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Title VII: Discriminatory Results and the Scope of Business Necessity

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TITLE VII: DISCRIMINATORY RESULTS AND THE SCOPE OF BUSINESS NECESSITY

Title VII[1] of the Civil Rights Acts of 1964[2] sought to end racially discriminatory employment practices. The statute forbids discriminatory application of employment standards as well as standards racially discriminatory on their face.[3] An employer may argue that Title VII requires only that an employment standard be nondiscriminatory in its terms, purpose and application and that the *results* under such a standard are irrelevant to an inquiry into alleged unlawful discrimination. The justification for this view is that requiring results to be nondiscriminatory might create situations in which unqualified blacks are given preferential treatment over more qualified whites.[4] However, failure to consider the results of a practice in determining whether it is discriminatory would disregard the subtle nuances of employment discrimination,[5] and ignore a major social goal of Title VII, which has been described as "a desire to enhance the relative social and economic position of the American black community."[6] In determining whether that goal has been achieved, results are highly relevant. Accordingly, the courts view the results under an employment standard as a critical factor in their determinations of Title VII cases.

The Origins of Business Necessity

The first United States Supreme Court decision to confront the issue of treatment and results under Title VII was *Griggs v. Duke Power Co.*[7] At one of defendant's power plants, the requirements for

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1. 42 U.S.C. §§ 2000e—2000e-15 (1970).

2. *Id.* at §§ 2000a—2000h.

3. *Id.* § 2000e-2a: (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.

4. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 236 (1971).

5. *Id.* 236.

6. *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HAR. L. REV. 1109, 1113 (1971).

7. 401 U.S. 424 (1971).

placement in the higher paying non-labor department jobs[8] were a high school diploma and satisfactory scores on an achievement test.[9] These standards resulted in no blacks being assigned to non-labor jobs until August, 1966, five months after charges were filed with the Equal Employment Opportunity Commission.[10]

The standards were not discriminatory on their face, and both the federal district court[11] and the court of appeals[12] found no showing of a racial or an invidious intent in their adoption or application. Though accepting these findings, a unanimous Supreme Court rejected the conclusion of both lower courts that there had been no violation of the Act, and held that even in the absence of discriminatory intent the testing mechanisms operated as " 'built-in headwinds' . . . unrelated to measuring job capability."[13] Fair application of racially neutral standards was not deemed sufficient to satisfy Title VII.

> What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance the practice is prohibited.[14]

Thus, if the results of a practice reveal an exclusion of applicants on the basis of race, justification for such a practice can be maintained only if the employer can show business necessity.

Since the *Griggs* decision, interpretations of the business necessity test have arisen in two discernible contexts. In the first context, the discriminatory results of a particular employment standard are

8. *Id.* at 427. The five departments were Labor, Coal Handling, Operations, Maintenance, and Laboratory and Testing. The lowest of these in terms of pay and advancement opportunity was the labor department. Prior to the effective date of the Civil Rights Act of 1964, the Company had openly discriminated on the basis of race, and blacks were assigned only to the labor department.

9. For an in depth discussion of validation of ability tests with respect to Title VII see *Employment Discrimination: A Title VII Symposium*, 34 LA. L. REV. 540, 572-89 (1974).

10. 401 U.S. 424, 427 n.2 (1971).

11. 292 F. Supp. 243 (M.D. N.C. 1969).

12. 420 F.2d 1225 (4th Cir. 1970).

13. 401 U.S. 424, 432 (1971).

14. *Id.* at 431.

reflected in the *business itself* by the employment of minority group members in numbers adversely disproportionate to their presence in the immediately available work force. In the second context, application of employment standards involving arrests, convictions and garnishments result in the elimination of a disproportionate number of minority group members at the job selection level. In this case, the presence and status of minority members in the particular work unit involved is of peripheral concern at best and is generally disregarded. These two areas of discrimination call for different tests of business necessity.

Discriminatory Results in the Work Unit

The courts have considered several cases similar to *Griggs* involving work units containing a disproportionate number of blacks when compared with the available work force. In *Rowe v. General Motors Corp.*,[15] percentages of blacks transferred to available salaried jobs from hourly jobs[16] were correlated with procedures by which transfers were made[17] to produce a finding of racial discrimination in violation of Title VII. The promotion procedures were heavily laden with subjective evaluation by the employee's immediate foreman and bore no relation to job performance.[18] To the Fifth Circuit, the adversely disproportionate figures were critical[19] and placed upon the employer the "burden of demonstrating why . . . the apparent disparity [was] not the real one."[20] The only reasons deemed acceptable by the court were those arising from a non-discriminatory legitimate

15. 457 F.2d 348 (5th Cir. 1972).

16. Of 169 salaried clerks at General Motors' Atlanta plant, 157 were white and 12 were black. Of the 224 salaried foremen, 214 were white and 10 were black. *Id.* at 352 n.6.

17. An hourly employee could secure transfer from hourly to salaried jobs either by employer-initiated action or employee-initiated action. The employer-initiated action involved the recommendation of the hourly employee for the salaried job by his immediate foreman to the general foreman or salaried personnel administrator. This chain then led to the management development committee which was made up of ten persons, and a majority vote of the committee was required for promotion. In the employee-initiated method, the employee seeking transfer was to make direct application to the salaried personnel administrator. The administrator then directed the employee to obtain the recommendation of his immediate foreman. Only then was the employee's name submitted to the Management Development Committee, where a majority vote was again required for promotion. In this case, plaintiffs sought salaried jobs through the employee-initiated method and were unsuccessful. *Id.* at 353.

18. "In one [instance] the process never gets started, in the other it stops in its tracks unless the foreman puts his blessings on the prospect." *Id.*

19. *Id.* at 358.

20. *Id.*

business necessity.[21] Since the subjective evaluations of immediate foremen were not grounded in any such necessity, they provided "a ready mechanism for discrimination against Blacks much of which can be covertly concealed."[22] That the employer "willingly" or "enthusiastically" attempted to eliminate segregation on the job site was not considered relevant to the inquiry.[23]

In another recent case, *Bing v. Roadway Express*,[24] a lower federal court strictly applied *Griggs* in a situation involving disproportionate racial composition in a work unit, despite the non-job related justifications proffered by the employer. The employment practice under attack was a no-transfer rule which restricted and penalized transfers from the job of "city driver" to the more lucrative and desirable job of "road driver."[25] Whites were employed both as city drivers and road drivers but all blacks were city drivers.[26] Such figures established a prima facie case that race was a factor in staffing the two driver categories.[27]

In an attempt to rebut this prima facie case, defendant-employer cited training costs, safety, and labor problems to justify the no-transfer rule on grounds of business necessity. First, defendant claimed that transfers caused additional training costs. Next, the rule

21. *Id.* at 354.

22. *Id.* at 359.

23. *Id.* at 355. A situation similar to *Rowe* was involved in *Hester v. Southern Railway Co.*, 349 F. Supp. 812 (N.D. Ga. 1972). A district court finding of fact determined that although whites were applying in only slightly larger numbers than blacks for the Data Typist position, defendant hired three times as many whites as blacks. In addition to the use of an unvalidated employment test, which plaintiff had passed, the employer defendant had used a single screening interview. This interview was conducted by defendant's only personnel officer who had been given no guidelines, standards or instructions for making his unreviewable decision and who could not remember his reason for rejecting plaintiff's employment application. Quoting the "ready mechanism" language of *Rowe*, the court found a violation of Title VII. However, the Fifth Circuit reversed, 497 F.2d 1374 (1974), saying that the district court findings of fact were unreliable. Therefore, no competent evidence was adduced establishing a prima facie case of racial discrimination as to the screening interview. Thus, the lower court determination as to the facts was "clearly erroneous." Had there been a prima facie case of discrimination supported by competent evidence, the court found the interview process "uncomfortably close" to the promotion procedure proscribed by *Rowe*. The case was remanded to the district court to determine if available statistical information, possibly making a prima facie case of discrimination, could be ascertained.

24. 444 F.2d 687 (5th Cir. 1971).

25. An employee had to resign the city driver position and forfeit accrued employment rights under it without any assurances prior to resigning his city driver job that he would be hired for the new position of road driver. *Id.* at 688.

26. *Id.*

27. *Id.* at 689.

was justified from a safety standpoint: road driving skills are different from those necessary to adequate city driving performance. Finally, defendant claimed that the transfers would cause labor problems because the two job categories were covered by different collective bargaining agreements.[28] The court found each of these allegations insufficient. While training costs would certainly result from transfers, it was just as certain that such costs would be incurred in filling the positions with new employees. Secondly, safety considerations could be satisfied by screening transferees in the same way new applicants are screened. Finally, the court concluded that every change in employee status is likely to lead to some personnel problems.[29] Because clear evidence of discriminatory results within the employer's own work force were shown, the court felt no inclination to give the employer the benefit of the doubt as to any of its alleged grounds for business necessity, and thus found racial discrimination in violation of Title VII. It thus seems likely that little consideration will be given to the factors of cost, efficiency, and safety, when disproportionate representation of minority group members in the work unit makes out a prima facie case of discrimination.

Arrests, Convictions and Garnishments

Quite often job criteria reflect social practices which have an adverse effect on minority group members. For example, blacks and other minorities are subject to arrest, conviction and multiple garnishment in greater percentages than whites.[30] In these instances, when the claim is that an employment standard constitutes illegal discrimination because it includes these factors, the courts have encountered difficulty in applying the *Griggs* test of business necessity based upon job performance.

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28. *Id.* at 690.

29. *Id.* at 691.

30. *See* Merriweather v. American Cast Iron Pipe Co., 362 F. Supp. 670 (N.D. Ala. 1973); Johnson v. Pike Corp., 332 F. Supp. 490 (C.D. Cal. 1971); Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971), *aff'd without opinion* 468 F.2d 951 (5th Cir. 1972); Gregory v. Litton Indus., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd* 472 F.2d 631 (9th Cir. 1972). *See also* text at nn. 33, 49, 50 *infra*.

In *Griggs* the Court cited 1960 North Carolina census statistics which showed that the defendant's high school diploma requirement could operate to exclude blacks from the work force because the census revealed that while 34 percert of white males had completed high school, only 12 percent of black males had done so. However, this figure was utilized by the Court in considerations of the validity of the test given and the diploma requirement was considered as linked to the test for the purpose of discerning whether or not it was a "professionally developed ability test" within the meaning of the statute. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

Prior to the Supreme Court's formulation in *Griggs* of a business necessity test arguably confined to considerations of job performance, the Ninth Circuit applied a broader definition of business necessity in *Gregory v. Litton Industries*,[31] a case involving employee arrest records. In *Gregory* a black applicant was offered employment as a sheet metal mechanic, but before undertaking his duties he disclosed on a preliminary security information form required of all Litton employees that he had been arrested fourteen times on charges involving non-traffic violations. In fact, plaintiff had never been convicted of any of the charges and it is unclear from the opinion whether he had even been brought to trial on any of them. The district court found that Litton's policy of disqualifying frequently arrested persons from employment was objectively applied and enforced without reference to race.[32] However, the court also found that such a policy of perusing arrest records of an applicant could have discriminatory results. Nationwide statistics cited by the court justified its finding that "Negroes are arrested substantially more frequently than whites in proportion to their numbers."[33] Using a rationale similar to that later employed in *Griggs*, the court held that "[a]n intent to discriminate is not required to be shown so long as the discrimination shown is not accidental or inadvertent."[34]

This intentional use of such a discriminatory practice is forbidden by Title VII unless the employer can justify it on grounds of business necessity which "in this context" the court defined as "essential to the safe and efficient operation of the business."[35] This definition considers not merely the individual's capability to fill the job, but also his suitability for the job from the viewpoint of the employer's interest in safety and efficiency.

In applying its version of the business necessity test, the court found no reason to believe that persons arrested on a number of occasions, but not convicted, are any less honest or efficient than other employees.[36] Accordingly, such information was irrelevant to suitability for employment.[37] Litton's policy was therefore held to be

31. 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd* 472 F.2d 631 (9th Cir. 1972).

32. Gregory v. Litton Indus., 316 F. Supp. 401, 402 (C.D. Cal. 1970).

33. *Id.* at 403. The court cited nationwide statistics showing that while blacks make up 11 percent of the U.S. population, they account for 27 percent of reported arrests and 45 percent of "suspicion" arrests.

34. *Id.* at 403.

35. *Id.*

36. *Id.* at 402-03. In fact, according to the court, the evidence was "overwhelmingly" contrary to any conclusion that persons arrested but not convicted are any less honest or efficient than other employees.

37. *Id.* at 403.

unlawful under Title VII "because it [had] the foreseeable effect of denying black applicants an equal opportunity for employment."[38]

In shaping its enforcement decree, the court again took cognizance of the safety and efficiency aspects of business necessity.[39] Litton was restrained from using arrest records gathered from any source, public or private.[40] However, the company was not restrained from getting the public record of any prosecution and trial of a prospective employee,[41] matters that presumably may be relevant to considerations of the safe and efficient operation of a business. The definition of business necessity enunciated by the court is much broader than that used in *Griggs*, which limited business necessity to the factor of job performance.[42]

Whether the business necessity test advanced in *Griggs* is limited to the facts of that particular case or whether the court intended job performance to be the exclusive criterion of business necessity in all cases is not clear. In *Johnson v. Pike Corp.*,[43] a federal district court chose the latter interpretation. An employee was discharged after his wages had been garnished several times.[44] The discharge was effected under a company rule providing for issuance of a warning to an employee after the first garnishment, and termination of his employment after several garnishments.

According to the *Johnson* court, *Griggs* established a two step approach for determining whether an employment practice is prohibited under Title VII.[45] The first step is to ascertain whether the prac-

38. *Id.*

39. The court of appeals reversed the injunctive relief on other grounds, namely that in the action, which was not brought as a class action, Gregory was seeking individual relief only and that the injunctive relief granted was "neither incidental nor necessary to the resolution of the pending litigation." Gregory v. Litton Indus., 472 F.2d 631, 634 (9th Cir. 1972).

40. Gregory v. Litton Indus., 316 F. Supp. 401, 403 (C.D. Cal. 1970).

41. *Id.*

42. *See* note 14 and accompanying test *supra*. The business necessity test in *Gregory* is similar to that in another pre-*Griggs* case, *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), which limited the carrying over of past discrimination into the present through a seniority system to situations where "incidents are limited to those that safety and efficiency require." 416 F.2d at 994.

43. 332 F. Supp. 490 (C.D. Cal. 1971).

44. This case was not rendered moot by *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), which found pre-judgment garnishment unconstitutional as violative of the due process clause, because all the garnishments rendered against plaintiff were post-judgment garnishments. Nor was plaintiff aided by Title III of the Consumer Credit Protection Act of 1968, which provides that no employer may discharge an employee for a garnishment as to one indebtedness. 15 U.S.C. § 1674 (1968). In *Johnson* multiple garnishments were involved.

45. 332 F. Supp. at 493.

tice discriminates against any group or person on the basis of race.[46] Looking to a survey of the available information on wage garnishment, the court found that minority group members suffer wage garnishments in a substantially higher proportion than do others in the general population.[47] The second step is to determine "whether the practice bears a 'demonstrable relationship' to successful job performance."[48] Although stating that "the exact boundaries and contours of the phrase 'business necessity' are still uncertain,"[49] the court nevertheless indicated where it felt those particular boundaries lie:

> The sole permissible reason for discriminating against actual or prospective employees involves the individual's capability to perform the job effectively. This approach leaves no room for arguments regarding inconvenience, annoyance or even expense to the employer.[50]

Therefore, the employee could not be removed as long as he successfully performed the day to day mechanics of his job, regardless of the administrative costs to the employer because of repeated garnishments of his employee's salary. This is an unreasonable and unrealistic restriction of the scope of the business necessity test. An employer seeks to make a profit from his business. An employee who consistently burdens his employer with administrative costs and thereby diminishes that profit, is an undesirable worker despite his job skills.[51] Moreover, the same result could have been reached without adopting such a restrictive interpretation of the business necessity test.

A business necessity test recognizing employer interests in safety and efficiency would not necessarily allow the burden of business necessity to be met by a mere showing of any conceivable safety or efficiency in maintaining a practice that results in discrimination. Rather, the hazards or inefficiencies involved should be shown to

46. *Id.*

47. *Id.* at 494.

48. *Id.* at 493.

49. *Id.* at 495.

50. *Id.* Because the *Johnson* court believed that Griggs intended the job capability criterion of "business necessity" to be "exclusive," the only matters considered of importance in determining "business necessity" were necessarily those connected with job performance.

51. An employer's "interest is in making a profit from his business. The most skilled employee who consistently costs the company more money, perhaps through excessive garnishments, than his work contributes, is an undesirable worker." Note, 85 HARV. L. REV. 1482, 1486 (1972).

outweigh the discriminatory impact. Thus, a defendant could not argue that relatively slight expenses outweigh the individual and societal interests in the enforcement of Title VII. Only "substantial"[52] expense which would impair significantly the efficiency of the employer's operation would justify a discriminatory practice.[53]

Contrary to *Johnson*, a federal district court in *Richardson v. Hotel Corporation of America*,[54] appeared to reject the idea that the *Griggs* definition of business necessity was an exclusive one. Plaintiff filed an application for employment at a New Orleans hotel at the time it began operation. He truthfully filled out his employment application and responded affirmatively to the question of whether he had ever been convicted of a crime other than a minor traffic violation. Before police checks could be made, plaintiff was hired as a bellman to work during the opening of the hotel. After his record of convictions for theft and receiving stolen goods became known to the management, they informed plaintiff that he no longer could be employed as a bellman. Upon plaintiff's refusal of an offer of other employment with the hotel, he was discharged.[55]

The plaintiff maintained that since more blacks than whites are convicted of serious crimes, the discharge of persons solely because of a record of criminal convictions is inherently discriminatory and in violation of Title VII.[56] The court concluded that "[t]he crucial issue therefore is whether the hotel's policy has been shown to be required by its business needs."[57] If the court had limited the scope of these business needs to job performance, the inquiry would have merely concerned whether or not the plaintiff could perform the mechanical duties (carrying luggage) required by the position. However, the court looked also to the "security sensitive" nature of the bellman's position,[58] and thus properly recognized that different barriers

52. *Id.* at 1487.

53. In *Johnson*, defendant employer offered no evidence of substantial expense or inefficiency. Instead, the undefined use of "expenses and time" of the clerical staff were offered. Such undefined evidence of administrative costs would not outweigh the mandate of Title VII which reflects society's interest in non-discriminatory employment, and the individual's interest in fair treatment.

54. 332 F. Supp. 519 (E.D. La. 1971), *aff'd without opinion* 468 F.2d 951 (5th Cir. 1972).

55. 332 F. Supp. at 520.

56. *Id.*

57. *Id.* at 521.

58. "Bellmen occupy one of the several positions that the hotel considers 'security sensitive.' They have access to guests' luggage and guests' rooms. They are permitted to obtain room keys from the desk clerk and even go behind the desk for keys. They may go through hotel corridors unaccompanied without provoking inquiry. They may

and their effects must be measured against a flexible scope of business necessity which may or may not outweigh the discriminatory results.

In concluding that the business needs involved did in fact outweigh the discriminatory results, the court reasoned:

> A past criminal record affords no basis to predict that a given person will commit a future crime. But the evidence indicates that a group of persons who have been convicted of serious crimes will have a higher incidence of future criminal conduct than those who have never been convicted. It is reasonable for management of a hotel to require that persons employed in positions where they have access to valuable property of others have a record reasonably free from convictions for serious property related crimes.[59]

One district court avoided choosing between the competing business necessity concepts by merely ignoring the standard approach to Title VII cases. In *Merriweather v. American Cast Iron Pipe Co.*,[60] the plaintiff, a prospective employee, failed to disclose in his application for employment and in a subsequent Identification and Employment Record form,[61] four previous employers and a conviction for assault with intent to rape.[62] Subsequently, plaintiff was discharged when the

enter and leave the hotel by any exit during the day, carrying parcels, while most employees must use a special employees' entrance where they are subject to inspection. Some effort is made by the head bellman to be aware of the whereabouts of bellmen during the day. Bellmen are expected to keep time records showing their activities. But these are not carefully scrutinized and they can of course be easily evaded: a bellman going to any specified room on a real errand might stop by another room en route without making any entry on the duty sheet." *Id.*

59. *Id.* The hotel was not guilty of any overt discrimination. The court noted that the hotel had an "exemplary" record with regard to affording job opportunities to minority group members at all levels of its operation. This resulted in a work force of 61 percent minority group members at all levels of its operations, while the minority population in the New Orleans Metropolitan area was only 31 percent. *Id.* at 522. Evidence also showed that the challenged policy had been applied equally as to both blacks and whites. *Id.* at 521. A white bellman had been terminated on the basis of a record of criminal convictions some two months prior to plaintiff's discharge. *Id.* at 522. "While not decisive these factors suggest that the requirement was not intentionally invidious." *Id.* at 521.

60. 362 F. Supp. 670 (N.D. Ala. 1973).

61. The Identification and Employment Record form contained the following legend: "I authorize investigation of all statements contained in this employment record and I understand that my continued employment with the Company is predicated upon the truthfulness of the statement herein contained. Having read the entire contents of this employment and identification record, I place my signature hereto of my own free will and accord." The plaintiff signed this record. *Id.* at 671.

62. *Id.*

employer learned of the previously undisclosed facts.[63] In resolving plaintiff's claim of unlawful discrimination against him, the court did not even discuss the concept of business necessity. Instead of considering whether or not legitimate and justifiable business reasons existed for the employer to require such information despite possible "chilling effects" on prospective employees,[64] the court avoided the issue entirely and held that the discharge of plaintiff was based on falsification of records and not on racial discrimination.[65]

Had the *Merriweather* court applied the business necessity test, which was clearly appropriate under the facts of the case, it could have reached the same conclusion. The presence of a fair proportion of blacks on the defendant's work site[66] could be thought to justify some flexibility in the definition of business needs, as such statistics tend to show that the standard in question does not provide a "ready mechanism for discrimination"[67] within the employer's own work force. Thus, the business necessity test in such cases should include consideration of the safety and efficiency of the work operation and not merely the mechanical aspects of job performance.[68]

The results of the standard used in *Merriweather* were discriminatory because proportionately more blacks than whites are convicted of serious crimes. But employers should be allowed to consider an applicant's conviction records and previous employment if there

63. *Id.* at 672.

64. The Equal Employment Opportunity Commission has held that reasonable cause exists to find a violation of Title VII when a black employee is discharged for failing to list previous arrests. E.E.O.C. Decision No. 71-2089, 4 F.E.P. Cases 148 (1971). The commission objected to the "chilling effect" such inquiries might have on black applicants, leading to falsification of employment data, which in turn would result in a disproportionate number of blacks being discharged for falsifying employment data. The Supreme Court in *Griggs* said that EEOC findings are entitled to "great deference." Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

65. *Id.* Judgment was rendered for defendant with costs. It should be noted that the court in *Richardson* refused to award attorney's fees to the prevailing defendant hotel against the indigent plaintiff saying: "What practical purpose such an award would serve in this matter is inscrutable, though it might conceivably serve as a precedent *in terrorem* to discourage other Title VII plaintiffs." Richardson v. Hotel Corp. of America, 332 F. Supp. 519, 521 (E.D. La. 1971).

66. As contrasted with the Birmingham Metropolitan area's 25 percent black population, defendant's work force from 1968-1972 contained 28-32 percent black employees. 362 F. Supp. at 672. *See also* note 60 *supra*.

67. *See* text at notes 19-23 *supra*.

68. Unlike situations involved in *Bing v. Roadway Express*, see text at notes 24-29 *supra*, where the employer's work unit was prima facie evidence of discrimination, the court should give an employer more latitude in justifying discriminatory results when racial balance in his *work force* indicates a prima facie case of good faith attempts to counter employment discrimination.

is a legitimate business interest in securing such information. Accurate information as to prior convictions would be relevant in assigning an applicant to an appropriate position and thereby ensuring that he not be placed in a position "custodial" in nature,[69] where higher standards of honesty and character might be required. Moreover, even using the narrower test of job performance, the employer would find justification in seeking accurate information about the applicant's prior employment, because past job performance may well be indicative of future employment suitability. The importance of such legitimate and necessary information to the employer clearly outweighs the possible impact of any "chilling effect" upon prospective employees in being required to reveal the requested information. Thus, rather than grounding the decision in *Merriweather* upon the finding that the "true" cause of discharge was falsification of data and not the presence of discrimination, the court should have held that the legitimate business interest in obtaining accurate and truthful data as to prior conviction and employment was justifiable despite the fact that requiring such data might lead to discriminatory results.

Conclusion

When statistics reveal that in a particular work unit minority group members are not represented in proportion to their presence in the population, it is both just and logical for courts to apply a restricted definition of business necessity. In those instances, it is the absence of minority representation in the jobs themselves that is placed directly at issue. Courts should look to the performance necessary to fulfill those jobs and view with skepticism other claims of business necessity. If the employment practice fails to have a substantial relationship to job performance, it is reasonable to conclude, on the basis of unequal representation in the work unit, that there is unlawful discrimination.

However, where discrimination results from the use of arrest records, garnishments, and other criteria which may reflect social prejudices, it is reasonable and proper for the employer to interpose considerations of safety and efficiency in formulating employment policies for the job concerned. If substantial reasons can be advanced for the discriminatory results under this broader scope of business necessity, it may be concluded that there is no violation of the Act.

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69. *See* text at note 62 *supra*.