

## GRIGGS v. DUKE POWER COMPANY

### EQUAL EMPLOYMENT OPPORTUNITY ACTIVITY

"It shall not be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such tests, its administration, or action upon the results, is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin."<sup>1</sup>

This section of the Civil Rights Act of 1964,<sup>2</sup> was the area in controversy in the March 8, 1971 decision of the United States Supreme Court, *Griggs vs. the Duke Power Company*.<sup>3</sup> The legal background begins with a class action brought by Black employees of the Duke Power Company, the latter being charged with discriminatory hiring and employment practices violating Title VII of the 1964 Civil Rights Act.<sup>4</sup> The first judgment was by the U.S. District Court in Greensboro, N.C. in favor of Duke Power, dismissing the suit. The basis for the District Court's ruling was quite explicit. The Court held the high school educational requirement of the employer (Duke Power) did not violate the plaintiff's rights under the 1964 Civil Rights Act.<sup>5</sup> The Act was held to be not retroactive as relates discriminatory employment practices taking place prior to July 2, 1965 which was the effective date of the Civil Rights Act.<sup>6</sup>

It was lawful for Duke Power to use a "professionally developed ability test" if it was not patently discriminatory. Furthermore, the test may not only measure specific abilities and skills required of a particular job, but also it may be permissible to measure levels of general intelligence which can be unrelated to the job to be performed. The test employed by the Duke Power Company did not violate the Civil Rights Act<sup>8</sup> and the "... Act does not deny the employer to determine the qualities, skills, and abilities required of his employees. . . ."<sup>9</sup>

Further the District Court found that the evidence presented was insuffi-

<sup>1</sup> 42, U.S.C.A. §2000e-2(h) (1964).

<sup>2</sup> *Id.* See also, §2000e-2(a); which provides: "It shall be an unlawful employment practice for an employer . . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual's race . . ."

<sup>3</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971).

<sup>4</sup> *Id.*, *supra* note 1.

<sup>5</sup> *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (D.C.N.C. 1968).

<sup>6</sup> *Id.*, at page 247.

<sup>7</sup> *Id.*, at page 251.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, note 5 at page 250.

cient to establish that the Black employees were discriminated against in the allocation of overtime.<sup>10</sup>

The thirteen plaintiff's involved appealed and the Fourth Circuit Court of Appeals granted partial relief to the employees.<sup>11</sup> The rulings were based on several premises:

First, although the 1964 Civil Rights Act was not retroactive previous to July 2, 1965, the actions of the employer "... encompassed present and continuous effects of past discrimination and relief may be granted to remedy such discrimination."<sup>12</sup>

Second, the six Black workers without high school education were locked into the lowest paying departments due to the educational requirements for promotion, while many whites, also without high school educations, had been hired into better paying departments and could be promoted.<sup>13</sup> The Black workers, hired into the lowest paying departments, had to pass a test with scores equivalent to high school graduates to be promoted, while white employees had been hired directly into higher paying departments thereby not having been required to take the tests.

Third, the tests, for Black employees, should be waived and not be invoked to inhibit their advancement. The test did have a genuine business purpose and was instituted without discriminatory intentions toward Negro employees hired after the rule went into effect.<sup>14</sup>

Fourth, the partial relief granted by the Court of Appeals did not affect four Black workers, without high school education, who had been hired after the educational requirement went into effect (employees must be high school graduates to be promoted from the lowest paying departments).<sup>15</sup>

Fifth, the Black employees, without a high school education, hired prior to that company rule, were entitled to injunctive relief and their rights under the 1964 Civil Rights Act insures their consideration for promotion.<sup>16</sup> The residual discrimination prior to July 2, 1965 was rejected.<sup>17</sup>

<sup>10</sup> *Id.*, note 5 at page 251, 252.

<sup>11</sup> *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir., 1970). See: *Testing Devices and Equal Employment Opportunity: Role of the Courts in Achieving Compatibility*, 1970 UTAH L. REV. 646 (1970). Note: Judge Sobloff's dissent at 1237. Compare: *Local 189 v. U.S.*, 416 F.2d 980 (1969).

<sup>12</sup> *Id.* at page 1230. See: *Local 53 v. Vogler*, 407 F.2d 1047, 1052 (5th Cir. 1969); *U.S. v. Local 189*, 416 F.2d 980 (5th Cir. 1969); *Quarles v. Phillip Morris*, 279 F. Supp. 505-516 (E.D. Va. 1968) where it was held that Title VII of the Civil Rights Act of 1964 did cover "present and continuing consequences of past discrimination."

<sup>13</sup> *Id.* at 1231.

<sup>14</sup> *Id.* at 1232.

<sup>15</sup> *Id.* at page 1235.

<sup>16</sup> *Id.* note 13; see also, page 1239, note 10: *Clark v. American Marine*, 304 F. Supp. 603 (E.D.La. 1969); *Local 189 v. U.S.*, 416 F.2d 980 (5th Cir. 1969).

<sup>17</sup> *Id.* at 1233. See 1970 Utah 646 at 649 "the message of the Griggs decision

Sixth, where departmental seniority would result in continuing discrimination in promotion, seniority considerations of an employee, who was the victim of past discrimination, should be done on a plant-wide instead of a departmental seniority basis.<sup>18</sup>

The plaintiffs now sought review of the Circuit Court decisions in the U.S. Supreme Court. The Supreme Court of the United States granted Certiorari.<sup>19</sup> The case was argued on December 14, 1970 and decided on March 8, 1971. The Supreme Court ruled in favor of the plaintiffs. The basic reason was that "What Congress had forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant. What Congress had commanded is that any tests used must measure the person for the job and not the person in the abstract."<sup>20</sup>

The Civil Rights Act (1964) was meant to achieve equality of employment opportunities and to break the practice of invidious discriminatory freezing and other employment practices.<sup>21</sup>

If an employment practice operates to exclude Negroes and cannot be shown to be directly related to job performance, it is discriminatory and illegal. Good Faith and intent which actually creates employment hurdles solely to minority groups and does not measure related capabilities is discriminatory.<sup>22</sup>

The subtle differences between the Supreme Court decision and those of the lower courts were not found on the finding of direct discrimination through legitimate testing practices, but rather if the test became the discriminatory vehicle through which resulted invidious discrimination since the test was non-job-related.<sup>23</sup>

The actual hiring and promoting procedures were dealt with in the lower

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(Court of Appeals) is clear—if an employer can persuade the court that no intent to discriminate was involved, the discriminatory effects of employment practices are virtually irrelevant."

<sup>18</sup> *Id.* at 1236. See generally, *Title VII Seven Years After*, 32 MONTANA L. REV. 229, 244 (1971); Quarles v. Phillip Morris, *supra* note 12. *Title VII, Seniority, Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 HARV. L. REV. 1598 (1969).

<sup>19</sup> 91 S. Ct. 33, 98 (1970).

<sup>20</sup> 91 S. Ct. 856 (1971).

<sup>21</sup> *Id.* at page 853.

<sup>22</sup> *Id.* at page 854.

<sup>23</sup> See, *Civil Rights—Employee Testing*, 7 WAKE FOREST L. REV. 425 (1971); *Racial Discrimination in Employment*, 12 WM. & MARY L. REV. 918 (1971); and 21 DRAKE L. REV. 188 (1971).

courts, but the Supreme Court dealt directly with the test clause itself and subjected it to a broader interpretation. The Act did not require a person to be hired simply because he had been a victim of discrimination or a member of a minority group. However, the high court did deem that such testing represented an "artificial, arbitrary, and unnecessary barrier to employment . . ." <sup>24</sup> since it resulted in discriminating on a racial level, not a job-related level.

The decision is somewhat reminiscent of Illinois's *Myart vs. Motorola* decision where employment tests in which the white applicant's performance was always better than the Negro's performance was deemed to be biased and discriminatory. Since the results of those tests acted to establish a serious barrier to opportunity for the Black applicant. The Illinois Fair Employment Practices Commission ruled that general ability does not lend itself to equal opportunity and Motorola did actively "Intend" to discriminate using the testing procedure as a vehicle by falsely recording the test scores.<sup>25</sup> Motorola did challenge the decision and the power of the commission to render such interpretation of the Illinois Fair Employment Practices law. The lower court upheld the decision;<sup>26</sup> but the Illinois Supreme Court reversed the decision due to a lack of evidence as to "intent" to discriminate.<sup>27</sup>

In *U.S. vs. Gaston County*<sup>28</sup> the Court recognized the differences in the quality of education of Negroes in segregated schools and their performance on any general test, such as on a voter's literacy test as in the Gaston case, is biased and invidiously bars certain groups from qualifying. There the Supreme Court ruled that the low scores on the literacy test were the "consequences" of a poor education formulated in the inferior, segregated school system which in turn acted as a barrier to the right to vote.<sup>29</sup>

The qualifications instituted by the Duke Power Co. did not have any relationship to successful job performance and were interpreted as being discriminatory in purpose since employees without high school educations or who did not take the test performed successfully.<sup>30</sup> Finally, the Supreme Court in contrast with the lower courts dealt with the nebulous realms of consequence as well as intent and the results of such actions.

For business these implications give rise to a reevaluation of former practices and the reliability of general ability tests. A question can be raised as to their effectiveness and limitations as well as their intent whether they are dis-

<sup>24</sup> *Id.* note 3, *supra* at 853.

<sup>25</sup> *Leon Myart v. Motorola Inc.*, Charge no. 63c-127 (1964) cited in 110 Cong. Rec. 5662 (1964).

<sup>26</sup> *Motorola v. Illinois FEPC*, 58 LRRM 2573 (1964).

<sup>27</sup> *Motorola v. Illinois FEPC*, 34 Ill. 2d 266, 215 N.E. 2d 286, (1966).

<sup>28</sup> 395 U.S. 285, (1969).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, see note 20.

criminatory or not.<sup>31</sup> If one considers the U.S. Chamber of Commerce's statistics stating that 55% of all companies employing 1600 or more use the *Wonderlic Personnel Test* and that another 20% utilize the *Bennett Mechanical Aptitude Test*, broad implications connotating change in policies are in the offing. The issue of "legitimate business needs" versus "serious barriers to discrimination" must be weighed upon scales that presently have not as yet been designed.<sup>32</sup> The entire problem has yet to be pragmatically outlined in guidelines that can be followed.

At present, the Equal Employment Opportunity Council is struggling to formulate new substantive guidelines in concurrence with the high court's ruling. The agency's previous guidelines, date August 1, 1970 are virtually obsolete.<sup>33</sup> The old guidelines allowed for general ability tests as being the criteria for hiring, transfer, promotion, etc. so long as they projected evidence of validity, equal rejection rates for nonminority as well as for minority candidates, and were job related.<sup>34</sup> The EEOC now suggests that only objective criteria should be used to "play it safe." In other words; in hiring a welder for example, the tests should be an actual welding test rather than a subjective dexterity test or an aptitude test, although the latter may not be completely foreclosed so long as they are not the sole criteria. Evaluation and research with consulting Industrial Psychologists appear to be in order to formulate more definitive guidelines. Industrial Psychologists involved in psychometry could be used to reevaluate and reinterpret their testing models in retrospect to the intent, purpose, and consequence relating to any discrimination.<sup>35</sup>

One unfortunate result of the proceedings is that the EEOC and the business sector of the country are at loggerheads. The EEOC sought to insure equal protection for minorities under the ever enbroadened 14th amendment. Both parties suggest the case-by-case method, which many predict will be the rule of thumb in such cases: but while business is concerned with hiring procedures, EEOC is concerned with discrimination. Any mutual cooperation between business and government is not foreseen on this issue. The U.S. Chamber of Commerce, acting as spokesman for business in their amicus curiae brief,<sup>36</sup> presented in *Griggs vs. Duke Power Co.*, made many claims dis-

<sup>31</sup> *Id.*, note 3; Amicus Curiae Brief of the U.S. Chamber of Commerce #124.

<sup>32</sup> Note: *Legal Duplications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 806 (1966).

<sup>33</sup> CCH EMPLOYMENT PRAC. GUIDE PARA. 16, ¶904.4; Para. 17, 304.53 (1966).

<sup>34</sup> *Id.* ¶16, 904.4: "Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which the candidates are being evaluated."

<sup>35</sup> *Supra*, note 32, see also Klein, "Job Testing Under Fire," *New York Times*, Sept. 19, 1971 (Sec. 8, p. 5).

<sup>36</sup> *Id.*, note 31.

counting any allegations of discrimination through testing. The Chamber said that if an employer were so inclined and if a test may be discriminatory, there would be "independent evidence" showing that the particular company's testing requirements were a subterfuge and that invidious discrimination was the intent.<sup>37</sup> The brief mentioned the high costs of test validation and of psychological services that are prohibitive in securing adequate samples. The Chamber of Commerce, in a seemingly purer manner, accused the EEOC of empire building and of trying to usurp the will of Congress by "consciously seeking to construe Title VII as broadly as possible in order to maximize the effects of the statute on employment discrimination without going back to Congress for more substantive legislation."<sup>38</sup> They indicated the EEOC for disregarding the "legislative history of the act" and employing creative interpretation" by using the courts rather than the Congress."<sup>39</sup> The statements, outlined in the Chamber of Commerce Amicus Curiae brief served no purpose but to inflame the situation, to sidetrack the real issues, and in the brief's own words: "... was a mere pretext of subterfuge and not the product of a bona fide, good faith business objective."<sup>40</sup>

It is the contention of many people involved that labor organizations are also to be subjected to scrutiny with relation to discriminatory practices using the "equal protection concept." Premises decisions suggest the trend.

In *Railway Clerks Association vs. Corsi*,<sup>41</sup> a New York State Civil Rights Law that forbid discrimination in entering a labor organization because of race, color, creed, or religion was upheld in that it was not unconstitutional in denying "equal protection under the law" as an interference with the association's right of property and liberty of control.

*James vs. Oglivie*<sup>42</sup> points out that membership in a labor union is a contractual relationship and the link in obtaining an employment contract. The right to union membership exists without regard to race or color under Civil Rights statutes providing for equal rights in making contracts.

*Local 53 of the International Association of Heat and Frost Insulators and Asbestos Workers vs. Vogler*<sup>43</sup> stated that refusal to refer nine individuals for employment amounted to unlawful discrimination.

The individualized case-by-case method of interpretation was affirmed by *Clark vs. Porter*.<sup>44</sup> It states that "although general propositions are to be

<sup>37</sup> *Id.*, note 31 at page 3, 4, & 13.

<sup>38</sup> *Id.*, note 31 at page 7.

<sup>39</sup> *Id.*, note 31 at page 6, 7.

<sup>40</sup> *Id.*, note 31 at page 13.

<sup>41</sup> 326 U.S. 88, 65 S. Ct. 1483 (1945).

<sup>42</sup> 310 F. Supp. 661 (1970).

<sup>43</sup> *Id.*, note 12 *supra*.

<sup>44</sup> 296 F. Supp. 40 (D.C. Ala. 1968).

sought, each case is best served by pragmatic approaches of judging that case in light of its own facts and the actual problems to be solved."

The intention that any discrimination is not openly announced per se, but carried by using other devices and subtle methods such as testing, grandfather clauses, etc. were considered in *Holland vs. Edwards*.<sup>45</sup>

Unions often use written tests, usually administered by a "testing committee" that may or may not be professionally developed. The tests relate to admission procedures, apprenticeships, seniority, and transfers. It is alleged that Black workers have been widely excluded, save for a few token members, on the basis of those tests and on certification. The handwriting on the wall is evident in a few more recent decisions. In *U.S. vs. Local 86, Ironworkers*<sup>46</sup> the Federal District Court of Washington ruled that the union violated Title VII of the 1964 Civil Rights Act<sup>47</sup> by discrimination against Negro apprenticeship applicants by limiting membership, work opportunities, and apprentice training to union members and whites by giving false information to Negro applicants regarding application for membership and training; by applying higher standards to Negroes than to whites, by recruiting whites but not Negroes, and by practicing nepotism in regards to training thereby excluding Negro applicants.

In *U.S. vs. Bethlehem Steel*<sup>47</sup> the U.S. District Court ruled that Bethlehem Steel engaged in racial discrimination in regards to hiring, assignments, and promotion at its Lackawana plant and that the United Steelworkers and its local unions were implicated in the "patterns or practice" of discrimination dealing with membership, apprenticeship, and seniority in accordance with Title VII. The union-management transfer and seniority system acted in such a way to lock-in a Negro worker into his assigned department. The 11 out of 82 departments to which the Black workers were assigned dealt with menial tasks. One factor in these two forementioned cases involving unions and discrimination is that suits were filed against the International Union as well as against the local involved thereby inferring tacit approval if not collusion on the part of the International toward the local's actions and a broader sweeping resolve on the part of the government.

The problem presented by *Griggs vs. Duke* and its related cases comprehensively affects all business hiring. While not yet operationally realized, many people involved in the business decision making processes fear that government quotas in hiring, transfer, and promotion will be the resulting nemesis for the problems at hand. Whether or not this will occur is mere conjecture, but more stringent regulations and guidelines can be anticipated. Discussions with EEOC revealed that the burden of proof probably would have to be

<sup>45</sup> 307 NY 38, 119 N.E. 2d. 581 (1954).

<sup>46</sup> 315 F. Supp. 1202 (D.C. Wash. 1971).

<sup>47</sup> 312 F. Supp. 977 (D.C.N.Y. 1970).

incumbent upon management (or union) to show the validity of a test. The most likely criteria to be developed is a statistical correlation between the test and work success involving a case-by-case method. This process would open new realms for Industrial Psychologists in the development of pragmatic tests seeking objectivity in a field. While the EEOC is reorganizing and the area is still somewhat beclouded, objective self-evaluation as to the intent and consequence of employment criteria must occur within business. This objectivity not only can be a deterrent to litigation, but also can be a self-evaluative factor as to the intent and aims of a company's position concerning equal employment opportunity and their qualification criteria relevancy. Furthermore, the forementioned proceedings dealt exclusively with blue collar employment. The potential hiring of white collar personnel, being far more subjective in nature, shall be a harder area to assure equitable standards. Once the line hiring procedural difficulties are overcome, it is probable that employment practices dealing with the hiring of white collar staff personnel will be the next target for scrutiny. The court saw all the possible implications and made their ruling extend beyond Duke Power Company, who did have an educational training program, to consequences and motives of long entrenched unequitable practices that can inhibit equal opportunity to applicants for employment, admission, training, transfer, and promotion.

The "equal protection" clause of the Fourteenth Amendment dealt only with the citizen right to protection from invidious discriminatory practices from or coupled with state action. The 1964 Civil Rights Act was passed using the 14th amendment as a Constitutional premise, and is concerned with equal protection vis-a-vis private discrimination. Therefore, equal opportunities and equal protection are assured all citizens from invidious discrimination. This latter point is of particular interest to business with relation to hiring opportunities and intent consequences of their hiring practices. The declaration of a company that we are "equal opportunity employers" (often claimed retrospectively without reading EEOC guidelines) is not *prima facie* true. Admittedly, the purpose is to announce to the public that the particular business is in compliance or will comply with the Federal civil rights laws requiring equal opportunity. Unfortunately, the declaration and the factors, especially as related to Duke Power Company, are in no way synonymous. Moreover, it is important to note that this case is only the first of many which EEOC has filed. The victory is sweet, the ramifications to the business community enormous *Caveat Employer*.

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THEODORE CHASE