. Now, did you participate in the writing of the report? [168] A. The drafts of the report were written by Drs. Kirkpatrick and Ewen, and I edited these comments sometimes, and sometimes in a small extent and sometimes fairly extensive but I passed over everything.

Q. Did other persons assist you in making this report? A. Yes, Professor Katzell.

Q. Would you identify him? A. He's the head of the New York University Department of Psychology—also took an active part in the design and conduct of the study, and he read all these reports, and depending upon the circumstances, the representatives of the cooperating organizations read and made comments on the reports.

Q. Were there other persons besides Dr. Kirkpatrick who participated in its preparation? A. Dr. Ewen,—I believe that's E-w-e-n,—and they don't know the extent to which the graduate assistants,—Mr. Greenhaus, Mr. Gavin, and Mr. Cohen, who participated in the actual writing.

The Court: Anything further of this question?

Mr. Belton: Just one or two more questions, Your Honor. I should be through in about five minutes.

The Court: All right. All right.

By Mr. Belton:

Q. Dr. Barrett, would you state why the report was undertaken? [169] A. Simply concerned with this as a social issue and also as a scientific issue.

Q. Now, let me put the question once again. In the consideration of the validation of tests, do you have an opinion as to whether race played a part in the validation?

Mr. Ferguson: Objection.

The Court: Hasn't he answered that before?

The Witness: Yes.

Mr. Ferguson: Yes.

The Court: His answer was, "Yes."

The Witness: That's right, yes.

The Court: All right.

Mr. Belton: No further questions.

The Court: All right, you may come down, Dr. Barrett, for a moment.

(Witness excused.)

You might want to take your documents with you. We will take an undeclared recess for a short time.

(Undeclared recess was taken.)

The Court: All right, Dr. Barrett is with the Defendant for cross examination.

Cross Examination by Mr. Ferguson:

Q. Dr. Barrett, this study that was introduced and received into evidence as Plaintiffs' Exhibit #34—as far as it's concerned, you don't know whether Duke [170] Power Company gave any consideration to different Socioeconomic or Ethic backgrounds as far as these tests were in use or concerned, do you? A. I don't know.

Q. As far as Duke Power was concerned, your study really has no relevance whatsoever to the tests and use at Duke, do they?—As far as Duke Power Company is concerned? A. Well as far as what I know about Duke Power Company is concerned, I would agree.

Q. It's true, is it not, Dr. Barrett, that you get as many differing variations with respect to—within groups, such as a group of white employees, as you would in a group of negro employees, or minority employees, do you not? A. I don't know what you mean by "differing variation."

Q. I mean, supposing you were examining a group of white employees. Differences within that group can be very big too, can't they? A. Yes. You mean, differences in their abilities? Is that what you're talking about?

Q. Yes. A. Yes.

Q. I believe, Dr. Barrett, you stated that validation was essential where it was possible? Is that right or best? A. "Essential" is a very strong word to use. I think that organizations can and will function without validation [171] where it is possible to have true validation.

Q. I believe you wrote an article in this last Harvard Business Review, did you not, Dr. Barrett? A. I did.

Q. January-February, 1968 issue? A. Yes.

Q. I'll ask you if in that you didn't state that tests for probably one job out of twenty can be adequately validated? A. One job out of twenty adequately validated for two different Ethnic groups, that I'm talking about. If you are not concerned with that, there are many more circumstances where you can do it, yes.

Q. All right, sir, I'll ask you if you didn't make this statement in the article? 'While testing the ability, the tests present employees with difficult problems. Their importance in Fair Employment perhaps has been overrated." Didn't you make that statement? A. Yes.

Q. Didn't you go further and say, "There are many easier ways to discriminate, if the employer is so inclined"? A. Yes.

Q. Didn't you indicate in this article that this business of testing presents a particularly tough problem? A. Yes, it does.

[172] Q. And as a matter of fact, the title of your article is "Gray Areas In Black and White Testing," is it not? A. Yes,—yes it is.

Q. And I believe you made this statement, did you not, —"It is often assumed if Negro applicants score lower than whites, the test may be unfair, but this is not necessarily the case. If the low-scoring Negroes are also ineffective

workers because of poor education or the debilitating effects of discrimination,—it is not the tests that are unfair. It is the society"? A. Yes.

Q. That "the test merely reflects society's unfairness"? A. That's right.

Q. Now, I believe, Dr. Barrett, you stated on your Direct Examination that validation was a matter of judgment and that the procedure to be used, or used to determine what a Company would do to select a test, would include a study of the labor market, to have some feel as to the type of people that will apply for jobs, and so forth? A. Yes.

Q. You stated, did you not, that this job evaluation should be done in terms, or this test evaluation should be done, in terms of skills on the job? A. Yes.

Q. The skills required by the job? [173] A. Yes.

Q. You're not telling this Court, are you, Dr. Barrett, that that's the only way to validate a test, are you? A. What's the only way to validate a test?

Q. By job related-ness? A. No, I went through a series of steps in which this is important, and how it is possible to ask people questions which on the surface, may seem nonsensical and have it turn out that they are valid predictors. This can happen—it's a reflection of a lack of thorough knowledge of human performance.

Q. And there are other types of validation, are there not? There is content validity and there is criterion and concurrent validity, is there not? A. Well, the terms are —that I think that you are getting close to is "Predictive ability."

Q. And "concurrent"? A. And "concurrent." These are the same sort of thing except for the time, plus "content validity." These are easily recognized terms, yes.

Q. Well, sir, a test, I suppose, you would say, should

have two qualities: one would be reliability and the other one would be validity? A. Yes.

Q. Reliabiilty means, does it not, Dr. Barrett, [174] that it consistently measures today what it measured yesterday? A. Without getting into a long discourse on reliability, that's essentially correct.

Q. And validity means that it is valid for the purpose for which you are using it, doesn't it? A. That's right.

Q. And I believe, in reading your answer, or the answer to Interrogatory #22, you stated that—or that answer stated which you read into the record, said that, "Duke Power Company uses these tests or minimum acceptable scores on these tests, as a substitute or in lieu of a High School education"? A. Yes.

Q. So that's the aim of the test, is it not? A. I do not know what the aim of the test is, from having read that statement.

Q. Well, the statement said, did it not, that the purpose of accepting minimum acceptable scores on the tests, was to accept that in lieu of a High School education? A. Yeah, but it also made other statements.

Q. And the tuition refund? A. It's not the aim of the test, as far as that answer you read. As far as that goes, yes; the aim of the test was to make it possible for people to move ahead without [175] the High School equivalent.

Q. Now, you're a member of the American Psychological Association, I take it? A. That's right.

Q. Would you agree with this statement, that validity information indicates the degree to which the test is capable of achieving certain aims? A. Yes.

Q. And the aim that we are—that Duke is using these tests for, is a substitute for a High School Education,—isn't that correct? A. That's an aim. What the objectives

of the Duke Power Company are, is something I do not know.

Mr. Chambers: Objection.

The Court: Overruled.

The Witness: I testified before as to what that statement said. I do not know what was on the minds of Duke Power Company.

By Mr. Ferguson:

Q. Now, you talked about job-related validity, did you not? You said that was the proper way to follow the test, did you not? Or one of the ways? A. No, you're using tests which I am not quite sure what you mean—job-related validity?

Q. Yes, sir. That's one way to validate tests—by taking the test score and correlating that with the **[176]** performance on the job? A. All right. O.K. That's it, yes.

Q. Now, when you take the test score, that is a factor that's ministerial? You see your test score, and you know what it is? A. Yeah.

Q. The other aspect of job-related validity, is performance on the job, is it not? A. Yes.

Q. So, job performance—rating of job performance depends, does it not, on the subjective interpretation of an employee's supervisor as to his experience on the job or as to his productivity or performance on the job? A. With relatively few exceptions, that's correct.

Q. And if there are 5,000 supervisors, you might get 5,000 different interpretations, mightn't you? A. Well, different—whether the difference in their interpretation is pertinent or not. Here, you get 5,000 people looking at any one thing, you're going to get 5,000 different things because

they're made up differently, neurologically in their experience and everything else. But that won't mean that there may not be commonality in the things that they observe and report.

Q. Each employer faces the situation that is unique in his own area, does he not? [177] A. Again, how unique is unique? There's a great deal of commonality and there are also unique features in the workaday world. So that can only be answered—I don't think you intend me to do—it's in great detail. You'd say, "What is common", and "What is not common"? It is not unique? You cannot say they're unique because there're very similar things going on.

Q. What I am getting at is the statement that you made in your article again. I believe it goes like this, "Since each employer faces a situation that is in some respects unique, he and he alone is in a position to develop and invalidate tests and other selection procedures which will help him to hire from the available labor force, the best employees, regardless of race? A. Yeah. He may hire someone to do it, yeah.

Q. Are you familiar with the job duties at Dan River? A. I have read over a part of the deposition which consisted of job descriptions, on the hourly employees and supervisors.

Q. And you've never been up there and seen what they do? A. No.

Q. You don't know how the test is administered—scored, or acted upon, as far as Duke Power is concerned, do you? [178] A. I read a deposition by a man who gave some of the tests, and that's all I know about it.

Q. That's all you know about it? You can't describe the facilities where the tests are given or how they're admin-

istered as far as Duke Power Company is concerned, can you? A. Except just what I learned from the deposition.

Q. Now, Dr. Barrett, the title of your study indicates that there should be some sort of separate treatment for Negroes or minority groups and whites, as far as testing is concerned? A. This is possible. You don't know whether this is true until you try it out. It exists in some cases.

Q. Well, I believe you say in your article, that when everything else fails, the only thing left to do is to grant Negroes special treatment? A. This, I say, is something that should be considered. I do not feel that it is something that is legal or even a moral obligation of a given employer, although people do it, and I think it's appropriate that they should do it.

Q. Even though that means one or two things, doesn't it? Either giving them special treatment or accepting poor performance on the job by minority groups? Isn't that what it means? A. Well, this special treatment may simply be the [179] appropriate training. It may be different job duties—different job classifications, and there are Companies, and I recognize that this is true, who do accept poor performance on the part of people because of racial background, and so forth. This is done.

Q. And that comes under attack from supervisors who are held accountable for the work as well as members of the majority group, who see other people getting by with less than what they get by with, and their work would be unacceptable, wouldn't it? A. This is one of the dangers of this policy, and it is a good reason why it should be recommended only under special circumstances—under control, and to make sure it doesn't get out of hand.

Q. Dr. Barrett, do you suggest—are you suggesting different norms for different races? A. Based on the evi-

dence that I am familiar with,—in this procedure, in using different norms on the tests, may lead to the selection of people from the minority and majority groups, who are in total more effective than if the same norms are used. Now, the answer is "Yes."

Q. All right, sir, assuming that the same test is used, then, that would necessarily mean you'd have to adopt separate scores, wouldn't it? A. Yes.

[180] Q. And wouldn't that affect the whites who may have the same mental ability levels as negro, and it would work discrimination in reverse? A. The intent of the test is not to have them exist—the intent of the test is to select people who will perform adequately on the job. The issue then is not whether they score high or low on the test; the issue is whether they perform satisfactorily on the job, if it is possible by some adjustment of the scores for one group to get just as good performance from members of that group, and this does not discriminate against the whites at all or the majority or whatever other group we're talking about.

Q. Well, it would affect whites in their own group; wouldn't it? A. I don't see why. What you really are predicting is the performance on the job, and you get the top people, both white and negro, but you get them by different means, and that the accepted level of performance in both groups is essentially the same, and this does not adversely affect any one group.

Q. Isn't it true that whites in the North and Northeast and Mid-west go higher on tests than the whites in the South? A. Yes.

Q. Isn't it a fact that it's difficult for industry [181] to operate on different standards? A. Well, maybe. I don't think it's difficult. It's a matter of, everything you do,

costs, and if the cost is worth it, why, you should do it. If it doesn't, it isn't worth it; you shouldn't do it.

Q. Well, sir, isn't the answer that minorities should raise their standards, because industry can't afford to relinquish their standards in the competitive world of today, can they?

Mr. Chambers: We object to that, Judge.

The Court: Sustained.

Mr. Ferguson: I may have just one more question.

The Court: All right.

Mr. Ferguson: I believe that's all, Dr. Barrett. Thank you, sir.

The Court: All right, come down.

(Witness excused.)

Is there any further evidence for the Plaintiffs?

Mr. Belton: Nothing further, Your Honor.

The Court: Have you had a report on Mr. Thies, recently?

Mr. Ward: Yes, Your Honor. He said that he was getting underway in just a few minutes, and this was during the recess, and he will be here by 2:30, I'm sure.

The Court: All right.

[182] Mr. Ward: It takes two good hours to drive it, to come into Greensboro. It takes about that long.

The Court: Let's see, he has to come from Draper?

Mr. Ferguson: No, sir, he's from Charlotte.

The Court: I regret that I felt the need to do that, but I believe maybe to get this record in the

shape, it would be proper that perhaps we should have him answer that question.

You people have simply objected to this evidence that is prior to the July date. I don' tknow whether that was a perfunctory objection or not. If the Court should be wrong in that, why, maybe we are wasting some time here. Do you people genuinely think that that is improper evidence?

Mr. Ferguson: Well, Your Honor, it depends on the context in which you are looking at it. It seems to me that any act which occurred before the effective date of the Act, which was legal to admit that, has shown that the same act is now illegal—just doesn't hold water. Then you assume that something occurred before the Act, all of a sudden, on July the 2nd, 1965, matured into a full-bloom cause of action?

The Court: I agree with you. We had a suit,—Mr. Chambers, you were in,—and I sustained an objection about one of your experts over there, and later, [183] I thought sincerely that it was not competent, but after we closed the evidence, I don't don't know what happened to the other side, but they wrote me stipulating that the testimony would come in, you know. I didn't know that this was a matter that you people were just perfunctorily objecting to, and it's obvious to me that you have a genuine feeling about it, and that you think it is incompetent, and I agree with you.

Mr. Ferguson: I just don't think it has any provative value, Your Honor, and I think it is entirely within the trial Judge's discretion.

The Court: Of course, you know that in some of these teacher's suits and so forth, that they have allowed and considered discriminatory practices that have occurred before, to go into those suits.

Mr. Ferguson: I have an argument for that.

The Court: What is your argument about that?

Mr. Ferguson: Your Honor, there you're talking about a controversion of the 14th Amendment which says no State shall—and this is a private action, not the action of any governmental agency.

The Court: Well, we won't argue that point. I am sure the Circuit Court will let me know if I'm wrong. They usually do.

Mr. Chambers: Your Honor, might I make one [184] inquiry about the Court's ruling? Is it the Court's ruling that no act of a Company occurring prior to the effective date of the Civil Rights Act of '64, is competent for any purpose?

The Court: I have ruled that it is not competent for what you are talking about in this complaint. You complained that they're in violation of Title 7, specifically, Section so and so of that Act that we referred to as the Civil Rights Act. That's what you said. You referred, Mr. Chambers, to a Section —that Section became effective in July of '65. Now, how could something without the issue as to whether they are in violation of that Act—how would something that happened prior to its effective date,— tell me—

Mr. Chambers: Even what transpired prior to the effective date of the Act might still presently affect the rights of the employees today, subsequent to the effective date of the Act?

The Court: Yes.

Mr. Chambers: If for instance, a Company discriminated in its initial hiring practice, prior to the effective date of the Act, which admittedly was not prohibited by Federal Statute, and put all negro employees as Janitors and now it poses a criteria for negro employees to become employed in positions that [185] were formerly excluded.

The Court: Let's lift it out of the context of Civil Rights for a moment, and say you have an Act that is passed or a law that is passed, and then, a person is accused of violating that law. It is just inconceivable to me that it would have value in deciding the issue of whether he was violating the Act, after its effective date that you go back and show what he was doing prior to that date.

Mr. Chambers: Suppose we consider the school cases, where prior to 1954, it was not unconstitutional to discriminate and subsequent to 1954, it became unconstitutional to discriminate, and the Court then talked about the necessity for taking certain corrective steps to eliminate the discriminatory practices that the School Board followed prior to 1954. Now, wouldn't practices that occurred prior to 1954 be competent in evidence in pointing out what the Board needed to do in order to disestablish—

The Court: I don't think that is analogous to the situation that we have here. As I mentioned, this action is pin-pointed and in a different aspect from that. I don't think that would be a comparable situation.

Mr. Chambers: That was what we—

[186] The Court: There're all kinds of questions. How far back? Would we sit here and put in evidence—I mean, where do you stop and how far back do you go? Does the fact that much time has transpired since the effective date of this Act? To me, it might make a difference, if this were pinpointed closer to the effective date of the Act, but that isn't true. Here it is more than a year after, is when this action is brought, and of course brought, but it is now '68—more than, '67—it's more than two years now. Where are we going with all this chasing around?

Mr. Chambers: I would think, as far as the Court needed to go—whether to determine whether the present practices of the Company are depriving any individual in the Company of Equal Employment Opportunity. The Phillip Morris decision went back several years.

The Court: But that wasn't really brought up in that—

Mr. Chambers: I think it was necessary for the Court, though, in reaching this decision as to the type of remedy, and also, in reaching its decision as to whether the present practices of the Company violated the right of the employee—

The Court: Well, let's move on to four or five years ahead. Now, are we then—

[187] Mr. Chambers: I assume that there have been no corrections of the practices of the Company, even now, after 13 years after the Supreme Court's decision. The Supreme Court—the Courts still allow practices that occurred prior to '54, if we're talking about our coun—

The Court: The evidence is going to be in there, and you have it in the Interrogatories, and we're getting Mr. Thies back here, and our Circuit will have no reservation about following what their judgment dictates about it. Let's take our recess until 2:00 o'clock.

Mr. Ferguson: Your Honor, if it please the Court, —I don't know what your normal hours are, but I believe I could get through the Direct Examination of Dr. Moffie in maybe 15 or 20 minutes.

The Court: You have another witness?

Mr. Ferguson: Yes, sir, I have an expert witness.

The Court: Oh, yes, you did mention that.

Mr. Ferguson: If we can finish and shorten the lunch hour somewhat and get back by 2:00 o'clock and finish this Cross Examination—

The Court: How long do you think on Direct?

Mr. Ferguson: I wouldn't say over 15 or 20 minutes.

The Court: I tell you, I have to meet somebody at [188] lunch. Let's come back here at 1:45. Does anybody have any appointments in reliance of the fact that you would be away until 2:00, as we usually do? Would that affect either side?

Mr. Ferguson: No.

The Court: All right, let's come back here at 1:45 instead of 2:00 'clock then, and get into that. All right.

(Lunch recess was taken.)

The Court: All right, Mr. Ferguson, if you are ready to call your witness?

Mr. Ferguson: Come around, Dr. Moffie.

Dr. Dannie Moffie—for Defendant—Direct

Whereupon, Dr. Dannie Moffie was duly sworn, and testified as follows:

Direct Examination by Mr. Ferguson:

Q. State your name, please, sir. A. Dannie Moffie.

Q. What's your educational background? A. I got my BS and MA and PhD at Pennsyvania State University.

Q. What is your present occupation? A. I am a Professor at UNC and a Management Consultant.

> Mr. Ferguson: If it may please the Court, I'd like to state for this record that Dr. Moffie is here as an [189] expert witness on behalf of Duke Power Company, and any opinion or statement that he might make, are not those of the University and are his and his alone. He asked me to make that statement for the record.
>
> The Court: All right.

By Mr. Ferguson:

Q. Would you name some of the clients for whom you are a Consultant? A. Yes. Burlington Industries, Duke Power, the Company that I was formerly with—Hanes Corporation, Fiber, on occasion—and it's Celanese Fiber Company.

Q. Are you presently engaged in any research in connection with Industrial Testing? A. Yes.

Q. What is it? A. Very much along the lines of the problems that are being discussed here. We are trying to validate tests in a couple of these industries who are also concerned or also in the process of doing research on creativity at the University and looking at creativity

in terms of how to predict it and how to assess it, and we are doing this really with a Research Grant from the Richardson Foundation, like in the other witness's case, as he is working with the Ford Foundation.

Q. Have you ever been employed in Industry, Dr. Moffie? A. Yes, I have.

[190] Q. By what Company and how long? A. I was a Vice-President at Hanes Corporation in Winston-Salem at the Hanes Hosiery Division. It has now merged with P. H. Hanes Knitting Company from 1955 until 1962.

Q. What Professional organizations and societies, if any, do you belong to? A. I belong to the American Psychological Association, the North Carolina Psychological Association,—at the moment, I am transferring my membership in Sigma Phi from State University to Chapel Hill—North Carolina State University to Chapel Hill.

Mr. Ferguson: If it please the Court, I could go through a lot more of Dr. Moffie's qualifications here, but I do have a document consisting of 5 pages, which I have furnished Counsel for the Plaintiffs, and I would like at this time to have it marked as Defendant's Exhibit #2, in which his qualifications and his education and his work experience and so forth is clearly set out together, with the name of his clients and the publications he's made, and the present research in which he is engaged.

The Court: Any objection to this Exhibit, Mr. Belton?

Mr. Belton: No.

[191] The Court: All right, let the record show that Defendant's Exhibit #2, being a document setting out Dr. Moffie's educational background and work experience, etcetera. All right.

(Defendant's Exhibit #2 was marked for identification.)

Mr. Ferguson: At this time, I'd like to tender Dr. Moffie as an Industrial Psychologist in the field of testing.

Mr. Belton: Just one or two questions.

The Court: In the field of what?

Mr. Ferguson: As an expert Psychologist in the field of Industrial and Personnel Testing.

The Court: All right, Mr. Belton.

Mr. Belton: Dr. Moffie, I think you indicated that you were doing research along the same lines as Dr. Barrett was doing?

The Witness: Not in the areas of Differential Equations at the moment. What we are doing is— we are doing research in Concurred Validity, and Predictive Validity. We have not attempted anything in the areas of Differential Equations, in terms of various Ethnic Groups. I'm not doing that. It's not that kind of research.

The Court: All right, let the record show that [192] the Court finds that Dr. Moffie is an expert Psychologist in the field of Industrial and Personnel Testing. All right.

Mr. Ferguson: Dr. Moffie—I'm sorry, Your Honor. Did I interrupt you?

The Court: No.

By Mr. Ferguson:

Q. Dr. Moffie, are you familiar with the EF1 Wonderlic Test and the Bennett Mechanical Test Form "AA"? A. Yes, I am.

Q. Are you familiar with the Manual? A. Yes, I am.

Q. Of your own knowledge, please state what extent these tests are being used by employers, if you know? A. As the Wonderlic Test is used very widely—I expect, one of the most widely used intelligence tests in the country—the Manual particularly indicates that it is being sold and used by the 1,000s. In some months, it involves 50,000 cases. The Bennett "AA" is distributed by the Psychological Corporation. It is also used quite widely. There are 3 forms of the Bennett: the Bennett "AA", the Bennett "BB", and the Bennett "CC". The "A" is the lowest form. Then, there is a middle form, and the "CC" is the form that is generally used for the Engineers. I am acquainted with both of them.

[193] Q. All right, sir. What kind of tests are they, please? A. All right. The Wonderlic—the Wonderlic Test is a measure of general intelligence. When it was originally constructed, Wonderlic—they took about 50 items from the Otis Self-administering Test, which is another test of Intelligence, and then constructed some of the early forms. Here recently, he constructed 4 other forms, which are variations, and all of them are comparable, but the test is general intelligence. It measures one's ability to understand one's ability to think—one's ability to use good judgment, and the items in the tests measure these kinds of characteristics or factors.

Q. What about the Bennett? A. Bennett "AA" is the measure of mechanical comprehension. It measures how well one understands the workings of—of pullies, for example or projectories, and this is all done by pictures. It is a measure of mechanical understanding—how a simple machine would operate—the wheel and the lever and so on.

Q. Dr. Moffie, you have heard preference in the testi-

mony in this case to professionally developed tests? A. Yes.

Q. Based on your knowledge and training as an expert in the field of Industrial and Personnel Testing, do you [194] have an opinion satisfactory to yourself as to whether or not the Wonderlic and the Bennett Mechanical Comprehensive Test Form "AA" are professionally developed? A. In my opinion, they are.

Q. First of all, the Wonderlic was, up until about a year ago, distributed by the Psychological Corporation. The Bennett "AA" is also distributed by the Psychological Corporation, but more than that, the values that indicate reliability and validity and these other 2 criteria that Psychologists used in evaluating a test—is it reliable, that is, does it measure consistently? Is it valid—that is, does it measure whatever it is supposed to measure—its aim, and in both cases, I would say that these 2 tests do meet these criteria.

Q. Dr. Moffie, state whether or not there is any category into which the Wonderlic and the Bennett Mechanical tests fall, for the purposes of administration? A. Yes.

Q. What is it? A. Category "A"—the level "A"—the American Psychological Association has set up 3 levels under which all tests are classified—Level "A", Level "B", and Level "C." Level "A" is that category that can be—that has tests in it, or the tests are classified in it, and that can be given by [195] non-psychologists; category "B" by people who have had some training in testing, either a course or 2, as the Manual indicates; Level "C"—these are the tests that can be given only by Psychologists. Incidentally, these two tests—the Wonderlic and the Bennett Mechanical "AA" are Level "A" tests.

Q. In other words, they are the lowest level of tests for the purposes of administration? A. That's correct.

Q. Dr. Moffie, do you know who administers the tests or who has administered the tests that have been given at the Defendant's Dan River Steam Station? A. Yes.

Q. Who? A. Mr. Richard Lemons.

Q. Do you know him? A. Yes, I do.

Q. Do you know what his education is? A. He's a Mechanical Engineer by training. He got his degree at North Carolina State University.

Q. Mr. Moffie, state whether or not you are familiar with the testing facilities at the Dan River Steam Station? By that, I mean, do you know where the tests are given? A. Yes, I do.

Q. Would you describe it, please, sir? [196] A. Yes. In preparing for this case, I decided to spend the day up there. The tests are given in a room, I would say, almost half the size of this one, and as a Psychologist, in looking it over, I would say that it meets all of the requirements of a test room, in the sense of ventilation, lighting, seating arrangement, and so forth.

Q. Would you state whether or not you have conducted a Training School for Duke Power Company as it relates to tests? A. Yes, I did. About 2½ years ago, following some of my work with Duke Power, I ran a 1-day training program in Charlotte, where I taught the Personnel Supervisors how to give these tests—how to interpret them—how to understand what the score was, and how to score them, and so forth. This was a 1-day program in Charlotte, North Carolina.

Q. Do you know whether or not Mr. Lemons was there? A. Yes, he was.

Q. Mr. Moffie, do you know what Duke requires as mini-

mum acceptable scores on the Wonderlic and the Mechanical "AA?" A. Yes, I do.

Q. What are those requirements? A. We are referring now to the jobs in question—are we not?

Q. No, sir, I'm just asking what minimum acceptable [197] scores are set up or what are the minimum acceptable scores—that Duke would accept on these tests? A. It's 20 on the Wonderlic and 39 on the Bennett "AA."

Q. All right, sir. This is an instrument which has been offered and received in evidence as "Plaintiffs' Exhibit #13," entitled Wonderlic Personnel Test Manual by E. F. Wonderlic. Do you recognize that? A. Yes, I do.

Q. Are you familiar with it? A. Yes, I am.

Q. Directing your attention to Page 5 of Plaintiffs' Exhibit #13, Dr. Moffie, does it state what the average score of the high-score graduate is, on the Wonderlic Personnel Test? A. Yes, it does.

Q. What does it show? A. 21.9. Dr. Barrett pointed it out this morning.

Q. And that is 2 points higher than Duke's minimum acceptable score, isn't it? A. That's correct.

Q. What is the copyright date shown on Exhibit #13? A. 1961.

Q. Dr. Moffie, are you familiar with the Cooperative Research Study of Minimum Occupational Scores for the Wonderlic Personnel Test by E. F. Wonderlic & Associates, Inc. [198] as represented in this black book here? A. Yes, I am.

Mr. Ferguson: I'd like to request that this be marked for identification as "Defendant's #3."

(Defendant's Exhibit #3 was marked for identification.)

By Mr. Ferguson:

Q. Dr. Moffie, this is an instrument that has been marked for identification as "Defendant's Exhibit #3." Would you compare this with Page 53 of the Manual and see if they are one and the same? A. Well, I can't check all these figures.

Q. Does it appear to be answered, "Yes"? Are you satisfied that that is the same page as Page 53? A. Yes.

Q. All right, sir. When was that study published? A. Well, it's in the book, and I assume the date that—that—

Q. When was it published? A. 1961.

Q. 1961? A. I'm sorry. Let me look inside. 1966.

Q. Does the study report "Minimum Occupational Scores by Industry?" A. Yes, it does.

Q. State whether or not "Minimum Scores for Utilities" [199] are reported? A. Yes, they are.

Q. Do you know whether or not Duke Power Company cooperated in the study? A. Yes, it did.

Q. Now, Page 53 shows the "Minimum Occupational Scores for Utilities," does it not? A. That's correct.

Q. Dr. Moffie, you previously testified that you spent a day up at Dan River in the preparation for this case. Are you familiar with the job duties of personnel at the Dan River Plant, and if so, state how you became familiar with them? A. I became familiar with them in two ways: 1, I observed, in moving around through the Plant as to what each job was, and then I also studied the job duties as written by the Company, so that I have seen it from both standpoints.

Q. Dr. Moffie, directing your attention to Page 53 of the study—that is that document that has been marked "Defendant's Exhibit #3,"— A. O. K.

Q. Would you state the category or categories into which the jobs at the Dan River Steam Station fall? A. The best that I could do would be the last two categories,—the Plant Staff and Line Personnel, and then [200] as I reviewed the jobs, I think many of them would fall in that other category, which is Day Labor, and Special. These would be the categories that I would see them falling into.

Q. What is the range of the scores in those categories? A. For Plant Staff and Line Personnel, these scores go from 27 to 23 and they hover around 18, 19, and 20. Many of them are in that category.

Q. How do these scores compare with Duke's Minimum Acceptance Scores? A. Oh, I would say they are very much in line with what Duke Power has set up, since it is somewhat—and even since it is somewhat flexible,—since as was pointed out the other day that if a person made a score of 19 and say 40 on the Bennett, that that person would still be accepted and so there is some flexibility. My feeling is that the score of 20 hovers right in the middle area here, without any question.

Q. And that is, in the jobs where Laborers could be promoted? A. That's correct.

Mr. Ferguson: I would like to request that this be marked for identification, as "Defendant's Exhibit #4."

(Defendant's Exhibit #4 was marked for identification.)

By Mr. Ferguson:

Q. Dr. Moffie, this is an Exhibit [201] #4. It's entitled, "Tests of Mechanical Comprehension, Form "AA" Manual,

George K. Bennett." I hand it to you and ask you if you recognize it? A. Yes, I do.

Q. Are you familiar with that Manual? A. Yes, I am.

Q. Directing your attention to Page 6 of Defendant's Exhibit #4, does it show the average score of the High School graduate on the Bennett Mechanical "AA" Test? By that, I mean, what does it show as the 50th percentile of the High School Senior average? A. It shows a score of 39, and this is exactly the 50th percentile.

Q. Would you consider this to be the norm for a High School graduate? A. A 50th percentile means that it is the exact average of 50 per cent above and 50 per cent below.

Q. Now, directing your attention to Page 7,— A. O. K.

Q. Of Duke's Exhibit #4, does it show or does the Manual on that page show what the Industrial norms are for the Mechanical "AA' Test? A. Yes, as all manuals, there are various norm tables and the 50th percentile for the norm table that would be in my opinion closest to the jobs under consideration, would be [202] applicants for unskilled jobs, and for that, it is 38, which would be roughly, one level down from the skilled jobs that are being considered here at this hearing.

Q. You don't know what those different classifications across there mean, I take it? A. Well, like in any Manual, there are various types; for example, Engineering positions would be up in the 15s; applicants for Mechanical positions would be 35; Bus and Street Operators, 39; and the closest that I could come to would be Applicants for Unskilled Jobs, and that's 38, and the Company requires 39,—you see, one step up in terms of the job categories.

Q. All right, sir. Dr. Moffie, assuming the greater rate of the evidence shows and the Court should find as a fact

the following: that Duke's Steam Production Department and in particular, the Dan River Steam Station has a policy of requiring a High School education in order to be considered for promotion in the Coal Handling Operations Department, and from the Labor Department and also from the Coal Handling Operation Departments into the Maintenance and Operation Departments inside the Plant; that the Company has immediately available to it the E. F. Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test Form "AA"; that 50 per cent of the High School graduates taking these tests scored 21.9 on the Wonderlic Test and 39 on the Mechanical [203] Comprehension Test; that Duke utilizes as Minimum Acceptable Scores, 20 for the Wonderlic and 39 for the Mechanical Comprehension Test. Now, assuming that the greater weight of the evidence shows that, and the Court should find this a fact,—those facts, do you have an opinion satisfactory to yourself based on your knowledge and experience in the field of Industrial and Personnel Testing as to whether or not Duke's acceptance of these Minimum Acceptable Scores, is a reasonably satisfactory substitute for a High School education?

Mr. Chambers: Objection.
The Court: Overruled.
The Witness: I do have an opinion.
Mr. Ferguson: What is your opinion?
Mr. Chambers: Objection.
The Court: Overruled.

By Mr. Ferguson:

Q. Go ahead. A. My opinion is, as a substitute for or in lieu of a High School education, that this is a reason-

able request, and frankly, as a Psychologist and working in Industry, I think the Company has leaned over backwards, really.

Mr. Chambers: Objection.

The Court: Sustained.

The Witness: All right. My reasoning behind that is that for a 12-minute test, a man can move into the [204] upper category. My reasoning behind that is that for a 12-minute test, a man can move into the upper category, does not need a High School education, and it is only 25 or 30 minutes on the Bennett "AA." Consequently, if he can pass the test, he has met the Company requirement of a High School education, whereas, if one has to go to school to get ready for a High School education—just to take a High School Equivalency Exam, this may take 2 or 3 years, and then, there's still no assurance of having passed it.

These scores are scores—

Mr. Chambers: Objection.

By Mr. Ferguson:

Q. That's all, Dr. Moffie. Dr. Moffie, this morning, the Plaintiffs introduced into evidence, certain Guidelines on Employment Testing Procedures, as has been put out by the Equal Employment Opportunity Commission. Have you read those? A. Yes, I am very well acquainted with them.

Q. In what terms, Dr. Moffie, does the EEOC establish Guidelines with validation? A. The Commission report of these Guidelines here, have considered validity, exclu-

sively in terms of Job Relatedness. It is my opinion that in some aspects, the Guidelines are too narrow—

Mr. Chambers: Objection.

[205] The Witness: And others are too broad.

The Court: Overruled.

The Witness: I think they're too narrow in the sense that there is more than one type of validity. We have got Content Validity, there is Job Validity or Criterion Validity. We have Construct Validity and very often, as was pointed out this morning, Industry has to use its best judgment. One can't wait for Predictive Validity or Concurrent Validity. Consequently, the Guidelines are a little too narrow, from that standpoint, and it is well-accepted in Psychology that we have 3 types of validity,—Content Validity, Criteria-Related Validity, and Construct Validity. I think they are too broad in other cases where, when a professionally developed test is considered. As defining the law, professionally developed, as considered by the Guidelines, are too broad in the sense that they want to consider the testing facilities, who gives the test, the administration of the test, and normally to a Psychologist, a professionally developed test means that it meets the criteria of validity and reliability and validity, in any of these 3 categories that I have indicated that that would be my opinion.

By Mr. Ferguson:

Q. Dr. Moffie, directing your attention to Page 3 of Plaintiffs' Exhibit #34, I will ask [206] you to state whether

or not the Commission recommends any particular test? A. No, it does not.

Q. Further directing your attention to Page 3 of the Guidelines, state whether or not the Commission adopts job-related tests as the last words? In other words, do they say that just special emphasis should be put on it, or do they say that that is the only way? A. Well, I think the Commission is also trying to find itself, too, in establishing these Guidelines, but the Commission does imply as a last word, that it must be job-related. I get that impression, as I read the Commission Guidelines.

Q. All it requests is that they place special emphasis on it? A. Yes.

Mr. Ferguson: You may examine him.
The Court: All right, Mr. Belton.

Cross Examination by Mr. Belton:

Q. Dr. Moffie, did you assist the Company in establishing the Cut-off Score for the Wonderlic? A. Not on this particular situation. I did, in terms of the total battery—for the Company as a whole, but on this particular situation, I did not—that is, in this particular job. I don't know whether I am making myself [207] clear on this. For this particular situation, I did not.

Q. When you say particular situation— A. I am referring to Dan River Mills, yes.

Q. Dr. Moffie, I believe you made a reference to Dan River Mills— A. Dan River Steam Plant, I'm sorry.

Q. Prior to your visit to the Dan River Steam Station, had you made a study of the job contents at Dan River? A. Yes, I did.

Q. When did you visit Dan River Steam Company—

Steam Plant? A. A week ago, today, I believe. Yes, a week ago, today.

Q. Was that your first trip? A. Yes, it was.

Q. Did you have knowledge of any written job descriptions prior to the ones you referred to in your Direct Examination? I think you referred— A. Yes, the ones that are used here.

Q. Would the written job descriptions be the ones—that were given to us? A. Yes, these are the job duties that I have seen. When the original cutting scores were established, it was done largely in terms of interviews with Mr. Austin Thies, Kenneth Austin, and this was done about 2½ or 3 years ago, [208] when the original tests—when the original cutting scores were established. This was in Charlotte. This was done entirely in terms of interviews as to what the jobs required at each of the job levels.

Q. And whom did you interview? A. Austin Thies.

Q. Did you interview him? A. Yes. And we spent roughly 2 days in discussing the various types of jobs in Charlotte—Kenneth Austin, too, who isn't here at this time.

Q. Did you assist Duke Power in selecting the Wonderlic Test? A. Yes. At the same time, it was being used by other Utility Companies, and it wasn't just a recommendation entirely on my part. It was a support of this test plus the fact that other Utility Companies were using it, but I have used this test in the Industry that I was in, for example. O. K. Go ahead.

Q. My question was, did you assist or recommend to Duke Power that they select the Wonderlic Examination? A. Well, it wasn't exactly a final recommendation; you see, it was a joint—it was a joint decision between myself and the officials of the Company, and I recommended it cer-

tainly, as a professional test, but it was being used by the Utility Industries.

[209] Q. Did you recommend the Mechanical Test? A. Yes, I did.

Q. When approximately did you make the recommendation that the Wonderlic be used? A. This goes back to—in fact, July of '65. July of '65, is when I wrote my original recommendations to the Company.

Q. Now, you said that you had several days of discussion with officials concerning jobs? A. That's correct.

Q. Did they give you detailed information as to job content? A. As detailed as one can get at, let's say, interviews; as detailed as I felt like I needed, in terms of what I would want to decide on—what tests we would select, yes. The interviews supplied me in terms of helping to make the selection. O. K.?

Q. Do you think that your opinion would have been changed, Dr. Moffie, if you had done it and done an outside inspection of what actually goes on in each job? A. I don't think so.

Q. I think you testified as to your opinion of what a professionally developed test is? Is that correct? A. That's correct.

Q. Were you here this morning, Dr. Moffie, when [210] Dr. Barrett testified? A. Yes, I was.

Q. Do you recall the testimony of Dr. Barrett to the extent that definition of job content is to be considered in the selection of a test instrument? A. Yes, I would agree with what he said.

Q. Do you recall the testimony that of Dr. Barrett to the extent that validation would be a consideration in the selection of a test instrument? A. Yes, I agree to that.

Q. You testified, I believe, that a professionally devel-

oped test should include— A. Should be reliable and it should be valid.

Q. Now, my question is this,—when you speak in terms of validity— A. That's right.

Q. Would you give us your definition of it? A. O. K. Well, it's really not my definition. These are standards, established by the American Psychological Association, and they are standards that we go by in Psychology—that validity is really, does the test measure what it has been set up to measure? What are its aims, and we go by the fact that there are 3 types of validity: Content Validity, Criterion-related Validity, and Construct Validity. So to me, when we talk about Validity, it's not just [211] Job-Related Validity. It's got to be any one of these three, you see.

Q. Has the Wonderlic been validated—how has it been validated? A. You mean, at Duke Power?

Q. Not for Duke Power, but has validation been conducted on the Wonderlic? A. Yes, I would say there have been hundreds of studies that have been done in one way or another where the Wonderlic has been used, and reasonably high coefficients have been found—that is, validity coefficients. If we are thinking of Concurrent Validity or Predictive Validity in terms of Job-Relatedness, very definitely.

Q. I think you indicated that there is Content Validity? Is that correct? A. That's correct.

Q. Were the Validation Studies done on the Wonderlic—Content Validity studies? A. In the original Wonderlic, Content Validity would be where the items were taken, let's say, from the Otis Test, which is another intelligence test, and then when that test is related to other intelligence tests, and if there is a high correlation and a high relationship, then it satisfies the Criterion. Content Validity—I would say that the Wonderlic has met that Criterion, but

it has also met the [212] Criterion of Jobs-Relatedness. There have been many studies that have done that.

Q. My question is, do you know whether Content Validation studies have been done on the Wonderlic for Duke Power? A. Well, you don't normally do that. You see, you assume that this is already been done, when tests have been constructed. When you say, Content Validity, I say, no, this has not been done. Industry doesn't normally do that. We are doing Job-Related Validities. For example, we have completed 1 study where we had taken oh, roughly 100 to 200 people, in some categories well over 200 people at different job levels, where we have attempted to validate the Wonderlic, and we are finding, as was pointed out this morning by Dr. Barrett, that we are too broad. We are going to have to become more definitive and take some specific jobs and build up samples in order to carry out these validities to a greater extent, and to do it in more depth. We have got one study going right now that has 120 people, and this, I'm afraid is going to be too broad—

Q. You say—now, is this being conducted at the Duke Power facilities? A. That's correct—throughout the facilities.

Q. Now, the validation studies that are underway, does this include any category of jobs? Now, when you said the Dan River Steam Station— [213] A. They would be included in Job Level 1. You see, the Company has these jobs classified—Job Level 1, Job Level 2, Job Level 3. I don't recall. I can't answer that. I'd have to go back to the data to see if any of the people at Dan River fell into this—under this grouping.

Q. Dr. Moffie, you said you did undertake to visit Dan River Steam Station. Is that right? A. Yes.

Q. Do you recall whether or not they had persons working there in the Control Room? A. Yes, a number of them.

Q. Do you know whether the study that you talk about would include employees in this category? A. I'm sure it would, yes, because it was Job Level 2, and Job Level 2 would include people in that category, yes.

Q. Do you recall during your visit, Dr. Moffie, whether they had employees working in Coal Handling at Dan River? A. Oh, yes, sure.

Q. Do you know whether validation studies are underway, now, including employees in this category? A. They would have to be because they would be in Job Level #1.

Q. Do you recall during your visit to Dan River [214] whether they had employees working in the Maintenance Department? A. Yes.

Q. Would employees in this category be in it? A. They would be in Job Level 2, I am sure—Job Level 2.

Q. Do you know when the validation studies were started? A. Oh, yes, about 2 years ago. We have started—

Q. Was that before July 2nd, 1965? A. No, it was after that—2 years ago. That would be—that would be roughly in the early—in early '66, I would say. I would have to go back to the date, but that's about when it would be.

Q. Now, Dr. Moffie, you are aware that Duke Power at Dan River does require a person in a Laborer's category who does not have a high school education or equivalency to successfully pass the Wonderlic and Mechanical? Is that correct? A. That's correct.

Q. Now, my question is, would you expect a test using such circumstances to be validated and we're talking about Predictive Validation at this point, before it is used to effectuate these results. What I mean by "effectuate these results" is as used, in order to determine his [215] promot-

ability? A. Yes. At Dan River, the tests are really not used for Predictive Validity. They are used as a substitute or in lieu of a High School education. The aim is different. Now, to do a Predictive Validity study, as was pointed out this morning, generally, you have to have a fairly good sized group, and sometimes this is not possible, even at Dan River Steam Plant. The groups wouldn't be large enough. Moreover, on a Predictive Validity study, it may take 2 or 3 years to do this, but the tests at Dan River Steam Plant, as I understand it,—these are used in lieu of and a substitute for a High School education. They are not predicted. They are used as a substitute.

Q. Are you saying, Dr. Moffie, that the use of the test in the circumstances you've just described, as a substitute for a High School education, is not the same use to which such tests would be used when you are defining or giving your opinion as to a professionally developed test? A. Oh, no, I didn't say that.

Q. I'm asking you if this is your testimony? A. My testimony is that at the Dan River Steam Plant, the two tests are used to determine whether or not a person has the intelligence level and the mechanical ability level that is characteristic of the High School graduate, and this is it. These are the purposes of the test there. Now, when [216] they function as a substitute or in lieu of a High School education, then, the assumption is that the test then,—the High School education is the kind of training and ability and judgment that a person needs to have, in order to do the jobs that we are talking about here—the jobs in the Control and the Coal Handling and in the Maintenance. This would be my testimony.

Q. Do you know, Dr. Moffie, whether or not the same cut-off scores that are used, under the circumstances they are

used at Dan River, with respect to Coal Handling and Laborers, is the same score that is used on this test with respect to applicants for employment? A. Yes, that is, for these level jobs that we're talking about—not for the Laboring jobs. They are not used for the Laboring jobs. They are used for the jobs that we are talking about here in this hearing. Yes, they are.

Q. Just to understand your testimony, you are saying then, that a person who is applying for a job and would be subjected—who would be required to take the Wonderlic, would have to score? A. He would have to score 20 on the Wonderlic and he would have to score 38 or a Bennett "AA" or with the flexibility of 1 point either way,—as we pointed out, in order to come into the jobs, under discussion here at this hearing, yes.

[217] Q. Now, are you familiar with the requirement that all employees except those who are applying for the categories of Laborers, must possess a High School education at Dan River? A. Yes.

Q. Would the cut-off scores—scores for the Wonderlic, Dr. Moffie, would the result be to exclude more than 50 per cent of the Labor population? A. It comes to less than that, really. You see, if you think of the average High School graduate, the score is 21.9, which is roughly 2 points above, and then if you take a look at the tables, it is going to be less than that, really. If you take a look—let's see if I can find you the tables, right off, here. You go to Page 7—you go to Page 7, you will notice that for the High School, male, 4 years High School, a score of 20 to 21, you would have roughly 42.8 per cent below that, you see, so that if you look at those figures, I think you would have to conclude that it is 40 percent. It will be

cutting roughly 40 per cent or less, really, so it is not 50, really. Have you got the page, there? It's Page 7.

Q. Page 7. Now, would the test score set for the Mechanical "AA"—your cutting score for the Mechanical "AA"—would the results of that cutting score be to exclude more than 50 per cent of the Labor population? [218] A. The score of 38 is exactly the 50th percentile, and it is for applicants for unskilled jobs. Now, this is the Laboring group. Now, if you think of the higher level up, or the jobs under consideration here at this hearing, you see, the score is even below. In other words, the group is below the type of score that would be normally assigned, let's say, to the jobs under consideration; so that exactly how many points—it may be 2 or 3 points below, really, what the tables indicate here. In my opinion, the two scores are rather typical of the average High School graduates, I think. I think this would answer your question.

Q. Now, my question, Dr. Moffie, is would the results of using both tests together result in excluding more than 50 per cent of the population? A. Not, necessarily. In fact, it might improve, because you see, the Company has some flexibility in this in the sense that if a person makes a lower score—let's say, 19 on the Wonderlic and let's see, 40 on the Bennett "AA", this person has a chance of coming in or vice versa, so that—so it could improve the selective aspects of this thing and make it even easier, really.

Q. Dr. Moffie, are you aware that Duke Power has a policy whereby employees in the Laborer's category do not have a High School education or its equivalency, may take both the Wonderlic and the Mechanical "AA" for consideration [219] for promotion to Coal Handling? A. Yes, I am.

Dr. Dannie Moffie—for Defendant—Cross

Q. Are you aware that Duke Power has a policy whereby employees in the Laborer's category do not have a High School education or its equivalency, may take both the Wonderlic and the Mechanical "AA" for consideration for promotion to Coal Handling? A. Yes, I am.

Q. Are you aware of the policy of the Company that employees in the category of Coal Handling who do not have a High School education or its equivalency, may take the Wonderlic and the Mechanical for promotion to other job categories? A. If they are already in it?

Q. No, my question is just a re-phrase of my earlier question,—that employees in Coal Handling who do not have a High School education or equivalency, could take the Mechanical and the Wonderlic to be considered for promotion to other jobs, other than Laborer's category? A. Yes, I think this is the real point that's under consideration. Yes, in other words, that is the policy that if the person does not have a High School education, then he is permitted to take the 2 tests and if the 2 tests—if he passes these 2 tests successfully, then the Company considers passing these 2 tests successfully in lieu or as [220] a substitute of a High School education. Yes, I am aware of that.

Q. Would you have a opinion as to what factors that the tests would measure concerning the job requirements in Coal Handling? A. Yes, I very definitely do. The intelligence test, the Wonderlic Test, is a measure of one's ability to think, to use good judgment, to solve problems. The Mechanical aptitude test is a measure of mechanical comprehension, and after studying the job duties and taking a look at those jobs up there, my feeling is that these kinds of abilities are required—the logging, the importance of all of the controls, and I may express an opinion: the

tremendous amount of money that is involved in terms of the generators that they've got and the necessity in maintaining these.

Q. My question was just the Coal Handling. A. There are lots of controls there.

Q. Would there be other criteria, Dr. Moffie, that could be used to determine those factors you've just described? A. Other tests, you mean?

Q. Not formalized tests but other considerations whereby you can make this determination of a person's ability? A. Oh, sure. There would be many. For example, [221] there could be other tests that could be used, and as Psychologists operate, we interview sometimes, too. At the same time, we are finding out more and more that the tests must be used to determine specific levels—that we cannot do it by interviews or by observation and so on. Now, for the aims that were set up here, I don't see how one could interview and come up with a score on intelligence and a score on mechanical aptitude. For this particular situation, let's say, it would be difficult to do. Looking at it as a Psychologist—

Q. You indicated that interviews would be another way of making this determination. Is that correct? A. You mean, as a substitute for a High School education?

Q. Right. A. It would have to be highly structured and it would have to be validated, too, you see, and one would have to establish reliability and validity; I'd hate to try it, but I say, maybe it could be done.

Q. Would you list for me, Dr. Moffie, 1 or 2 other selection processes, if you would, that would aid in determining whether a person has the ability to do the jobs in the Coal Handling Department? A. Yes, the High School equivalency exam. I think this has been my point—that

the GED, the General Education [222] Development Test or the High School equivalency test is what one normally uses, and this is why I say that the Company has leaned over backwards by having a 12-minute test and roughly a 30-minute test in the Bennett Mechanical Comprehension, to see if they have got this kind of ability that makes them like an average High School person. Yes, very definitely, we have by State Law and through the State Board of Higher Education—through the Boards of Education, the High School equivalency test. This is the way it is normally done.

Q. When you say, "lean over backwards" in establishing cut-off scores, would this leaning over backwards, would it be—would it—my question is, would this leaning over backwards in—of the purport of the professional standards— A. I'm not so sure I know your statement now. I think the Company—I think the Company has used acceptable scores that are by the tables and norms, typical of the High School graduate. By leaning over backwards, I mean that the Company has established the 2 tests—the one that takes 12 minutes and the other that takes 30 minutes and if the person is able to pass these two tests, then he doesn't have to go through all of the courses that he has to take to get ready to take the High School equivalency test. This is what I mean by leaning over backwards.

Q. There are several other questions. A. O.K.

[223] Q. Just one other question, Dr. Moffie. Would you consider previous experience on a lower job as a selection factor for promotion? A. Are you talking in general now—Industry-wide? I'm not sure I get the point of reference. If you ask me in terms of Industry-wise—

Q. To clarify the question, if you will, I think I asked

you to list for me some of those selection factors—selection criteria that you would use in lieu of, and I think you had indicated that High School was one, the interview— Now, my question is, what previous experience would act as selection device—would previous experience on a low-rated job act as a selection device for promotion? A. I think you are leading me into the type of an answer that I don't think I can give. When one considers promotion and all these policies have been established within the Company, then all of these factors are important. For example, in selecting a salesman, if I can think of jobs in general, we always use previous experience as one of the factors and interview test scores and so on; where a Company has already established, however, a High School degree or diploma as the admittance, then that becomes set. Then, you have to go by that. So, if you are asking me, can you accept previous experience to take the place of a High School diploma where a Company has already established the [224] High School Diploma, my answer is, no, definitely not. You cannot do that. The only way you can establish a High School diploma is through a High School equivalency test. If you are saying a High School equivalent substitute—the Company's substitute test, this is in lieu of or a substitute for a High School education—

Q. Just to put the question again, would this be a factor that could be considered—previous experience in determining whether to promote or not to promote? A. You mean, for these particular jobs in question?

Q. For these particular jobs in question. A. No, not when the Company has set a High School equivalency.

Q. I'm saying, aside from that, what the Company has done. A. That's not the issue. The issue is, are the 2 tests—are the 2 tests reasonable substitutes for a High School education? That's the issue.

Q. That's not my question, though. A. I would say, no, if you are asking me, can I determine in an interview whether or not the person has the equivalent of a High School education. I cannot.

Q. That's not my question. Let me clarify it, because I do want you to address yourself to it. I'm not asking you to relate this to the requirements that the Company now has. [225] My question is this: given a situation where a person, if you will, in the Learner's position in Coal Handling—I am asking you, would his experience in the position of Helper be a selection factor—could it be a selection factor in determining whether to promote him to the next highest position? A. It would be a factor, but that in itself wouldn't tell me whether he has the ability or the trainability for a job at a higher level. It merely means that he has been in this job, and he has had this experience, but this doesn't say, does he have the ability or the trainability for the higher level training jobs? No; I can answer that question very emphatically, no. This experience would not tell you that.

Q. Would the tests by themselves tell you this? A. No, the tests could not. You would have—

Q. Would the High School education by itself tell you this? A. A High School education would merely tell you that you have the necessary abilities as defined by a High School education, and if the Company feels that this is required in these jobs, that's all it would tell you.

Mr. Belton: No further questions.

The Court: All right.

Mr. Ferguson: Nothing on Re-Direct. Does the [226] Court have any questions of this witness?

The Court: No, you may come down, Dr. Moffie.

(Witness excused.)

I believe that Mr.—Do you have something Mr. Belton?

Mr. Belton: Yes, Your Honor. I'd like to call Dr. Barrett back for a few questions in rebuttal.

The Court: All right, Gentlemen, this is a case you assured me we could try in one day. I have this letter before me now. All right. You all have a copy of the letter. Mr. Chambers wrote it, and you didn't take exception to it.

Mr. Ward: If Your Honor, please, if I had seen it, I would have taken exception to it.

Mr. Ferguson: That was based on his assumption, Your Honor.

The Court: Yes, but he put you on guard. You should have notified the Court that he was in error.

(Dr. Barrett resumed the stand—was previously sworn.)

Direct Examination by Mr. Belton:

Q. Dr. Barrett, there are several questions. Would the use of the 2 tests—the Wonderlic and the Mechanical—would the cut-off score now in use at Dan River result in excluding more than 50 per cent of the **[227]** population?

Mr. Ferguson: Objection.

The Court: Overruled.

The Witness: I think that the use of these 2 tests simultaneously is a considerably more stringent requirement, —

The Court: Now, this is in the form of an opinion?

The Witness: Yes.

The Court: All right.

The Witness: Than the High School diploma itself for a couple of reasons. In the first place, according to the norm tables on the test of Mechanical Comprehension, the average High School student scores 39. However, many, many people graduate from High School with ability that is less than average. In fact, about half of the people are below average, so it should be considerably easier to get a High School diploma in terms of the intellectual requirements than it is to score 39 on the Bennett, because that means you have to be up well into the average group. People get out with a "D" average. The average that we have here that we're talking about here is about a "C" average. Furthermore, if you use the 2 tests in conjunction, you wind up with this circumstance: the first test eliminates half of the people, but some of those people who passed that [228] will fail the other test. Therefore, you are eliminating noticeably more than half the people. Again, this makes it even more stringent than being an average High School graduate. No; no, they have shaded this by about 2 points, which helps compensate for this point, but the issue is that this is really much more difficult than it is to have the High School diploma.

By Mr. Belton:

Q. Dr. Barrett, did you hear Dr. Moffie testify concerning the use of the Wonderlic and the Mechanical at the Dan River as a selection device? A. Yes.

Q. Did you also hear Dr. Moffie testify concerning the use of a High School education as a selection criteria for promotion? A. Yes.

Q. Now, in your opinion, would you think that the High School education would be the most appropriate requirement for promotion?

> Mr. Ferguson: Objection.
>
> The Court: I have to sustain that.
>
> Mr. Belton: No further questions.
>
> Mr. Ferguson: Just a couple of questions, if I may, please, sir.

Cross Examination by Mr. Ferguson:

Q. Dr. Barrett, I believe you [229] stated that you had never been up to Dan River? A. That's right.

Q. You don't know what the content of the jobs are other than what you read? A. Right.

Q. You state that in your Re-Direct Examination that the use of the test is more stringent. By that, you don't mean to imply that Duke Power was unreasonable, do you?

> Mr. Chambers: We object to that.
>
> The Court: Overruled.

By Mr. Ferguson:

Q. I mean, you can't testify to the reasonableness of what Duke Power Company is doing, can you? A. The reasonableness that I am concerned with, has to do with the reasonableness of substituting one procedure for another. Now, if we take for granted, which I do not necessarily take for granted, that a High School diploma is an appropriate standard for people to meet, either for selection or promo-

tion, then, I say, that the use of these 2 tests, — the Wonderlic Test and the Bennett Test as described in the testimony here, is not a reasonable substitute in that it is noticeably more difficult. It places higher intellectual demands on the people than the High School diploma. The High School diploma takes effort and time to get, and these are otherwise tests of basic ability.

[230] Q. Are you saying that a High School graduate has made a certain amount of achievement? A. Of course.

Q. And you are saying, too, that he has a certain mental ability level, too, are you not? A. Achievement is something we know because we measured it by test. We don't know what his mental—mental ability is. We have an idea what it is, in order to pass through the High School course.

Q. What is more reasonable that taking of what 50 per cent of them make—with what the High School seniors average? A. If you accept all High School graduates with their diploma and accept only the top half of people of High School graduates because of their test score, you have a much more stringent way of selecting people. It is much more difficult.

Q. How is it more stringent? A. Because, you say, anybody who gets a High School diploma is qualified to go through the selection procedure from there on. Now, by using this test you are saying that only the half of the people who have the capacities, of people who get High School diplomas, are able to go through the rest of the inception procedure and pass this hurdle and gone on.

[231] Q. You have stated, at best, this is a difficult problem, haven't you? A. I don't know what you mean, sir. What is the difficult problem?

Q. This testing presents a particularly tough problem? A. Why, yes, sure.

Q. It is just not an easy thing to go out here and validate tests overnight and say, "This is the proper way to do it?" and "This is the improper way to do it;" and, "This is more stringent;" and "This is less stringent;" and "This is unreasonable;" and "That's not reasonable." I am driving at this, that back to your article, wherein you say that since each employee faces a situation that is in some respects unique, he and he alone is in a position to develop and validate tests and other selection procedures which will help him to hire the best available employees, regardless of race. Now, you made that statement. A. What's your question?

Q. My question is, and I've asked you on several occasions, whether or not you can't say this is unreasonable as far as Duke Power Company is concerned, can you? A. I think you, in your preamble to the question, went from the point that it is difficult on to further shading, which is not what I have said. To say that it is difficult is not saying that it is impossible; to say that [232] it is difficult to produce good procedures is not saying that it is impossible to say that some procedures are not good, and this is what I am addressing myself to—that the sheer logic of these tables, and these are the tests, is that the use of the tests is a more stringent and noticeably more stringent way of selecting people than is the use of a High School diploma or its equivalent, since half the people who get a High School diploma would fail the test.

Q. All of them have the mental ability level, don't they? Everybody has some mental ability level, whether they went to High School or college, or has a PhD in Psychology? A. O. K.

Q. If the Power Company's purpose is to measure a mental ability level— A. Yes?

Q. We can assume, can we not that the average High School graduate has the mental ability level that the 50th percentile has, can't you? A. Well, you don't assume that because there are some people who work very hard and get to be an average High School student, and they're not so smart; and there are other people who are lazy; they come out average, too.

Q. Everybody has a mental— A. Everybody has some capacity for intellectual activity, yes.

[233] Q. And you have heard testimony that that is what Duke Power Company is attempting to measure—is mental ability level, haven't you? A. Yes.

Mr. Ferguson: I think that's all.
The Witness: O. K.
The Court: All right.

(Witness excused.)

The Court: Anything further?
Mr. Belton: No.

The Court: All right, I think we will just remain for Mr. Thies' examination. Do you have anything further?

Mr. Ferguson: Yes. I want to introduce 1 more bit of evidence here, but we need about a 5 or 10 minute recess to talk to Mr. Thies, if that's all right with the Court, since he just got here, and we haven't had an opportunity to confer with him.

The Court: Gentlemen, I had relied on the fact that this was a day—now, we've had—passed a day and a half, and I have some matters—I know it's an important case to all of you—I have some matters that I must really move back to doing, so I ask you

to do it as quickly as you can, and you people be thinking about the questions you want. This shouldn't take you so [234] long to get this into the record.

Mr. Ferguson: 5 minutes would be fine with us.

The Court: You let me know when you're ready to go. You all be thinking about the questions you want to ask, and let's conclude this matter. All right this is an undeclared recess. Mr. Ferguson and Mr. Belton, you notify me when you are ready to go.

Mr. Ferguson: All right, sir.

(A brief recess was taken.)

The Court: All right, Mr. Ferguson, are you ready?

Mr. Ferguson: I'm ready to tender Mr. Thies for Cross Examination.

The Court: Mr. Thies, would you come back to the stand, please, sir?

Clerk Vaughn: You are still under oath. This is a continued further Cross Examination.

The Court: Mr. Belton.

Further Cross Examination by Mr. Belton:

Q. Mr. Thies, my question is, was there a policy at Dan River—at the Dan River Steam Station to hire only Negro employees for certain job categories prior to July 2nd, 1965?

Mr. Ferguson: Objection.

The Court: Sustained. But you may put it in the record.

[235] Mr. Ferguson: Answer the question.

The Witness: There was not a policy to hire only Negro employees for any classification at Dan River.

By Mr. Belton:

Q. Did the Company, before July 2nd, 1965, hire only Negroes for the Laborer's Classification?

Mr. Ferguson: Objection.

The Court: Your question is, before the July date?

Mr. Belton: That's right.

The Court: Sustained. But you may answer, Mr. Thies, for the record.

The Witness: As far as the Power Station operating Steam Production Department is concerned, all of the persons who made application for the Laborer Classification were Negroes. However, there were 2 white employees in the Laborer Classification at the time the Plant was being built, but those men moved on away with the Construction Department, when the Construction Department left the job site.

By Mr. Belton:

Q. Do you know, Mr. Thies, whether any Negro employees in the Laborer's category requested promotion to other jobs prior to July 2nd, 1965?

Mr. Ferguson: Objection.

The Court: Sustained, but you may answer for the record.

The Witness: Yes, they did.

[236] *By Mr. Belton:*

Q. Do you have an approximation Mr. Thies of the number of Negroes who made requests for promotion prior to July 2nd? A. Yes, sir.

Q. Would you give that?

Mr. Ferguson: Your Honor, I don't necessarily object—want to object to every term, but I do want to have my objection recorded to this continuing line.

The Court: You had better object.

Mr. Ferguson: All right, I object.

The Court: All right. Sustained, but you may answer.

The Witness: To the best of my knowledge, there was one.

Mr. Belton: Was this request for promotion directed to you?

Mr. Ferguson: Objection.

The Court: Sustained, but answer.

The Witness: It was directed to the Superintendent of the Station. It was directed to the Station Superintendent. I am located in Charlotte. I set the policy. The Superintendent of the Station administers locally. The request was directed to the Power Station Superintendent by one individual in the Laborer Classification.

[237] The Court: About what year was that, Mr. Thies?

The Witness: I can't testify from my own knowledge, but to the best of our recollection, it was in 1964, and there was no job opening at that time for the place that he wanted to work, and he was not refused a job. He was told, at the present time there was no job opening.

Mr. Belton: Do you know, Mr. Thies, whether you had Negro employees in the Laborer's category with a High School education, who were in that category prior to July 2nd, 1965?

The Witness: Yes.

Mr. Ferguson: Objection.

The Court: Sustained, and the answer is, "Yes."

The Witness: I am assuming, Your Honor, this is automatic each time?

The Court: Yes, but if you will just give me time to make the entry there. That's all right. Go ahead.

Mr. Belton: Do you know whether you had white employees in jobs other than Laborers, without a High School education, prior to July 2nd, 1965?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer.

The Witness: Yes.

[238] Mr. Belton: Was it the policy, Mr. Thies, of the Company prior to July 2nd, 1965, to employ persons only in those categories for which they requested?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer for the record.

The Witness: The general policy was, "Yes." To employ persons in the kinds of jobs that they expressed an interest in, yes.

Mr. Belton: Do you know what—do you know if the policy of the Company of July, 1965, was to promote employees only to those jobs for which they requested?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer for the record.

The Witness: No. We promote employees that we think—that we think can do the next higher job, and if they are in a department and in line of normal

progression or promotion, then they are all interested in this promotion as it comes up, and we select the senior man, if qualified, and offer him the job. He doesn't have to request it within a departmental promotion set-up.

Mr. Belton: Do you recall, Mr. Thies, whether there were occasions prior to July 2nd, 1965, in which [239] the Company of its own initiative requested an employee to move up to a higher paying job to fill a vacancy?

Mr. Ferguson: Objection.

The Court: Sustained. Answer for the record, please.

The Witness: Yes, I am sure that there have been. I don't know the specific cases, but I am sure that people have been asked to move up to higher jobs, yes.

Mr. Belton: One or two other questions, Mr. Thies. Prior to July 2nd, 1965, did you have employees who were in Coal Handling without a High School education moved to—well, were promoted to jobs in the Maintenance Department?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer.

The Witness: We did not, during the last 10 or 12 years—during the time that the policy requiring a High School education for this move, has been in effect. Prior to the time of that policy going into effect on our Power System, then, we did have employees who did not have a High School education, who moved from Coal Handling into the Plant Operations. but when that policy was instituted

System-wide, the practice was stopped. In fact, that's what made me select these 2 tests—to offer them an opportunity to be qualified, [240] 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, and they were blocked by this policy, which has been in effect for a number of years.

Mr. Belton: Do I understand your answer, Mr. Thies? Are you testifying that after the Company initiated the High School requirement, that no employee in Coal Handling was allowed to move from Coal Handling to other jobs without this?

The Witness: That's correct.

Mr. Belton: Now, the High School—the provision went into effect around 1955?

The Witness: Somewhere along in there.

Mr. Belton: Prior to July 2nd, 1965, did you promote employees in Coal Handling—allowed employees in Coal Handling, who did not have the High School education or the equivalency?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer.

The Witness: They were promoted within the Coal Handling Operation, but not out of Coal Handling into any other department. Once a man is in the Coal Handling Department and in a line of progression, then he will move as far up in that department as his qualfiications [241] and job performance will let him move. He won't be blocked, is what I am saying, and, once he gets in that department.

Mr. Belton: Weren't these employees in Coal Handling during the period we're talking about, white employees?

Mr. Ferguson: Objection.

The Court: Sustained. Answer for the record.

The Witness: Prior to July 2nd, 1965?

Mr. Belton: This is correct.

The Witness: Yes.

Mr. Belton: One other question,—Mr. Thies, prior to July 2nd, 1964, was there a custom at the Dan River Steam Station whereby certain facilities,—toilets, water fountains, were limited to Negroes?

Mr. Ferguson: Objection.

The Court: Hasn't that been eliminated from this case? You all stipulated.

Mr. Ferguson: By stipulation of Counsel—

Mr. Belton: Your Honor, we realize that. This is our last question, but even though we have stipulated—

The Court: O. K. Go ahead. I will let you answer for the record. That just seems to me a bit—but the question—go ahead with the question.

The Witness: That was prior to July 1st, 1964?

[242] Mr. Belton: That's correct, sir.

Mr. Ferguson: Objection.

The Court: Sustain the objection, but you may answer.

The Witness: Sometime in the early '60s, we eliminated separate facilities at our stations, as far as policy was concerned; that there was no one to occupy different facilities because of their race, creed, national origin or what have you. We did not force our employees to bodily pick up their belongings and move their lockers to accomplish this. We said that anyone was free to choose any locker they wanted. The individuals in question at Dan River were in one

locker room, and they remained there, but there was no policy that said they had to stay there, after sometime in the early '60s.

Mr. Belton: This is my last question. My question was not in terms of policy, but was it a custom, as opposed to a fixed policy?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer.

The Witness: Well, I thought my answer clarified that, but they did remain in one location, so if you call that a custom, then they were in one location, yes.

Mr. Belton: No further questions.

[243] Mr. Ferguson: That's all. I have no questions, Your Honor.

The Court: All right. Anything further, Gentlemen? Anything further for the Plaintiff?

Mr. Belton: No, Your Honor.

The Court: From the Defendant?

Mr. Ferguson: Yes, Your Honor, I want to have this document marked for identification. It's Page 4. It's that Page 4 of the Digest of Legal Interpretation adopted by the Commission. It is a Digest of Legal Interpretations issued or adopted by the Commission, July 2nd, 1965 to October the 8th, 1965—Page 4 of that document, waiver of identification, and authentication of which has been waived by the Plaintiffs in the Final Pre-Trial Order, and the document speaks for itself. I am averting particularly to their general Counsel opinion letter, which states that "the Differential - - not based on one of the exprohibitive grounds—that is, sex, race, and so forth, and further, that discrimination based on educational qualifications does not violate Title 7, Opinion Letter of October, '65.

Mr. Belton: We object, Your Honor, on the grounds that that is a legal opinion.

The Court: What Exhibit # is that?

[244] Clerk Vaughn: 5.

The Court: Let the record show that the Court receives into the evidence Defendant's Exhibit 5—that the Plaintiffs object to the receipt into the evidence of this Exhibit and except to the rule of the Court.

(Defendant's Exhibit #5 was marked for identification and received into evidence.)

Mr. Ferguson: Your Honor, I don't know that I have offered or you have received into evidence all of my Exhibits, but I now offer into evidence, Exhibits 1 through 5, just for the record.

The Court: Now, we are talking about Exhibits—Defendant's Exhibits 1, 2, 3, and 4. Are there objections that you want to register, Mr. Belton, to the Exhibits?

Mr. Belton: No objection, Your Honor.

The Court: All right. Let the record show that Defendant's Exhibits 1, 2, 3, and 4 are received into the evidence.

(Defendant's Exhibits #1, #2, #3, and #4 were received into the evidence and #1 was marked for identification.)

Mr. Ferguson: You have already received #5, I take it?

The Court: Yes, we just made an entry.

[245] Mr. Ferguson: All right, sir. The Defendant has nothing further. I would like to be heard

on the motion, if I could presume on the Court's good nature for 5 minutes. I assume you would know what the motion would be. We move—

The Court: All right.

Mr. Ferguson: We move that the Court dismiss this action.

The Court: Let me state this to you before you get to this. I am not insisting that you all present oral argument. I am just before dictating a memorandum that you will give me proposed findings of fact and conclusions of law, providing that you may present briefs and give you ample time, and then, to make inquiry as to whether you wanted oral argument or not, and I am not trying to cut you off, but should you want later, oral argument, it can be set forth at— let's see what the Plaintiff says about it. Are you all going to want oral argument? If not, maybe you would want it later?

Mr. Ferguson: I don't see how Your Honor today can really rule on my motion to dismiss, because really, the record hasn't jelled to the extent that you could do so, and I realize that you would have to hold your ruling in abeyance.

[246] The Court: You could present that in your brief or however you wished.

Mr. Ferguson: Yes, sir, I would like the opportunity to do that and he will present it by a brief or oral argument as the Court deems fit to have—

The Court: All right.

Mr. Ferguson: I do want the motion made for the record.

Mr. Belton: On the question of oral argument, we would like to state at this time, that we would like

to take the advantage of the opportunity, if oral argument is presented. However, it might be that after we get into the job of briefing and writing, we might—

The Court: All right, state your motion for the record, then, Mr. Ferguson.

Mr. Ferguson: We move to dismiss, based on the grounds that the Plaintiff has failed to shoulder the burden of proof with respect to showing the intention of discrimination or the intentional aspects of the discriminatory acts as alleged in the complaint.

The Court: Let the record show that the Court defers its ruling on the motion of the Defendant until after proposed findings of fact and conclusions of law have been presented in brief to the Court.

(End of Case)

Opinion of the United States Court of Appeals

In the

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 13,013

Willie S. Griggs, *et al.*,

Plaintiff-Appellant,

versus

Duke Power Company,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

(January 9, 1970)

Before

Sobeloff, Boreman, and Bryan,

Circuit Judges.

Boreman, Circuit Judge:

Present Negro employees of the Dan River Steam Station of Duke Power Company in Draper, North Carolina, in a class action with the class defined as themselves and those Negro employees who subsequently may be employed at the Dan River Steam Station and all Negroes who may hereafter seek employment at the station, appeal from a judgment of the district court dismissing their complaint brought under Title VII of the Civil Rights Act of 1964.

(Duke Power Company will be referred to sometimes as Duke or the company.) The plaintiffs challenge the validity of the company's promotion and transfer system, which involves the use of general intelligence and mechanical ability tests, alleging racial discrimination and denial of equal opportunity to advance into jobs classified above the menial laborer category.

Duke is a corporation engaged in the generation, transmission and distribution of electric power to the general public in North Carolina and South Carolina. At the time this action was instituted, Duke had 95 employees at its Dan River Station, fourteen of whom were Negroes, thirteen of whom are plaintiffs in this action. The work force at Dan River is divided for operational purposes into five main departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. The positions of Watchman, Clerk and Storekeeper are in a miscellaneous category.

The employees in the Operations Department are responsible for the operation of the station's generating equipment, such as boilers, turbines, auxiliary and control equipment, and the electrical substation. They handle also interconnections between the station, the company's 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.

Technicians working in the Laboratory Department analyze water to determine its fitness for use in the boilers and run analyses of coal samples to ascertain the quality of the coal for use as fuel in the power station. Test Department personnel are responsible for the performance of the station by maintaining the accuracy of instruments, gauges and control devices.

Employees in the Coal Handling Department unload, weigh, sample, crush, and transport coal received from the mines. In so doing, they operate diesel and electrical equipment, bulldozers, conveyor belts, crushers and other heavy equipment items. They must be able to read and understand manuals relating to such machinery and equipment.

The Labor Department provides service to all other departments and is responsible generally for the janitorial services in the plant. Its employees mix mortar, collect garbage, help construct forms, clean bolts, and provide the necessary labor involved in performing other miscellaneous jobs. The Labor Department is the lowest paid, with a maximum wage of $1.565 per hour, which is less than the minimum of $1.705 per hour paid to any other employee in the plant. Maximum wages paid to employees in other departments range from $3.18 per hour to $3.65 per hour.

Within each department specialized job classifications exist, and these classifications constitute a line of progression for purposes of employee advancement. Promotions within departments are made at Dan River as vacancies occur. Normally, the senior man in the classification directly below that in which the vacancy occurs will be promoted, if qualified to perform the job. Training for promotions within departments is not formalized, as employees are given on-the-job training within departments. In transferring from one department to another, an employee usually goes in at the entry level; however, at Dan River an employee is potentially able to move into another department above the entry level, depending on his qualifications.

In 1955, approximately nine years prior to the passage of the Civil Rights Act of 1964 and some eleven years prior

to the institution of this action, Duke Power initiated a new policy as to hiring and advancement; a high school education or its equivalent was thenceforth required for all new employees, except as to those in the Labor Department. The new policy also required an incumbent employee to have a high school education or its equivalent before he could be considered for advancement from the Labor Department or the position of Watchman into Coal Handling, Operations or Maintenance or for advancement from Coal Handling into Operations or Maintenance. The company claims that this policy was instituted because it realized that its business was becoming more complex and that there were some employees who were unable to adjust to the increasingly more complicated work requirements and thus unable to advance through the companys lines of progression.

The company subsequently amended its promotion and 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 equivalent, could become eligible for transfer or promotion from Coal Handling, Watchman or Labor positions into Operating, Maintenance or other higher classified jobs by taking and passing two tests, known as the Wonderlic general intelligence test and the Bennett Mechanical AA general mechanical test, with scores equivalent to those achieved by an average high school graduate. The company admits that this change was made in response to requests from employees in Coal Handling for a means of escape from that department but the same opportunity was also provided for employees in the Labor Department.

Until 1966, no Negro had ever held a position at Dan River in any department other than the Labor Department. On August 6, 1966, more than a year after July 2,

1965, the effective date of the Civil Rights Act of 1964, the first Negro was promoted out of the Labor Department, as Jesse C. Martin (who had a high school education) was advanced into Coal Handling. He was subsequently promoted to utility operator on March 18, 1968. H. E. Martin, a Negro with a high school education, was promoted to Watchman on March 19, 1968, and subsequently to the position of Learner in Coal Handling. Another Negro, R. A. Jumper, was promoted to Watchman and then to Trainee for Test Assistant on May 7, 1968. These three were the only Negroes employed at Dan River who had high school educations. Recently, another Negro, Willie Boyd, completed a course which is recognized and accepted as equivalent to a high school education; thereby he became eligible for advancement under current company policies. Insufficient time has elapsed in which to determine whether or not Boyd will be advanced without discrimination, but it does appear that the company is not now discriminating in its promotion and transfer policies against Negro employees who have a high school education or its equivalent.

The plaintiff Negro employees admit that at the present time Duke has apparently abandoned its policy of restricting all Negroes to the Labor Department; but the plaintiffs complain that the educational and testing requirements preserve and continue the effects of Duke's past racial discrimination, thereby violating the Civil Rights Act of 1964.[1]

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[1] Pertinent sections of Title VII of the Civil Rights Act of 1964 are:

Section 703(a), 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

The district court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Negroes were relegated to the Labor Department and deprived of access to other departments by reason of racial discrimination practiced by the company. This finding is fully supported by the evidence.

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to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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

Section 703(h), 42 U.S.C. § 2000e-2(h):

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Section 706(g), 42 U.S.C. § 2000e-5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice.)

However, the district court also held that Title VII of the Civil Rights Act of 1964 does not encompass the present and continuing effects of past discrimination. This holding is in conflict with other persuasive authority and is disapproved. While it is true that the Act was intended to have prospective application only, relief may be granted to remedy present and continuing effects of past discrimination. *Local 53* v. *Vogler,* 407 F.2d 1047, 1052 (5 Cir. 1969); *United States* v. *Local 189,* 282 F.Supp. 39, 44 (E.D. La. 1968), *aff'd,* No. 25956, —— F.2d. —— (5 Cir. 1969); *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968). *See, United States* v. *Hayes International Corporation,* No. 26809, —— F.2d —— (5 Cir. 1969), 38 L.W. 2149 (Sept. 16, 1969). In *Quarles,* it was directly held that present and continuing consequences of past discrimination are covered by the Act, the court stating, "It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Quarles* v. *Philip Morris, Inc.,* supra at 516. The *Quarles* decision was expressly approved and followed in *United States* v. *Local 189, supra,* as the district court, with subsequent approval of the Fifth Circuit Court of Appeals, struck down a seniority system which had the effect of perpetuating discrimination. ". . . [W]here, as here, 'job seniority' operates to continue the effects of past discrimination, it must be replaced * * *." *United States* v. *Local 189, supra* at 45. In *Local 53* v. *Vogler,* 407 F.2d 1047, 1052 (5 Cir. 1969), the court said: "Where necessary to ensure compliance with the Act, the District Court was fully empowered to eliminate the present effects of past discrimination."

Those six Negro employee-plaintiffs without a high school education or its equivalent who were discrimina-

torily hired only into the Labor Department prior to Duke's institution of the educational requirement in 1955 were simply locked into the Labor Department by the adoption of this requirement. Yet, on the other hand, many white employees who likewise did not have a high school education or its equivalent had already been hired into the better departments and were free to remain there and be promoted or transferred into better, higher paying positions. Thus, it is clear that those six plaintiff Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief; the educational requirement shall not be invoked as an absolute bar to advancement, but must be waived as to these plaintiffs and they shall be entitled to nondiscriminatory consideration for advancement to other departments if and when job openings occur.

Likewise, as to these same six Negro plaintiffs, the testing requirements established in 1965 are also discriminatory. The testing requirements, as will be fully explained later in this opinion, were established as an approximate equivalent to a high school education for advancement purposes. Since the adoption of the high school education requirement was discriminatory as to these six Negro employees and the tests are used as an approximate equivalent for advancement purposes, it must follow that the testing requirements were likewise discriminatory as to them. These six plaintiffs had to pass these tests in order to escape from the Labor Department while their white counterparts, many of whom also did not have a high school education, had been hired into departments other than the Labor Department and therefore were not required to take the tests. Therefore, as to these six plaintiffs, the testing requirements must also be waived and shall not be invoked as a bar to their advancement.

Next, we consider the rights of the second group of plaintiffs, those four Negro employees without a high school education or its equivalent who were hired into the Labor Department after the institution of the educational requirement. We find that they are not entitled to relief for the reasons to be hereinafter assigned. In determining the rights of this second group of plaintiffs, it is necessary to analyze and determine the validity of Duke's educational and testing requirements under the Civil Rights Act of 1964. We have found no cases directly in point. The Negro employee-plaintiffs contend that the requirements continue the effects of past discrimination and, therefore, must be struck down as invalid under the Act. We find ourselves unable to agree with that contention.

Plaintiffs claim that Duke's educational and testing requirements are discriminatory and invalid because: (1) there is no evidence showing a business need for the requirements; (2) Duke Power did not conduct any studies to discern whether or not such requirements were related to an employee's ability to perform his duties; and (3) the tests were not job-related, and § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), requires tests to be job-related in order to be valid.

The company admits that it initiated the requirements without making formal studies as to the relationship or bearing such requirements would have upon its employees' ability to perform their duties. But, Duke claims that the policy was instituted because its business was becoming more complex, it had employees who were unable to grasp situations, to read, to reason, and who did not have an intelligence level high enough to enable them to progress upward through the company's line of advancement.

Pointing out that it uses an intracompany promotion system to train its own employees for supervisory positions inside the company rather than hire supervisory personnel from outside, Duke claims that it initiated the high school education requirement, at least partially, so that it would have some reasonable assurance that its employees could advance into supervisory positions; further, that its educational and testing requirements are valid because they have a legitimate business purpose, and because the tests are professionally developed ability tests, as sanctioned under § 703(h) of the Act, 42 U.S.C. 2000e-2(h).

In examining the validity of the educational and testing requirements, we must determine whether Duke had a valid business purpose in adopting such requirements or whether the company merely used the requirements to discriminate. The plaintiffs claim that centuries of cultural and educational discrimination have placed Negroes at a disadvantage in competing with whites for positions which involve an educational or testing standard and that Duke merely seized upon such requirements as a means of discrimination without a business purpose in mind. Plaintiffs have admitted in their brief that an employer is permitted to establish educational or testing requirements which fulfill genuine business needs and that such requirements are valid under the Act. In support of this statement, we quote verbatim from appellants' brief:

> "*An employer is, of course, permitted to set educational or test requirements that fulfill genuine business needs.* For example, an employer may require a fair typing test of applicants for secretarial positions. *It may well be that, because of long-standing inequality in educational and cultural opportunities available to Negroes, proportionately fewer Negro applicants than*

> *white can pass such a test. But where business need can be shown,* as it can where typing ability is necessary for performance as a secretary, *the fact that the test tends to exclude more Negroes than whites does not make it discriminatory.* We do not wish even to suggest that employers are required by law to compensate for centuries of discrimination by hiring Negro applicants who are incapable of doing the job. But when a test or educational requirement is not shown to be based on business need, as in the instant case, it measures not ability to do a job but rather the extent to which persons have acquired educational and cultural background which has been denied to Negroes." (Emphasis added.)

Thus, plaintiffs would apparently concede that if Duke adopted its educational and testing requirements with a genuine business purpose and without intent to discriminate against future Negro employees, such requirements would not be invalidated merely because of Negroes' cultural and educational disadvantges due to past discrimination. Although earlier in this opinion we upheld the district court's finding that the company had engaged in discriminatory hiring practices prior to the Act and we concluded also that the educational and testing requirements adopted by the company continued the effects of this prior discrimination as to employees who had been hired prior to the adoption of educational requirement, it seems reasonably clear that this requirement did have a genuine business purpose and that the company initiated the policy with no intention to discriminate against Negro employees who might be hired after the adoption of the educational requirement.

This conclusion would appear to be not merely supported, but actually compelled, by the following facts:

(1) Duke had long ago established the practice of training its own employees for supervisory positions rather than bring in supervisory personnel from outside.[2]

(2) Duke instituted its educational requirement in 1955, nine years prior to the passage of the Civil Rights Act of 1964 and well before the civil rights movement had gathered enough momentum to indicate the inevitability of the passage of such an act.[3]

(3) Duke has, by plaintiffs' own admission, discontinued the use of discriminatory tactics in employment, promotions and transfers.[4]

(4) The company's expert witness, Dr. Moffie, testified that he had observed the Dan River operation; had observed personnel in the performance of jobs; had studied the written summary of job duties; had spent several days with company representatives discussing job content; and he concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skilled classifications. This testimony is uncontroverted in the record.

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[2] The company had an obvious business motive and objective in establishing the high school requirement, that is, hiring only personnel who had a reasonable expectation of ascending promotional ladders into supervisory positions thereby eliminating road blocks which would interfere with movement to higher classifications and tend to decrease efficiency and morale throughout the entire work force.

[3] It is highly improbable that the company seized upon such a requirement merely for the purpose of continuing discrimination.

[4] This tends to demonstrate the company's good faith.

(5) When the educational requirement was adopted it adversely affected the advancement and transfer of white employees who were Watchmen or were in the Coal Handling Department as well as Negro employees in the Labor Department.[5]

(6) Duke has a policy of paying the major portion of the expenses incurred by an employee who secures a high school education or its equivalent. In fact, one of the plaintiffs recently obtained such equivalent, the company paying seventy-five percent of the cost.[6]

Next, we consider the testing requirements to determine their validity and we conclude that they, too, are valid under § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). In pertinent part, § 703(h) reads: "* * * nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin."

There is no evidence in the record that there is any discrimination in the administration and scoring of the tests. Nor is there any evidence that the tests are not professionally developed. The company's expert, Dr. D. J. Moffie, testified that in his opinion the tests were professionally developed and are reliable and valid; that they are "low

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[5] It is unreasonable to charge the company with prospective discrimination by instituting an educational requirement which was to be applied prospectively to white, as well as Negro, employees.

[6] It would be illogical to conclude that Duke established the educational requirement for purposes of discrimination when it was willing to pay for the education of incumbent Negro employees who could thus become eligible for advancement.

level" tests and are given at Dan River by one who has had special training in the administration of such tests. The minimum acceptable scores used by the company are approximately those achieved by the average high school graduate, which fact indicates that the tests are accepted as a substitute for a high school education. The evidence disclosed that the minimum acceptable scores used by Duke are Wonderlic-20, and Bennett Mechanical-39; the score of the average high school graduate, *i.e.,* the fiftieth percentile, is 21.9 for the Wonderlic, nearly two points higher than the score accepted by Duke, and 39 for the Bennett Mechanical.

The plaintiffs claim that tests must be *job-related* in order to be valid under § 703(h). The Equal Employment Opportunity Commission which is charged with administering and implementing the Act supports plaintiffs' view. The EEOC has ruled that tests are unlawful "* * * in the absence of evidence that the tests are properly related to specific jobs and have been properly validated * * *." *Decision of EEOC,* December 2, 1966, reprinted in CCH, Employment Practices Guide, ¶ 17,304.53. The EEOC's position has been supported by two federal district courts. *United States* v. *H. K. Porter,* 59 L.C. ¶ 9204 (M.D. Ala. 1969); *Dobbins* v. *Local 212, IBEW,* 292 F. Supp. 413 (S.D. Ohio 1968). In *Dobbins* the court invalidated a test which was being given for membership in a labor union or in connection with a referral system because it was not adequately related to job performance needs. However, in that case it was clear that the testing requirement was not one of business necessity and the reasons for adopting such a requirement compellingly indicated that the purpose of such requirement was discrimination, which is not true in the present case.

The court below held that the tests given by Duke were not job-related, but then refused to give weight to the

EEOC ruling that tests must be job-related in order to be valid under § 703(h). The plaintiffs assert that such refusal was error. It has been held that the interpretation given a statute by an agency which was established to administer the statute is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 15 (1965). This principle has been applied to EEOC interpretations given the Civil Rights Act of 1964. *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5 Cir. 1969); *Cox* v. *United States Gypsum Co.*, 284 F. Supp. 74, 78 (N.D. Ind. 1968); *International Chemical Workers Union* v. *Planters Manufacturing Co.*, 259 F. Supp. 365, 366 (N.D. Miss. 1966). Plaintiffs cite these cases last mentioned above to support their argument that this court should adopt the EEOC ruling that tests must be job-related in order to be valid. However, none of these cases stands for the proposition that an EEOC interpretation is binding upon the courts; in fact, in *International Chemical Workers, supra* at 366, it was held that such interpretations of the EEOC are "* * * not conclusive on the courts * * *." We cannot agree with plaintiffs' contention that such an interpretation by EEOC should be upheld where, as here, it is clearly contrary to compelling legislative history and, as will be shown, the legislative history of § 703(h) will not support the view that a "professionally developed ability test" *must* be job-related.

The amendment which incorporated the testing provision of § 703(h) was proposed in modified form by Senator Tower, who was concerned about a then-recent finding by a hearing examiner for the Illinois Fair Employment Practices Commission in a case involving Motorola, Inc. The examiner had found that a pre-employment general intelligence test which Motorola had given to a Negro applicant for a job had denied the applicant an equal employment

opportunity because Negroes were a culturally deprived or disadvantaged group. In proposing his original amendment, essentially the same as the version later unanimously accepted by the Senate, Senator Tower stated:

> "It [the amendment which, in substance, became the ability testing provision of § 703(h)] is an effort to protect the system whereby employers give *general ability and intelligence tests to determine the trainability of prospective employees.* The amendent arises from my concern about what happened in the Motorola FEPC case * * *.
>
> "Let me say, only, in view of the finding 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 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."* (Emphasis added.) 110 Congressional Record 13492, June 11, 1964.

The discussion which ensued among members of the Senate reveals that proponents and opponents of the Act agreed that general intelligence and ability tests, if fairly administered and acted upon, were not invalidated by the Civil Rights Act of 1964. *See,* 110 Congressional Record 13503-13505, June 11, 1964.

The "Clark-Case" interpretative memorandum pertaining to Title VII fortifies the conclusion that Congress did

not intend to invalidate an employer's use of bona fide general intelligence and ability tests. It was stated in said memorandum:

> "There is no requirement in Title VII that employers abandon bona fide qualification tests *where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups.* An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." (Emphasis added.) 110 Congressional Record 7213, April 8, 1964.

When Senator Tower called up his modified amendment, which became the ability testing provision of §703(h), Senator Humphrey—one of the leading proponents and the principal floor leader of the fight for passage of the entire Act—stated:

> "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 found it to be in accord with the intent and purpose of that title.
>
> "I do not think there is any need for a rollcall. We can expedite it. *The Senator has won his point.*
>
> "I concur in the amendment and ask for its adoption." (Emphasis added.) 110 Congressional Record 13724, June 13, 1964.

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 re-

quired 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. An amendment requiring a "direct relation" between the test and a "particular position" was proposed in May 1968,[7] but was defeated. We agree with the district court that a test does not have to be job-related in order to be valid under § 703(h).[8]

Having determined that Duke's educational and testing requirements were valid under Title VII, we reach the conclusion that those four Negro employees without a high school education who were hired after the adoption of the educational requirement are not entitled to relief. 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

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

[8] This decision is not to be construed as holding that *any* educational or testing requirement adopted by *any* employer is valid under the Civil Rights Act of 1964. There must be a genuine business purpose in establishing such requirements and they cannot be designed or used to further the practice of racial discrimination. Future cases must be decided on the bases of their own fact situations in light of pertinent considerations such as the company's past hiring and advancement policies, the time of the adoption of the requirements, testimony of experts and other evidence as to the business purpose to be accomplished, and the company's stated reasons for instituting such policies.

as an approximate equivalent to a high school education for advancement purposes, neither is it racially discriminatory.

Once we have determined that certain of the plaintiffs are entitled to relief the next question for consideration is the nature and extent of relief to be provided.[9] Those six Negro employees without a high school education or its equivalent who were hired prior to the initiation of the educational requirement are entitled to injunctive relief under § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).[10] The educational and test requirements are

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[9] The plaintiffs disclaim any request for or entitlement to relief other than by way of injunction. Had there been an issue as to monetary awards for damages to those plaintiffs found to have been the victims of racial discrimination, there would have been presented the further issue as to the date of applicability of the Act. There were only 95 employees at the Dan River plant when the Act became effective on July 2, 1965, but Duke Power Company then employed some 6,000 persons throughout its entire system. The Act was initially applicable to employers with 100 or more employees, and it did not become applicable to employers with 75 to 100 employees until July 2, 1966. However, since the relief requested and awarded is solely injunctive in nature no question as to the applicability date of the Act is presented for decision.

[10] Section 706(g) of the Civil Rights Act of 1964 limits injunctive relief to situations in which an employer or a union has "intentionally engaged in or is intentionally engaging in" an unlawful employment practice. While we have found Duke's educational and testing requirements valid as to employees hired subsequently to the adoption of the educational requirement, we further conclude that Duke had intentionally engaged in discriminatory hiring practices in earlier years long prior to the enactment of the Civil Rights Act of 1964 and that, as to those six Negro employees hired prior to the adoption of the educational requirement, the effects of this discrimination were continued. Thus, these six plaintiffs may be granted appropriate injunctive relief under § 706(g). See, Clark v. American Marine Corp., No. 16315, —— F. Supp. —— (E.D. La. Sept. 15, 1969); Local 189 v. United States, No. 25956, —— F.2d —— (5 Cir. July 28, 1969).

invalid as applied to their eligibility for transfer and promotion. Thus, on remand, the district court should award proper injuctive relief to insure that these six employees are considered for any future openings without being subject to the educational or testing requirements. This will work no hardship upon the company since the relief provided will simply require it to consider those Negro employees equally with similarly situated white employees, many of whom do not have a high school education or its equivalent. If a Negro employee is advanced to a job in one of the better departments and his inability to perform the duties of the job is demonstrated after a reasonable period the company will be justified in returning him to his previous position or placing him elsewhere. As Judge Butzner said in *Quarles,* 279 F.Supp. 505, 521 (E.D. Va. 1968), *supra*:

> "If any transferee fails to perform adequately within a reasonable time * * * he may be removed and returned to the department and job classification from which he came, or to another higher job classification for which the company may believe him fitted."

In granting relief, the district court should order that seniority rights of the six Negro employees who are victims of discrimination be considered on a plant-wide, rather than a departmental, basis. To apply strict departmental seniority would result in the continuation of present effects of past discrimination whenever one of the six is considered in the future for advancement to a vacant job in competition with a white employee who has already gained departmental seniority in a better department as a result of past discriminatory hiring practices. In *United States*

v. *Local 189,* 282 F.Supp. 39, 44 (E.D. La. 1968), *aff'd,* No. 25956, —— F.2d —— (5 Cir. 1969), *supra,* the court held:

> "Where a seniority system has the effect of perpetrating discrimination, and concentrating or 'telescoping' the effect of past discrimination against Negro employees into the *present* placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system." [11]

It is to be understood and remembered that there are thirteen named Negro plaintiffs who bring this action. Jesse C. Martin, a Negro formerly employed in the Labor Department who had a high school education, was advanced to a higher position subsequent to the effective date of the Act. He is not joined as a plaintiff since the past discrimination against him has been removed. This case is now moot as to two of the named Negro plaintiffs who have high school educations and have been advanced; also as to Willie Boyd, who has acquired the equivalent of a high school education and is now eligible for advancement.

Briefly summarizing, only those six Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief. As to them the judgment below is reversed and the case is remanded to the district court

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[11] Here, despite the company's representations to the contrary, it is apparent that strict departmental seniority is not always followed since the company admits that an employee sometimes enters a new department at a position *above* the entry level; however, it is the more general practice for an employee to enter a new department at the lowest classification therein.

with directions to fashion appropriate injunctive relief consistent with this opinion. As to the remaining Negro plaintiffs the judgment below is affirmed.

Affirmed in part,
reversed in part,
and remanded.

SOBELOFF, Circuit Judge, concurring in part and dissenting in part:

The decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years. For that reason and because the prevailing opinion puts this circuit in direct conflict with the Fifth,[1] I find it appropriate to set forth my views in some detail.

While I concur in the grant of relief to six of the plaintiffs, I dissent from the majority opinion insofar as it upholds the Company's educational and testing requirements and denies relief to four Negro employees on that basis.

The case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified.[2] This is not the first time the federal courts of our circuit have been exposed to this problem. In what has become a leading case, Judge Butzner of our court, sitting

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[1] Local 189 v. United States, —— F.2d ——, 71 LRRM 3070, 3081 (5th Cir., July 28, 1969), discussed at note 8, *infra*.

[2] *See generally* Cooper and Sobel, Seniority and Testing Under Fair Employment Laws, A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (June 1969) [hereinafter cited as Cooper and Sobel]; Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Col. L. Rev. 691 (April 1968).

as a district judge by designation, authoritatively dealt with the question of the denial of jobs to blacks because of a seniority system built upon a pattern of past discrimination. *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). Today we are faced with an analogous issue, namely, the denial of jobs to Negroes who cannot meet educational requirements or pass standardized tests, but who quite possibly have the ability to perform the jobs in question. On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.

The pattern of racial discrimination in employment parallels that which we have witnessed in other areas. Overt bias, when prohibited, has ofttimes been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before. Illustrative is the use of the Grandfather Clause in voter registration—a scheme that was condemned by the Supreme Court without dissent over a half century ago. *Guinn* v. *United States*, 238 U.S. 347 (1915).[3] Another illustration is the resort to pupil transfer plans to nullify rezoning which would otherwise serve to desegregate school districts. Again, the illusory even-handedness did not shield the artifice from attack; the Supreme Court unanimously repudiated the plan. *Goss* v. *Bd. of Education*, 373 U.S. 683 (1963). It is long recognized constitutional doctrine that "sophisticated as well as simple-minded modes of discrimination" are prohibited. *Lane* v. *Wilson*, 307 U.S.

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[3] The opinion was unanimous save for Mr. Justice McReynolds, who took no part in the consideration or decision of the case.

268, 275 (1938) (Frankfurter, J.). We should approach enforcement of the Civil Rights Act in the same spirit.[4]

In 1964 Congress sought to equalize employment opportunity in the private sector. Title VII, § 703(a) of the 1964 Civil Rights Act provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).

The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employ-

[4] It is not part of my contention that the defendant in the present case availed himself of "objective" employment procedures deliberately to evade the strictures of Title II. As will be developed, an employer's state of mind when he adopts the standards is irrelevant when the effect of his actions is not different from purposeful discrimination. At any rate, it is my view that the majority's construction of Title VII will invite many employers to seize on such measures as tools for their forbidden designs.

ment practices. The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end. *Quarles* v. *Philip Morris, supra; Local 189* v. *United States,* —— F.2d ——, 71 LRRM 3070 (5th Cir. July 28, 1969); *Local 53* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969). For example, a requirement that all applicants for employment shall have attended a particular type of school would seem racially neutral. But what if it develops that the specified schools were open only to whites, and if, moreover, they taught nothing of particular significance to the employer's needs? No one can doubt that the requirement would be invalid. It is the position of the Equal Employment Opportunities Commission (EEOC) that educational or test requirements which are irrelevant to job qualifications and which put blacks at a disadvantage are similarly forbidden.

I

Use of Non-Job-Related Educational and Testing Standards

The Dan River plant of the Duke Power Company is organized into five departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. There is also a miscellaneous category which includes watchmen. Until 1965 blacks were routinely relegated to the all-Negro Labor Department as part of a policy of overt discrimination.

The era of outrightly acknowledged bias at Duke Power is admittedly at an end. However, plaintiffs contend that administration of certain "objective" transfer criteria have accomplished substantially the same result. It was not until August 1966 that any Negro was promoted out of the Labor Department. Altogether, as of this date, three blacks

have advanced from that department. They were the only ones that could mesaure up to the Company's requisites for transfer.[5]

In 1955 the Company first imposed its educational requirement: a high school diploma (or successful completion of equivalency ["GED"] tests) would be necessary to progress from any of the outside departments (Labor, Coal Handling, Watchmen) to any of the inside departments (Operations, Maintenance, Laboratory and Test) or from Labor to the two other outside classifications. In 1965 the Company provided that in lieu of a high school diploma or equivalent, employees could satisfy the transfer standards by passing two "general intelligence" tests, the 12 minute "Wonderlic" test and the 30 minute "Bennett Mechanical AA" test. It is uncontroverted that all of these requirements are equivalent.

A. *The Necessity for Job-Relatedness*

Whites fare overwhelmingly better than blacks on all the criteria,[6] as evidenced by the relatively small promotion

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[5] At oral argument we were told that one other black has since qualified but has not yet been transferred.

[6] No one seriously questions the fact that, in general, whites register far better on the Company's alternative requirements than blacks. The reasons are not mysterious.

High School Education. In North Carolina, census statistics show, as of 1960, while 34% of white males had completed high school, only 12% of Negro males had done so. On a gross level, then, use of the high school diploma requirement would favor whites by a ratio of approximately 3 to 1.

Sandardized Tests. It is generally known that standardized aptitude tests are designed to predict future ability by testing a cumulation of acquired knowledge.

> In other words, an aptitude test is necessarily measuring a student's background, his environment. It is a test of his

rate from the Labor Department since 1965. Therefore, the EEOC contends that use of the standards as conditions for transfer, unless they have significant relation to performance on the job, is improper. The requirements, to withstand attack, must be shown to appraise accurately those characteristics (and only those) necessary for the job or jobs an employee will be expected to perform. In others, the standards must be "job-related."

Plaintiffs and the Commission are not asking, as the majority implies, that blacks be accorded favored treatment in order to remedy centuries of past discrimination. That many members of the long disfavored group find themselves ill equipped for certain employments is a burden which the 1964 Civil Rights Act does not seek to lift. The argument is only that educational and cultural differences caused by that history of deprivation may not be fastened on as a test for employment when they are irrelevant to the issue of whether the job can be adequately performed.

Duke Power, on the other hand, maintains that its selection standards are unimpeachable since in its view the

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> cumulative experiences in his home, his community and his school.

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, —— F.2d —— (D.C. Cir. 1969) (en banc).

Since for generations blacks have been afforded inadequate educational opportunities and have been culturally segregated from white society, it is no more surprising that their performance on "intelligence" tests is significantly different than whites' than it is that fewer blacks have high school diplomas. In one instance, for example, it was found that 58% of whites could pass a battery of standardized tests, as compared with only 6% of the blacks. Included among those tests were the Wonderlic and Bennett tests. Decision of EEOC, cited in CCH Empl. Prac. Guide ¶1209.25 (Dec. 2, 1966).

For a comprehensive analysis of the impact of standardized tests on blacks, see Cooper and Sobel, 1638-1641.

tests (and therfore also the equivalent educational standard) are protected by § 703(h) of Title VII.

Section 703(h) provides, in pertinent part:

> * * * nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(h).

The Company asserts that its tests are "professionally developed ability tests" and thus do not have to be job-related. The District Court agreed and rejected the construction put upon § 703(h) by the EEOC. The majority here adopts this view.

In its *Guidelines on Employment Testing Procedures*[7] the Commission has held that a test can be a "professionally developed ability test" only if it

> fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.[7a]

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[7] Issued September 21, 1966. The *Guidelines* may be found in CCH Empl. Prac. Guide ¶16,904 at 7319.

[7a] The newly appointed chairman of the EEOC, William H. Brown, III, has recently reaffirmed this thesis. In an address on November 26, 1969 he asked representatives of more than forty

In rejecting the Commission *Guidelines* the District Court erred and the majority repeats the error. Under settled doctrine the Commission's interpretation should be accepted. The Supreme Court has held that

> [w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. *See also, e.g., Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408.

Udall v. *Tallman*, 380 U.S. 1, 16 (1965). In the *Tallman* case, the Court found that a construction of an Executive Order made by the Secretary of the Interior was not unreasonable. Accordingly, it followed the Secretary's interpretation.

Guidelines of the EEOC are entitled to similar consideration. The Fifth Circuit agrees. In *Weeks* v. *Southern Bell*

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trade associations to "review selection and testing procedures to make sure they reflect actual job requirements." 72 LRR 413, 416 (12/8/69).

Tel. & Tel. Co., 408 F.2d 228 (5th Cir., 1969), that court, in deciding a Title VII sex discrimination case, accorded "considerable weight" to the EEOC guideline which construed the relevant statutory provision. In a more recent case the same court noted the rejection of the EEOC's position by the lower court in the present case and specifically disapproved of the decision here under review.[8] *Local 189* v. *United States,* —— F.2d ——, 71 LRRM 3070, 3081 (July 28, 1969). We should do the same.

Other courts have reached similar results. Granting relief from the effects of a departmental and seniority structure, Judge Butzner found in *Quarles* that "[t]he restrictions do not result from lack of merit or qualification." 279 F. Supp. at 513. The Eighth Circuit has held that "it is essential that journeyman's examinations be objective in nature, that they be designed to test the ability of the applicant to do that work usually required by a journeyman * * * " *United States* v. *Local 36, Sheet Metal Workers,* —— F.2d —— (8th Cir. Sept. 16, 1969). *Accord, Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968).

Not only is the Commission's interpretation of § 703(h) not unreasonable, but it makes eminent common sense. The Company would have us hold that any test authored by

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[8] Judge Wisdom stated that

> [The *Griggs* court] went on to strike down an EEOC interpretation of that provision which would limit the exemption to tests that measure ability "*required* by the *particular job* or class of jobs which the applicant seeks." * * *
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> When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes ongoing discrimination, unless the incidents are limited to those that safety and efficiency require. That appears to be the premise for the Commission's interpretation of § 703(h). To the extent that *Griggs* departs from that view, we find it unpersuasive.

71 LRRM at 3081.

a professional test designer is "professionally developed" and automatically merits the court's blessing. But, what is professionally developed for one purpose is not necessarily so for another. A professionally developed typing test, for example, could not be considered professionally developed to test teachers. Similarly, a test that is adequately designed to determine academic ability, such as a college entrance examination, may be grossly wide of the mark when used in hiring a machine operator. Moreover, the Commission's is the only construction compatible with the purpose to end discrimination and to give effect to § 703(a). Although certainly not so intended, my brethren's resolution of the issue contains a built-in invitation to evade the mandate of the statute. To continue his discriminatory practices an employer need only choose any test that favors whites and is irrelevant to actual job qualifications. In this very case, the Company's oft-reiterated but totally unsubstantiated claim of business need has been deemed sufficient to sustain its employment standards. The record furnishes no supporting evidence, only the defendant's *ipse dixit.*

It would be enough to rest our decision on the reasonableness of the EEOC's position. A deeper look, however, at the legislative history of § 703(h) provides powerful additional support for its construction.

Congressional discussion of employment testing came in the swath of the famous decisions of an Illinois Fair Employment Practices Commission hearing examiner, *Myart* v. *Motorola.*[9] That case went to the extreme of suggesting that standardized tests on which whites performed better than Negroes could never be used. The decision was

[9] Decided on February 26, 1964. Reproduced in 110 Cong. Rec. 5662-64 (1964).

generally taken to mean that such tests could never be justified *even if the needs of the business required them.*

Understandably, there was an outcry in Congress that Title VII might produce a *Motorola* decision. Senators Clark and Case moved to counter that speculation. In their interpretive memorandum they announced that

> [t]here is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.[10]

Read against the context of the *Motorola* controversy, the import of the Clark-Case statement plainly appears: employers were not to be prohibited from using tests that determine *qualifications.* "Qualification" implies qualification *for* something. A reasonable interpretation of what the Senators meant, in light of the events, was that nothing in the Act prevents employers from requiring that applicants be fit for the job. Tests for that purpose may be as difficult as an employer may desire.

Senator Tower, however, was not satisfied that a *Motorola* decision was beyond the purview of Title VII as written. He introduced an amendment which had the object of preventing the feared result. His amendment provided that a test, administered to all applicants without regard to race, would be permissible "if * * * in the case of any

[10] 110 Cong. Rec. 7213 (1964).

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 employment* [or promotion or transfer] *in the particular business or enterprise involved* * * *." [Emphasis added.][11] It was emphatically represented by the author that the amendment was "not an effort to weaken the bill"[12] and "would not legalize discriminatory tests"[13] but was offered to stave off an apprehended *Motorola* ruling that might "invalidate tests * * * to determine the professional competence or ability or trainability or suitability of a person *to do a job.*" (Emphasis added.)[14] It is highly noteworthy that

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[11] The amendment was introduced on July 11, 1964. In its entirety it reads:

> (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—
>
> (1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or
>
> (2) in the case of an 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 by such employer without regard to the employee's race, color, religion, sex, or national origin.

110 Cong. Rec. 13492 (1964).

[12] *Id.*

[13] *Id.* at 13504.

[14] *Id.* at 13492.

Senator Tower's exertions were not on behalf of tests unrelated to job qualifications, but his aim was to make sure that job-related tests would be permitted. He squarely disavowed any broader aim.

Senators Case and Humphrey opposed the amendment as redundant.[15] Reiterating the message of the Clark-Case memorandum, Senator Case declared that "[t]he Motorola case could not happen under the bill the Senate is now considering."[16] Senator Case also feared that some of the language in the amendment would be susceptible to misinterpretation.[17] The amendment was defeated.[18]

Two days later Senator Tower offered § 703(h) in its present form, stating that it had been agreed to in principle "[b]ut the language was not drawn as carefully as it should have been."[19] The new amendment was acceptable to the proponents of the bill and it passed.[20]

What does this history denote? It reveals that because of the *Motorola* case there was serious concern that tests that select for job qualifications—job-related tests—might be deemed invalid under Title VII. Senators Clark, Case and Humphrey thought the fear illusory, but Senator Tower

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[15] *Id.* at 13503-04.

[16] *Id.* at 13503.

[17] In fact, it appears that Senator Case was concerned that the amendment might be construed the way Duke Power would have us construe the enacted § 703(h).

> If this amendment were enacted it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, whether it was a good test or not, so long as it was professionally designed.

Id. at 13504.

[18] *Id.* at 13505.

[19] *Id.* at 13724.

[20] *Id.*

expended great effort to insure against the possibility. At the same time he gave assurance that he did not mean to weaken the Act. His first proposed amendment contained language which contemplated that tests were to be job-related. According to his own formulation tests had to be of such character as to determine whether "an individual is suitable with respect to his employment." At no time was there a clash of opinion over this principle but the amendment was opposed by proponents of the bill for other reasons and was rejected. The final amendment, which was acceptable to all sides could hardly have required less of a job relation than the first.[21] Since job-relatedness was never in dispute there is no room for the inference that the bill in its enacted form embodied a compromise on this point. The conclusion is inescapable that the Commission's construction of § 703(h) is well supported by the legislative history.[22]

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[21] Indeed, the avowed tightening of language by Senator Tower in the interim, n.19, *supra,* was presumably in response to the misgiving expressed by Senator Case that the original amendment could lend itself to the construction that Duke Power now seeks. *See* n.15, *supra.*

[22] The majority argues that congressional action some years after the passage of the 1964 Act supports the Company's position. This is not legislative history. Even if the import of the action were unequivocal it would not speak for the will of the 88th Congress which passed the statute.

The cited legislative deliberation was occasioned by a bill introduced in May 1968 to modify Title VII. *See* S. 3465, 90th Cong., 2d Sess. § 6(c) (1968). If adopted it would have amended § 703(h) to embody a job-related standard in express terms. However, the bill was not enacted. One can draw differing and inconsistent conclusions from these events. It could be argued, as the majority does, that the bill's proponents recognized that § 703(h) as it stands does not contemplate job-relation. It is equally possible that the bill ultimately did not pass because the amendment was thought to be unnecessary. The bill's adherents might also have thought that the new amendment would represent no change,

Manifestly, then, so far as Duke Power relies on § 703(h) for the proposition that its tests (or other requirements) need not be job-related, it must fail.

B. *The District Court's Findings and the Evidence Supporting It.*

There can be no serious question that Duke Power's criteria are not job-related. The District Court expressly found that they were not,[23] and that finding is the only one consistent with the evidence.

To insure that a criterion is suitably fitted to a job or jobs, an employer is called upon to demonstrate that the standard was adopted after sufficient study and evaluation. It is not enough that officials think or hope that a requirement will work. In the District Court, Dr. Richard Barrett

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but offered it to forestall employers, such as Duke Power, from construing § 703(h) incorrectly. The inferences to be drawn from the introduction of the bill and its death are at best ambiguous and inconclusive.

If one must look to subsequent events for elucidation, consideration might be given to the comment of a Senator who was intimately involved in the passage of § 703(h). Senator Humphrey has stated that in his view § 703(h) did not protect tests if they were "irrelevant to the actual job requirements." Letter to American Psychological Association, quoted in The Ind. Psychologist (Div. 14, Am. Psychological Ass'n Newsletter), August, 1965, at 6, cited in Cooper and Sobel, 1653, n.67.

[23] The District Judge said:

> The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available.
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> * * *
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> * * * These qualities are general in nature and are not indicative of a person's ability to perform a particular task. Nevertheless, they are qualities which the defendant would logically want to find in his employees.

292 F. Supp. 243, 250 (1968).

was qualified as an expert witness for plaintiff on the "use of tests and other selection procedures for selection in promotion and employment." He testified as to what sound business practice would dictate: First, a careful job analysis should be made, detailing the tasks involved in a job and the precise skills that are necessary. Then, on the basis of this analysis, selection procedures may be chosen that are adapted to the relevant abilities. Then, the most important step is to validate the chosen procedures, that is, to test their results with actual performance.

The EEOC concurs. The *Guidelines* detail methods to be used to develop, study, and validate employment criteria.[24]

Compare with the above what Duke Power has done and what it has failed to do. Company officials say that the high school requirement was adopted because they thought it would be helpful. Indeed, a company executive candidly admitted that

> 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 this was a reasonable requirement * * *.

Duke Power offered the testimony of Dr. Dannie Moffie, an expert "psychologist in the field of industrial and per-

[24] The recommended methods were adopted after study by a panel of psychologists. The Commission has the power "to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public[.]" 42 U.S.C. 2000e-4(f)(5). *Also see* 33 Fed. Reg. 14392 (1968). By order of the Secretary of Labor, detailed minimum standards of evidence of test validity have been issued for federal contractors. That evidence is reviewed by the Office of Federal Contract Compliance to determine whether or not a contractor has violated Executive Order 11,246, 3 C.F.R. 339 (1964-65 comp.), banning racial discrimination.

sonnel testing." Dr. Moffie agreed that a professionally developed test "should be reliable and * * * should be valid." The question of validity, he said, is whether "the test measures what it has been set up to measure." Dr. Moffie never asserted that the Bennett and Wonderlic tests had been validated for job-relatedness. In fact, he testified that a job-related validity study was begun at the Dan River plant in 1966 but has not yet been completed. What this expert did claim was that the tests had been validated for their express purpose of determining "whether or not a person has the intelligence level and the mechanical ability level that is characteristic of the High School graduate. According to Dr. Moffie,

> when [the tests] function as a substitute or in lieu of a High School education, then, the assumption is that the test then,—the High School education is the kind of training and ability and judgment that a person needs to have, in order to do the jobs that we are talking about here * * *.

It is precisely this assumption that is totally unsubstantiated. The tests stand, and fall, with the high school requirement. The testimony does establish that the tests are the equivalent or a suitable substitute for a high school education, but there is an utter failure to establish that they sufficiently measure the capacity of the employee to perform any of the jobs in the inside departments. This is a fatal omission and should mark the end of the story.

C. *The Alleged Business Justification*

But on the majority's theory, there can be business justification in the absence of job-relatedness. The Company's promotion policy has always been to give on-the-job

training—the next senior man is promoted if, after he tries out on the job, he is found qualified. The Company claims that ten years before the start of this suit it found that, its business having become increasingly complex, employees in the advanced departments "did not have an intelligence level high enough to enable them to progress" in the ordinary line of promotion. It is asserted that in order to ameliorate this situation and to "upgrade the quality of its work force" the Company adopted the high school requirement, and later the alternative tests, as conditions for entry into the desirable inside departments. On these claims the majority grounds its determination of business need.

In fairness to the majority and to the Company, the thrust of this factual presentation is to suggest an argument that does not necessarily disavow job-relatedness. Rather, the rule would be that the jobs for which the tests must be fitted may be jobs that employees will *eventually, rather than immediately*, be expected to fill. However, the plaintiffs and the Commission have neither addressed nor rejected that proposition. Rather, it is their contention, supported by the testing and finding below, that Duke Power has not shown that its educational and testing requirements are related to *any* job.[25]

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[25] The notion that future jobs can be the basis for a test is not inconsistent with the language of the *Guidelines* which speaks of "the applicant's ability to perform a particular job or class of jobs." Of course it would be impermissible for an employer to gear his requirements to jobs the availability of which is only a remote possibility. The office of Federal Contract Compliance administers Executive Order 11,246, 3 C.F.R. 339 (1964-65 comp.) which bans discrimination by government contractors. That agency has recognized this problem and has provided (by order of the Secretary of Labor) that when a hiring test is based on possible promotion to other jobs, promotion must be probable "within a

Distilled to its essence, the underpinning upon which my brethren posit their argument is their expressed belief in the good faith of Duke Power. For them, the crucial inquiry is not whether the Company can establish business need, but whether it has a bad motive or has designed its tests with the conscious purpose to discriminate against blacks. Thus the majority stresses that the standards were adopted in 1955 when overt discrimination was the general rule, and hence the new policy was obviously not meant to accomplish that end. But this is no answer.

A man who is turned down for a job does not care whether it was because the employer did not like his skin color or because, although the employer professed impartiality, procedures were used which had the effect of discriminating against the applicant's race. Likewise irrelevant to Title VII is the state of mind of an employer whose policy, in practice, effects discrimination. The law will not tolerate unnecessarily harsh treatment of Negroes even though an employer does not plan this result. The use of criteria that are not backed by valid and corroborated business needs cannot be allowed, regardless of subjective intent. There can be no legitimate business purpose apart from business need; and where no business need is shown, claims to business purpose evaporate.[26]

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reasonable period of time and in a great majority of cases." 33 Fed. Reg. 14392, § 2(b)(1) (1968).

In this case, however, the issue is not the propriety of testing for remote positions. We might assume that once an employee joins the line of progression his advance will be inexorable. Nevertheless, the fact remains that Duke Power's requirements have never been validated for jobs at the end of the ladder, let alone those on the bottom rung.

[26] As I have noted from the outset of this discussion, the ultimate question under Title VII is whether there are business needs for

It may be accepted as true that Duke Power did not develop its transfer procedures in order to evade Title VII, since in 1955 this enactment could not be foreseen. However, by continuing to utilize them at the present time, it is now evading the Act. And by countenancing the practice, this court opens the door to wholesale evasion. We may be sure that there will be many who will seek to pass through that door.

The Company's claim to business justification is further attenuated by imbalance in the application of the standards. Even if we view the standards as oriented toward future jobs, the fact remains that of those that might apply for such positions in the inside partments, only the outsiders must meet the questioned criteria in order to qualify. Intra-departmental progression remains the same. Also there is apparently no restriction on transfer from any of the inside departments to the other two inside departments. An employee with no more than a fifth grade education who has not taken the tests may try out for new inside jobs and transfer to a vacancy in another department if he is already in an inside department. In spite of Duke Power's vaunted faith in the necessity of a high school education or its equivalent, such an employee may,

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an employer's policy. Plaintiffs agree and the majority properly quotes their brief, adding emphasis:

> An employer is, of course, permitted to set educational or test requirements that fulfill genuine business needs. * * * [W]here business needs can be shown * * * the fact that the test tends to exclude more Negroes than whites does not make it discriminatory.

The statement is correct and certainly does not "concede," as the majority urges, that the question is only whether Duke Power had a "genuine business purpose and [was] without intent to discriminate against future Negro employees * * *."

without any test, advance as far as his actual talents permit and qualify for higher pay.

The fact that Duke Power has not consistently relied on its standards, especially when viewed in light of the fact that the exempted inside group was constituted when racial descrimination was in vogue, belies the claim to business justification.

In short, Duke Power has not demonstrated how the exigencies of its business warrant its transfer standards. The realities of the Duke Power experience reveal that what the majority seizes upon as business need is in fact no more than the Company's bald assertion. The majority opinion's measure of "genuine business purpose" must be very low indeed, for, after all is said and done, Duke Power has offered no reason for allowing it to continue its racially discriminatory procedures.

II

Discriminatory Application of Standards

As described above, the Company's criteria unfairly apply only to outsiders seeking entrance to the inside departments. This policy disadvantages those who were not favored with the lax criteria used for whites before 1955. As I will show, this when juxtaposed with the history and racial composition of the Dan River plant, is itself sufficient to constitute a violation of Title VII.

It is true, as the majority points out, that the unevenhanded administration of transfer procedures works against some whites as well as blacks. It is also true that unlike the Constitution, Tile VII does not prohibit arbitrary classifications generally. Its focus is on racial and other specified types of discrimination. Thus, when an employer

capriciously favors the inside employees, to the detriment of those employed in the outside departments, this is not automatically an unlawful employment practice if whites as well as blacks are in the disadvantaged class.

On the other hand, it cannot be ignored that while this practice does not constitute forthright racial discrimination, the policy disfavoring the outside employees has primary impact on blacks. This effect is possible only because a history of overt bias caused the departments to become so imbalanced in the first place. The result is that in 1969, four years after the passage of Title VII, Dan River looks substantially like it did before 1965. The Labor Department is all black; the rest is virtually lily-white.

There no longer is room for doubt that a neutral superstructure built upon racial patterns that were discriminatorily erected in the past comes within the Title VII ban. Judge Butzner put the point to rest when he rejected an employer contention that "the present consequences of past discrimination are outside the coverage of the act." In his words, "[i]t is apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 515-16 (E.D. Va. 1968).

A remedy for this kind of wrong is not without precedent. The "freezing" principle (more properly, the anti-freezing principle), developed by the Fifth Circuit in voting cases is analogous. In those cases a pattern and practice of discrimination excluded almost all eligible Negroes from the voting lists but enrolled the vast majority of whites. Faced with judicial attack, the authorities found that they could no longer avowedly employ discriminatory practices. They invented and put into effect instead new,

unquestionably even-handed, but onerous voting requirements which had the effect of excluding new applicants of both races, but, as was to be expected, primarily affected Negroes, who in the main were the unlisted ones. As the Fifth Circuit explained the principle,

> [t]he term "freezing" is used in two senses. It may be said that when illegal discrimination or other practices have worked inequality on a class of citizens and the court puts an end to such a practice but a new and more onerous standard is adopted before the disadvantaged class may enjoy their rights, already fully enjoyed by the rest of the citizens, this amounts to "freezing" the privileged status for those who acquired it during the period of discrimination and "freezing out" the group discriminated against.

United States v. *Duke,* 332 F.2d 759, 768 (5th Cir. 1964). Accordingly, the new voting requirements were struck down. This remedial measure was approved by the Supreme Court in *United States* v. *Louisiana,* 380 U.S. 145 (1965).

Applying similar reasoning to the Title VII employment context, the Fifth Circuit invalidated the nepotism policy of an all-white union, which restricted new members to relatives of old ones. Although the policy of course discriminated against whites as well as others, it was prohibited since it enshrined the white membership and effectively forever denied membership status to Negroes or Mexican-Americans. *Local 53* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969).[27]

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[27] *See also* Houston Maritime Ass'n, 168 NLRB 83, 66 LRRM 1337 (1967). A union, after having consistently rejected Negroes for membership, adopted a new "freeze" policy whereby all new

Title VII bars "freeze-outs" as well as pure discrimination, where the "freeze" is achieved by requirements that are arbitrary and have no real business justification. Thus Duke Power's discrimination against *all* those who did not benefit from the pre-1955 rule for whites operates as an illegal "freeze-out" of blacks from the inside departments.

III

Conclusion

Beside the violation found by the majority, Duke Power is guilty of an unlawful employment practice in two other ways. First, it has used non-job-related transfer standards which have the effect of excluding blacks. Second, it has implemented those same standards in a discriminatory fashion so as to freeze blacks out of the inside departments.

This case deals with no mere abstract legal question. It confronts us with one of the most vexing problems touching racial justice and tests the integrity and credibility of the legislative and judicial process. We should approach our task of enforcing Title VII with full realization of what is at stake.

For all of the above reasons, the judgment of the District Court should be reversed with directions to grant relief to all of the plaintiffs.

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applicants were turned down, white and black. The Labor Board found that the union violated the National Labor Relations Act.

> [B]y adopting a practice which in operative effect created a preferred class in employment, the result was that the Union's previous policy of discrimination against Negroes as to job opportunities solely on the basis of race was continued and maintained.

66 LRRM, at 1339.

Order Allowing Certiorari, June 29, 1970

SUPREME COURT OF THE UNITED STATES

No. 1405—October Term, 1970

Willie S. Griggs, *et al.*,

Petitioner,

—vs.—

Duke Power Company, a corporation,

Respondent.

"The motion of the United Steel Workers of America AFL-CIO, for leave to file a brief, as *amicus curiae,* is granted. The petition for a writ of certiorari is also granted and the case is placed on the summary calendar. Mr. Justice Brennan took no part in the consideration or decision of this motion and petition."

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