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Griggs v. Duke Power Co.: The First Landmark under Title VII of the Civil Rights Act of 1964

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be enhanced by requiring state courts to follow clear and uncontradicted holdings of lower federal courts on constitutional questions. This would seem especially appropriate when the federal court involved is a district court within the state or a court of appeals whose circuit includes the state. In this fashion uniformity of federal law could be achieved in all state and federal courts within a circuit, leaving only disparities among the circuits to be resolved by the Supreme Court. But whether uniformity of laws, forum shopping, availability of federal remedies, or the ultimate power under the supremacy clause is considered more important, surely all are worthy of examination by any court adjudicating a conflict involving the relationship of federal and state courts.

If it is true that "the federal courts are the unique tribunals which are to be utilized to preserve the civil rights of the people,"[43] then this decision must be looked upon as a blow to the enforcement of civil liberties. It seems unlikely that *Lawrence* will be considered as the final disposition of the constitutional question discussed here.[44] An ordered relationship between the federal and state courts would seem to require that this clear conflict be resolved in a more probing fashion. As long as this decision stands, it will make uncertain and suspect the concept of "the primacy of the federal judiciary in deciding questions of federal constitutional law."[45]

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Griggs v. Duke Power Co.: The First Landmark Under Title VII of the Civil Rights Act of 1964

Prior to July 2, 1965 (the effective date of title VII of the Civil Rights Act of 1964),[1] the Duke Power Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant at Draper, North Carolina.[2] The plant was organized into five operating departments: (1) labor, (2) coal handling, (3) operations, (4) maintenance, and (5) laboratory and test. Negroes were relegated to the labor department and were prevented access to other departments by reason of their race.[3] In 1955 the company instituted a policy of requiring a high school education for initial assignment to any de-

[43] Harrison v. NAACP, 360 U.S. 167, 179 (1959) (Douglas, J., dissenting). "National sentiment also regards federal tribunals as the appropriate guardians of federal rights." Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928).

[44] However, *Lawrence* itself has already been cited as authority. Brown v. State, 466 S.W.2d 527, 528 (Tenn. Crim. App. 1971).

[45] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964).

[1] Civil Rights Act of 1964, Pub. L. No. 88-352 (July 2, 1964), 78 Stat. 241 (*codified in* 28 U.S.C. § 1447(d), 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000d-4, 2000e to 2000h-6 (1964)).

[2] Griggs v. Duke Power Co., 292 F. Supp. 243, 248 (M.D.N.C. 1968) (finding of the trial court).

[3] *Id.* at 247. The labor department was the least desirable in the plant, the maximum wage being $1.565 per hour. In the other departments wages ranged from a minimum of $1.705 to a maximum of from $3.18 to $3.65 per hour.

partment except labor, and for transfer from coal handling to any "inside" department (operations, maintenance, or laboratory). When the company abandoned its policy of restricting Negroes to the labor department in 1965, completion of high school also was made a prerequisite for transfer from labor to any other department. On July 2, 1965, the company added a further requirement for new employees: to qualify for placement in any but the labor department, the prospective employee had to register satisfactory scores on two professionally prepared aptitude tests, as well as have a high school education. Only the completion of high school was required of employees eligible for transfer to the four desirable departments if the incumbent had been employed prior to the time of the new requirement. In September 1965 the company began to permit incumbent employees who lacked a high school education to qualify for transfer from labor or coal handling to an "inside" job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Aptitude Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs.[4]

In 1967 a group of thirteen incumbent Negro employees brought a class action against Duke Power Company, claiming that the company's educational and testing requirements were discriminatory and invalid. The district court found that although the company had engaged in discriminatory practices prior to the passage of title VII of the Civil Rights Act of 1964,[5] thereafter the company had not limited, classified, segregated, or discriminated against its employees in any way which had deprived or tended to deprive them of any employment opportunities because of race or color.[6] The district court also found the legislative history of the Act to be replete with evidence of Congress' intention that the Act be applied prospectively and not retroactively; and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.[7] In addition, the district court stated: "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."[8]

The Fourth Circuit affirmed in part and reversed in part,[9] granting relief to six Negro employee-plaintiffs without a high school education or its equivalent who were discriminatorily hired only into the labor department and subsequently *locked in* by the adoption of the high school education requirement in 1955.[10] The court of appeals agreed with the district court that a test did not have to be job-related in order to be valid under section 703(h), and denied relief to the four Negro employees without a high school education who were hired after the adoption of the educational requirement.[11] The United States Supreme Court granted certiorari.[12] *Held, reversed*: An employer is prohibited

[4] *Id.* at 250.
[5] 42 U.S.C. § 2000e (1964).
[6] 292 F. Supp. at 251.
[7] *Id.* at 248.
[8] *Id.* at 250.
[9] Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970).
[10] *Id.* at 1236.
[11] *Id.* at 1235.
[12] 399 U.S. 926 (1970).

from requiring a high school education or the passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (1) neither standard is shown to be significantly related to successful job performance, (2) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (3) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

I. THE CIVIL RIGHTS ACT OF 1964

Legislative History. The passage of title VII of the Civil Rights Act of 1964[13] by the Eighty-Eighth Congress will probably be recorded in history as the most important piece of legislation in the field of labor law in this second half of the twentieth century. Title VII, dealing with equal employment opportunity, marked the passage of the first comprehensive federal law in this area after many years of proposals and counterproposals.[14]

The act had its beginning in the Kennedy administration; a draft of his proposed legislation went to Congress in mid-1963. The assassination of President Kennedy put a spotlight on the unfinished legislative business of his program and provided the impetus needed to move the bill through the Congress. Passed by the House in early 1964, the bill received extensive debate in the Senate.[15] It was in the Senate debates that Senator John Tower added an amendment which was to become section 703(h)—the provision relating to, among other things, the use of professionally developed ability tests by employers.

Senator Tower's amendment was a result of a decision by a hearing examiner for the Illinois Fair Employment Commission in *Myart v. Motorola Co.*[16] That decision had been widely interpreted as invalidating any test which had an adverse impact on blacks without regard to business need.[17] Shortly after the *Motorola* case Senators Clark and Case introduced an interpretative memorandum on the constitutionality of the Act which declared:

> 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 this basis of test performance.[18]

Not satisfied with this explanation, Senator Tower put the full text of the *Motorola* decision in the record[19] and introduced an amendment to make it clear that the extreme implications of *Motorola* would not be incorporated into

[13] 42 U.S.C. § 2000e (1964).

[14] *See, e.g., Civil Rights and the South—A Symposium*, 42 N.C.L. REV. 1 (1963); *Emancipation Proclamation Centennial Symposium*, 9 WAYNE L. REV. 401 (1963); *Symposium on Civil Rights*, 24 FED. B.J. 1 (1964).

[15] The debate in the Senate lasted over 534 hours. BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 21 (1964).

[16] The text of the examiner's report is reprinted at 110 CONG. REC. 5662-64 (1964).

[17] *See, e.g.*, 110 CONG. REC. 5614-16 (1964) (remarks of Senator Ervin); *id.* at 5999-6000 (remarks of Senator Smathers); *id.* at 7012-13 (remarks of Senator Holland); *id.* at 9599-9600 (remarks of Senator Fulbright).

[18] 110 CONG. REC. 7213 (1964) (emphasis added).

[19] *Id.* at 13,493.

title VII. He stated his purpose to be the protection of tests "designed to determine or predict whether an individual is suitable or trainable with respect to his employment in the particular business or enterprise involved."[20] The amendment was rejected after an attack by the proponents of title VII, who alleged that it was loosely worded and gave the employer an absolute right to use a professionally designed test even if it operated discriminatorily.[21] A compromise version was introduced, passed without debate, and constitutes the present section 703(h). That section provides that it shall not be unlawful: "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 . . . ."[22]

In addition to the legislative history of 703(h), another possible indication of congressional intent is that an amendment requiring a "direct relation" between the test and a "particular position" was proposed in May 1968, but was defeated.[23]

EEOC Guidelines. Guidelines relating to testing have been established by the Equal Employment Opportunity Commission.[24] The Guidelines, which were originally issued in 1966 and revised in 1970, unequivocally require that the tests be job-related.[25] The Guidelines define the term "test" as "any paper-and-pencil or performance *measure* used as a basis for any employment decision,"[26] and the definition

> includes, *but is not restricted to*, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term 'test' includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewer's rating scales, scored application forms, etc.[27]

One can see that by defining "test" as any "paper-and-pencil or performance *measure*" and including in that definition all of the above items, the EEOC intends the definition of "test" to include any and all measures used by the employer in making his employment decision. Any written criteria, whether com-

[20] *Id.* at 13,492.
[21] *Id.* at 13,504 (remarks of Senator Case).
[22] 42 U.S.C. § 2000e-2(h) (1964) (emphasis added). Senator Humphrey, one of the bill's principal proponents, commented: "Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title." 110 CONG. REC. 13,724 (1964).
[23] S. REP. No. 1111, 90th Cong., 2d Sess. 17 (1968).
[24] The five-member Equal Employment Opportunity Commission performs its tasks through a system of formal and informal remedial procedures, with the emphasis on efforts to obtain voluntary compliance. The Commission is established under section 705 of title VII, and the procedures it follows in preventing and remedying unlawful employment practices are set forth in section 706.
[25] 35 Fed. Reg. 12,333 (1970).
[26] *Id.* at 12,334 (emphasis added).
[27] *Id.* (emphasis added).

posed by the employee in the form of an application blank, intelligence test, or summary of personal history, or composed by the employer in the form of scored interviews and interviewer rating scales, are within the EEOC's definition of "test." If any of the above measures are used by the employer in making his employment decision and adversely affect any class protected by title VII, such use is considered discrimination by the EEOC unless: "(a) The test has been validated and evidences a high degree of utility, and (b) The person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use."[28]

The EEOC Guidelines also require that the employer have available evidence of the test's validity, which "should consist of empirical data demonstrating that the test is predictive or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[29]

In addition, the EEOC Guidelines require a "differential validity" study.[30] This means that "[d]ata must be generated and results separately reported for minority and nonminority groups wherever technically feasible."[31] Also, the "presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test, and the criteria, permitting judgments of the test's utility in making predictions of future work behavior."[32] The guidelines specifically state that, "Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity."[33] The employer cannot avoid the Guidelines by going through independent employment agencies, since those agencies are required to meet the same standards of test validity as employers.[34] The Guidelines clearly prohibit disparate or unequal treatment in testing of employees: "Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by Title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force."[35]

II. EMPLOYEE TESTING

It has been estimated that fifteen to twenty per cent of all charges filed under title VII involve a testing issue.[36] At first glance this may seem to be a high percentage, but when it is considered that practically every employer requires a test of one kind or another in determining who will be hired, promoted, or

[28] *Id.*

[29] *Id.*

[30] *Id.; see* notes 41-43 *infra*, and accompanying text for an explanation of the testing theory aspects of "differential validity."

[31] 35 Fed. Reg. 12,335 (1970).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 12,335-36.

[35] *Id.* at 12,336.

[36] Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1637 (1969). In addition, *see generally* Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (1968).

assigned to the most desirable job, the estimate is really not surprising. What is surprising is that aptitude or ability tests in common usage in many instances do not measure what they purport to measure. While there are several reasons for this, probably the foremost is that tests usually simply "measure how well a person has assimilated the knowledge and skills that the particular test is measuring. Regardless of whether the test is an 'aptitude' or 'achievement' test, the crucial factors in a person's score are the same, namely the quality and extent of his past schooling and training and his cultural background and environment."[37] Racial discrimination, particularly in the South, has resulted in lesser educational and cultural opportunities for blacks, which in turn has resulted in lower average scores on most standardized tests.[38]

Another important consideration is the *validity* of the test used to determine whether the applicant has the particular qualifications the job requires. It can hardly be said that the test is a useful predictor of future performance if the employer has never correlated test results with actual performance on the job. However, there is evidence that this is more often the case than not.[39] One textbook view is that "[n]o matter how complete the test author's research, the person who is developing a selection or classification program must, in the end, confirm for himself the validity of the test in his particular situation. . . . He must validate the test in his own school or factory . . . ."[40]

The above points, when combined, create another problem that further complicates the subject. Even if a test has some validity (*i.e.*, it measures and is predictive of the presence of qualities or attributes which are necessary to the successful performance of a particular job), the "equal exposure" assumption usually leads to differing degrees of prediction for different groups.[41] "In some cases, the tests may accurately predict white job performance but not black performance . . . . In other cases, tests may accurately predict job performance for

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[37] Cooper & Sobol, *supra* note 36, at 1637. In Hobson v. Hansen, 269 F. Supp. 401, 478 (D.D.C. 1967), the court stated the same proposition in these words:

> It used to be the prevailing theory that aptitude tests—or 'intelligence' tests as they are often called, although the term is obviously misleading—do measure some stable, predetermined intellectual process that can be isolated and called intelligence. Today modern experts in educational testing and psychology have rejected this concept as false. . . .
>
> . . . In other words, an aptitude test is necessarily measuring a student's background, his environment. It is a test of his cumulative experience in his home, his community and his school.

The Wonderlic Personnel Test, which was one of the tests administered by Duke Power Company, is one of the more popular general ability tests. It has been described as follows:

> All spiral omnibus tests (of which Wonderlic is an example) operate on the principle of sampling a wide range of knowledge and skills principally of the kinds that are acquired in school and by reading within the tradition of Anglo-American culture . . . . They have the disadvantage of relying on the assumption that those who take them have had a uniform exposure to our white, middle-class environment.

Note, *supra* note 36, at 712.

[38] Cooper & Sobol, *supra* note 36, at 1598, 1637-41 (1969). *See also* OFFICE OF EDUCATION, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 219-20 (1966); Kirkwood, *Selection Techniques and the Law: To Test or Not To Test?*, 44 PERSONNEL, Nov.-Dec. 1967, at 18.

[39] *See* J. RUSMORE, PSYCHOLOGICAL TESTS AND FAIR EMPLOYMENT TESTING IN THE SAN FRANCISCO BAY AREA 3-4 (1967) (only 1 of 39 employers surveyed had local validation information, although 85% used tests).

[40] Cooper & Sobol, *supra* note 36, at 1647.

[41] *Id.* at 1646.

both blacks and whites, but do so at different levels. In other words, a score of ten for the average black may predict adequate performance while for the average white a score of twelve is needed to predict adequate performance."[42] This is known in the testing world as "differential validity."[43]

The above indicates the complexity of job aptitude testing and its potential as a tool of intentional or unintentional discrimination.

III. GRIGGS v. DUKE POWER CO.

As the first case decided on the merits by the United States Supreme Court under title VII of the 1964 Civil Rights Act,[44] *Griggs* is necessarily a landmark decision in the burgeoning field of equal employment opportunity law. The case concerned the use of ability tests and high school diplomas as a criteria in the selection, transfer, and promotion of employees when the criteria employed had the effect of screening out and/or blocking the advancement of a substantially higher number of blacks than whites. Perhaps Judge Sobeloff, the dissenter in the Fourth Circuit's consideration of *Griggs*,[45] best expressed the importance of the case when he said:

> 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. . . . 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. . . . On this issue hangs the validity 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.[46]

The Supreme Court opinion by Chief Justice Burger, although clothed in generalities, does give the Act the liberal interpretation necessary for it to remain a potent tool for equalization of employment opportunity."[47] The Court stated that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[48] The Court discarded the defense of absence of discriminatory intent: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups . . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[49] Thus, the test is an objective one; there will be no inquiry into subjective intent, and an employer who persists in an employment practice with knowledge that it discriminates against protected minority groups will be presumed to intend the consequences of his actions, and will have to meet the standards of job-relatedness and busi-

[42] *Id.*
[43] *Id.*
[44] 42 U.S.C. §§ 2000e to 2000e-15 (1964).
[45] 420 F.2d 1225 (4th Cir. 1970).
[46] *Id.* at 1237-38.
[47] *Id.*
[48] 401 U.S. at 430.
[49] *Id.* at 432. The Court also stated that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Id.* "The touchstone is business necessity." *Id.* at 431.

ness necessity in order to justify testing.

By requiring that testing or measuring procedures demonstrate "a reasonable measure of job performance,"[50] and concluding "that the EEOC's construction of section 703(h) to require that employment tests be job related comports with Congressional intent,"[51] affording "good reason to treat the Guidelines as expressing the will of Congress,"[52] it is very possible that the Court may require employers to conform to all EEOC requirements in the area of employment testing. It should be pointed out that although section 703(h) applies only to testing, and not to high school diploma requirements,[53] the EEOC definition of "test" includes any "specific educational . . . requirement."[54] But this is really a moot point since the Court's opinion clearly requires the same job-relatedness standard for high school diplomas or college degrees as it does for tests: "The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability . . . . Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality."[55] Thus, it appears that the current practice of establishing the mandatory requirement that an applicant possess a high school diploma or college degree in order to be considered for employment may become a thing of the past if it tends to discriminate against minority groups (which it probably will, especially in the South) and it fails to measure up to the EEOC "validity" requirements (which will probably occur in many cases). This thesis is clearly demonstrated in *Griggs*, where the evidence established that in North Carolina thirty-four per cent of white males had completed high school, but only twelve per cent of Negro males had done so.[56] Unquestionably the diploma requirement tended to discriminate against Negroes, and, in the absence of evidence of job-relatedness, the Court struck down the requirement.

Other statements made by the Court are unclear. The Court stated that "[b]asic intelligence must have the means of articulation to manifest itself fairly in a testing process,"[57] and "Congress has now required that the posture and condition of the job seeker be taken into account."[58] These statements indicate that the Court is suggesting the application of different standards for blacks in some instances to compensate for inferior education received because of prior discriminatory practices. Such an indication is reinforced by the Court's discussion of its decision in *Gaston County v. United States*,[59] wherein the institution of a literacy test for voter registration was disallowed on the ground that the test would abridge the right to vote indirectly on account of race due to the inferior education received by blacks in North Carolina.[60] In an employ-

[50] *Id.* at 436.
[51] *Id.*
[52] *Id.* at 434; *cf.* United States v. Georgia Power Co., 3 FEP Cases 767 (1971).
[53] 401 U.S. at 433 n.8.
[54] 35 Fed. Reg. 12,333 (1970).
[55] 401 U.S. at 433.
[56] 1 UNITED STATES BUREAU OF THE CENSUS, UNITED STATES CENSUS OF POPULATION: 1960, pt. 35, table 47.
[57] 401 U.S. at 430.
[58] *Id.* at 431.
[59] 395 U.S. 285 (1969).
[60] *Id.* at 296.

ment context this may mean that an employer in Mississippi, although able to show that his written test is job-related and necessary to his business, may have to devise a less difficult test or offer a performance test to black applicants to take into account "the posture and condition of the job-seeker" (inferior education) and allow the black applicant the means of articulation to "manifest fairly" his basic intelligence.

IV. CONCLUSION

The Court's holding in *Griggs* is important for two major reasons. The first is the immediate impact that it will have upon the use of various employment testing and measuring procedures by the employer. The second, and probably more important, is the liberal construction the Court gives the Act for the lower federal courts to follow in deciding future title VII cases.

The Immediate Impact. The consequences of requiring employers to conform to the EEOC Guidelines will probably be two-fold. First, the small employer, after reviewing the EEOC Guidelines, may decide to dispense with testing altogether. The larger employer may decide to employ testing procedures, but will probably do so only if convinced that it is absolutely necessary to the successful operation of his business. The reason for this is that the Guidelines are so comprehensive and require such a detailed set of procedures for administering and validating tests that most employers will find it economically unfeasible to comply.

One important question pointed out, but not decided, in *Griggs* is the extent to which "testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need."[61] The EEOC Guidelines provide:

> If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. . . . This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a *high probability* that persons employed will in fact attain that higher level within a *reasonable* period of time.[62]

No doubt there will be litigation on this point, and it may be one area in which the EEOC will have to give ground. Clearly many employment practices that have been in use for many years and have been considered standard up to now will be challenged, and will have to meet the job-relatedness standard imposed by *Griggs* and defined in the EEOC Guidelines.[63]

Construction of Title VII. While one can draw one's own conclusions about the intent of Congress regarding section 703(h), the Court indicated that the

[61] 401 U.S. at 432.

[62] 35 Fed. Reg. 12,333 (1970).

[63] In reporting the *Griggs* decision the *Wall Street Journal* stated:

> Following the court actions yesterday, a leading group of civil-rights lawyers

EEOC Guidelines, at least to some extent, are indicative of that intent.[64] In essence, the EEOC requirements are the same as those laid down by the Supreme Court in *Griggs*: (1) that the test be job-related, and (2) that there must be a substantial degree of business necessity for using it in view of its discriminatory effect.[65]

Just *how liberally* the Burger Court will interpret title VII is a question that can only be answered by years of litigation. There will undoubtedly be some give-and-take between the EEOC and employers. Other outside factors may enter into and have an important influence on the future litigation under the Act. There is a definite belief in some quarters that the EEOC will receive adjudicatory and enforcement powers in the near future similar to those of the NLRB.[66] Also, the EEOC is seriously undermanned in the face of a case load in excess of 15,000 cases per year, and an eighteen-month backlog of cases has already developed.[67] There has also been a recent interest in equal employment opportunity litigation under the Civil Rights Act of 1866.[68] What effect resort to that Act will have on title VII remains to be seen. A Supreme Court decision laying out rules for an accommodation of the two will probably be necessary.

Griggs v. Duke Power Co. is a landmark case, and a lengthy stride in defining what Professor William Gould has termed the "central meaning" of title VII. His quotation of a statement made by Judge Tuttle in *Culpepper v. Reynolds Metals Co.*[69] probably best expresses the "central meaning" that *Griggs* gives to title VII:

> Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the Courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and the battle with semantics.[70]

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> in New York promised a broad legal attack on many employers. The National Association for the Advancement of Colored People Legal Defense and Education Fund said, 'we are now ready to proceed with scores of cases involving many thousands of workers who have been denied jobs or promotions because of non-job-related tests which have come into widespread use since passage' of the 1964 Civil Rights Act.

Wall Street Journal, Mar. 9, 1971, at 4, col. 1 (S.W. ed.).

[64] *See* notes 52-53 *supra*, and accompanying text.

[65] *See* notes 25-28 *supra*, and accompanying text.

[66] Bills increasing the power of the EEOC have been introduced. *See, e.g.*, H.R. 1746, 9247, 90th Cong., 1st Sess. (1971). *See also* Comment, *Implementing Governmental Policy Against Racial Discrimination in Employment: Fair Employment Practice Laws, Title VII, National Labor Relations Act, and the Philadelphia Plan*, 23 U. FLA. L. REV. 157 (1970).

[67] 1970 COMMITTEE REPORTS OF THE SECTION OF LABOR RELATIONS LAW OF THE AMERICAN BAR ASSOCIATION 53 (1970).

[68] *Id.* at 75. *See also* Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971).

[69] 421 F.2d 888 (5th Cir. 1970).

[70] Gould, *The Central Meaning of Affirmative Action and Title VII*, 33 TEX. B.J. 871, 872-73 (1970).