The Focal Issue: Discriminatory Motivation or Adverse Impact?

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Title VII forbids any employment policy decision made on the basis of certain proscribed criteria which the Congress implicitly regards as invidious:

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 an 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.1

Thus, by the plain language of the Act, any employment decision motivated by racial considerations is forbidden. However, very early in the operation of Title VII, the question arose whether only intentionally discriminatory employment practices were forbidden, or whether standards which are racially neutral in their formulation, but which, in fact, result in discrimination against a racial group, were unlawful employment practices as well. Before the operation of Title VII, private employers had an unlimited number of prerogatives in formulating criteria for hiring, promoting and firing their employees. Title VII limited these prerogatives by forbidding employers to be influenced in such decisions by a person's race.2 However, it was unclear whether this was the full extent of the scope of the Act, so that in order to bring the remedial provisions of the Title into effect, an aggrieved employee would have to prove that the employer was motivated to make a particular decision, at least in part, by racial considerations. The chief alternative was to consider invalid any standard which discriminated against minorities in its operation. The resolution of this question would determine in large measure the effectiveness of the Act, because if only intentionally discriminatory employment practices were construed as within the scope of prohibi-

2. Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1116 (1971) [hereinafter cited as Developments].
tion, much de facto discrimination would go untouched, and only the most obviously arbitrary activity would be reached.

Those charged with administration or interpretation of the Act were faced with the choice of diluting its application by requiring a showing of discriminatory intent or of sharply reducing employer prerogatives in hiring practices. If the latter course was taken, the question became where to draw the line in forbidding practices whose results were discriminatory whether intentional or not. Certainly, even the strongest supporters of a broad interpretation of the Act acknowledged that an employer could not be required to hire a minority applicant merely because he was a member of a protected group. The Act clearly forbade such preferential treatment. But, for example, if the employer had a policy of hiring only graduates of a local high school, and it so happened that only whites attended that school, was this included in the provisions of the Act as a "refus(al) to hire" an individual "because of such individual's race"? On the other hand, would the employer's legitimate interest in promoting public relations with the local populace overcome the adverse impact his policy had on members of the minority group?

To complicate the problem, the Act approved with certain qualifications two of the most widely used criteria for employment decisions: tests and seniority systems.

Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race . . . , nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race . . . .

Thus, administrative and judicial decisions considering the use of facially neutral standards that resulted in discrimination centered around testing and seniority promotion cases, each progressing through its separate but related development until finally converging before the United States Supreme Court in Griggs v. Duke Power Co.5

Testing as a Criterion in Making Employment Decisions

The EEOC Guidelines

The agency charged with administration of Title VII is the Equal Employment Opportunity Commission. The Commission issued guidelines on testing in 1967 which were revised into more comprehensive provisions in 1970. These administrative directives framed the basic issues to be later litigated in the courts and served to initiate momentum toward an expansive interpretation of the Act.

A principal concern of experts considering employment testing involved strong evidence that many tests used as employee screening devices did not, in practice, accurately predict relative job performance. This problem was further compounded in the Commission’s view by the fact that such tests invariably disqualify a greater percentage of blacks than whites from consideration for employment positions, and may be unpredictable as to entire cultural and racial groups. The guidelines, consequently, require that standards used by employers to make hiring and other employment decisions be “job related.” Tests with a detrimental effect upon minority groups were declared presumptively illegal, without any showing of discriminatory intent, unless proven to be related to job performance by use of a scientific procedure known as “validation.” Furthermore, the Commission advocated the use of empirical validation, the most

6. The majority of employers using tests to screen applicants are doing so without empirical evidence that the test measures the abilities sought, and many studies have indicated that scores on even the most widely used tests bear little or no relationship to job performance. See Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 COLUM. L. REV. 691, 696-98 (1968) [hereinafter cited as Legal Implications]; Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1637-38, 1647 (1969) [hereinafter cited Cooper & Sobol]; Developments at 1121.

7. This fact is generally explained by the fact that blacks have been deprived of educational, social and cultural opportunities relevant to the content and skills in taking many employment tests but often irrelevant to performance of the particular employment task involved. All ability examinations, whether intelligence, aptitude, or achievement tests, measure what the individual has learned; the crucial factors in a person’s score are the quality and extent of his past schooling and training and the degree of correlation between his cultural milieu and that which serves as the test’s point of reference. See Legal Implications at 704; Cooper & Sobol at 1639; Westman, Intelligent Testing, 23 AM. PSYCH. 267 (1968).


9. Developments at 1116. Empirical validation involves giving a random sample group of job applicants of a significant number a test whose contents experts believe are of such a nature that test performance should bear a direct relationship to job performance. The next step is to employ the entire sample group, and, using objective
stringent variety of such procedures, as well as the generation of separate data for minority and non-minority groups, ("differential validation"), in order to compensate for the bias against blacks inherent in many tests.¹⁰

A related problem attacked by the Commission as discriminatory under the Act was "promotability" or "trainability" testing, a device used by employers to test job applicants as to their ability to hold higher positions than they are seeking in the company. Such procedures often have a disproportionately adverse effect upon minorities,¹¹ and the guidelines sanction their use only if the worker's progress to the higher job for which he is tested is of "high probability" or "nearly automatic."¹²

Court Decisions Before Griggs

As the courts began considering complaints under Title VII, the first determination with which they were faced was the appropriate standard for establishing that an employer was discriminating on the basis of race in contravention of the Act. The pre-Griggs cases fall into basically two categories: (1) those rejecting the guidelines by

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¹⁰. 35 Fed. Reg. 12,335 (1970). Differential validity determines (a) whether the test has validity in predicting job performance for both races and (b) whether a lower score by a black applicant is equally predictive of his future job success as a higher score is by a white. If both of these determinations are answered in the affirmative, the employer must upgrade the sources of blacks as a cultural group to equalize the predictive capability of the test. See H. Wilson, Griggs and Job Testing, 58 Va. L. Rev. 844 (1972); Lopez, Current Problems in Test Performance of Job Applicants, Symposium, The Industrial Psychologist: Selection and Equal Employment Opportunity, 19 Pers. Psych. 1, 10-19 (1966); Legal Implications at 705.

¹¹. It has been pointed out that it is unnecessary and even wasteful to require in every candidate for employment a potential for promotion to higher positions within the corporate hierarchy. In one particular case reaching the courts, an employer required even janitorial applicants to successfully complete a test which was proven to be valid in predicting job success for only the top eight percent of the jobs in the plant. Moreover, employees may improve their capabilities during the years before they are eligible for promotion, especially in cases where they are members of minority groups whose capabilities have been artificially suppressed by discrimination. See Cooper & Sobol at 1648-49.

requiring a showing that the test was administered or graded with the intent to discriminate and thus was not related to any "genuine business purpose"; and (2) those following the guidelines by requiring that tests with a statistically significant adverse differential impact upon minorities be job related.

Those courts adopting the "business purpose" standard erected a difficult barrier for aggrieved employment applicants to overcome. There was no requirement that the test be related to job performance and, absent a showing of discriminatory intent, an almost impossible burden of proof in most cases, the plaintiff was required to demonstrate that the test served no conceivable business purpose.

Even those courts which accepted the requirement of job relatedness as the standard in determining the propriety of a discriminatory test varied substantially in the requisite criteria demanded from employers seeking to demonstrate that their tests were job related. The only unequivocal endorsement of the EEOC's requirement of empirical validation came in the Fifth Circuit decision, Hicks v. Crown Zellerbach, Inc. The court affirmed the district court which declared that validation of a test which is prima facie discriminatory demands great professional expertise, and the empirical validation methods prescribed in the guidelines should be given "great deference." On the other hand, in United States v. H.K. Porter, a district court held that empirical validation is not necessary in all circumstances to prove job relatedness. No data was presented, but rather, a personnel manager who had "majored in psychology in college" studied the job performance of employees who had been given an employment test, and thereby determined that the test was a valid predictor of employment performance. To the same effect was Dobbins v. Electrical Workers Local 212, where a test was upheld on the grounds that it was, in the opinion of the court "reasonably related to the proper attitudes" and "properly selected" by an expert consultant. Again, there was a total absence of any empirical evidence, and even the attempted content validity procedures were of no value by scientific standards.

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17. Id. at 538.
19. Id. at 76. "Such a loose definition of validation dilutes considerably the court's approval of job relatedness." See Developments 1133.
Considering the low threshold of proof required to exonerate employers of charges of discrimination in their testing procedures and in determining whether a test is discriminatory or not, it is no surprise that the other, even more demanding requirements of the guidelines received little support from the judiciary. Most judges did not even consider the necessity of differential validation, and that concept was specifically rejected in *H.K. Porter* as constituting “prohibited discrimination” in favor of blacks.  

Even those cases ostensibly accepting the job related standard for testing allowed employers to test applicants for promotability without restriction.

*Use of Seniority Systems in Transfer and Promotion*

Seniority systems are of many types and are used as criteria for management decision-making of all kinds. However, the type of seniority system involved here determines relations of employees to one another, or their “comparative status.” As such, a seniority system involves a set of rules governing job movements, including promotions, transfers, downgrading and lay-offs. The most “senior” man among a group of competing workers within a particular “seniority unit” is preferred, provided that he is qualified and eligible to fill the job in question. Seniority may be measured by length of service in an entire plant, in a department, in a “line of progression,” or even in a particular job. However, regardless of how seniority is measured, its effect largely depends upon the range of jobs for which an employee is allowed to compete when openings occur and from which he can “bump” a less senior man if he is displaced from his position.

As with other employment procedures, discrimination was common in the structure and administration of seniority systems before the effective date of Title VII. Seniority systems are so varied and complex that an examination of all their forms would be virtually impossible, and the various structures formerly used to effectively segregate and disadvantage black employees within such systems is equally unapproachable. However, three types of explicit discrimination were most common: (1) separate white and black seniority lists for the same work, structured in such a way that the highest position in the black seniority unit was below the lowest position in the white unit; (2) artificial division into two or more seniority units of a group

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22. *Developments* at 1138.
23. *Id.* at 1156.
24. Note, 80 *Harv. L. Rev.* 1260, 1263 (1967) [hereinafter cited as *Seniority*].
25. *Developments* at 1158.
of jobs having so much functional interrelation in terms of skills required for performance that the jobs would normally have constituted a single unit for seniority purposes; both blacks and whites were hired to fill the lowest or entry positions, but only whites were allowed to transfer to the other unit where the more lucrative jobs of a similar functional nature were located; (3) two or more groups of related jobs organized into separate segregated seniority districts, with blacks holding the “Negro” jobs, invariably the lowest paid and least desirable, and whites holding the more preferable “white” jobs.

That part of Title VII forbidding segregation or classification of employees on the basis of race in any way when such separation results in an adverse impact upon any employees clearly made any overt discriminatory seniority system illegal. Thus, within the years immediately subsequent to the passage of the Act, employers eliminated virtually all segregated lines of progression, the barriers to transfer by blacks to formerly all-white seniority units, and exclusive racial hiring for particular classes of jobs. However, the systems which employers substituted in place of the overt discrimination often constituted a structure serving to “freeze” blacks into positions they held under the prior systems. The past operation of a discriminatory seniority system had established a particular distribution of jobs among the employees and a fixed competitive standing among them with respect to future job movements, and the contention was that the failure to take some sort of remedial action beyond merely a cessation of policies overtly hostile to newly hired black employees, constituted present discrimination proscribed by the Title.

Perhaps the best approach to take in order to elucidate this rather complex problem is to examine a typical illustration of the consequences of merging seniority lines. The particular fact situation described below was presented to the Fifth Circuit in Local 189, United Papermakers and Paperworkers v. United States, a case involving Crown Zellerbach’s plant at Bogalusa, Louisiana.

The company, until May, 1964, organized jobs hierarchically within “lines of progression” by race, resulting in the white union having jurisdiction of the more desirable lines and the black union charged with responsibility over the “left-overs,” so that the lowest white jobs were more highly paid than the highest black positions. Promotion within the lines was determined by “job seniority”: when

27. Developments at 1158.
28. Id.
29. Seniority at 1268.
30. 416 F.2d 980 (5th Cir. 1969).
a vacancy occurred, workers in the job slot immediately below it could bid for the opening, and the one who had worked longest in that slot was given priority.\textsuperscript{31}

The company put new employees on "extra boards," which were labor pools used to fill temporary vacancies within the lines of progression. The senior workers on the extra boards had first call on vacancies in the entry jobs at the bottom of the various lines. When lay-offs occurred, those at the bottom of the line were "bumped back" to the extra board, but under "rights of recall," they had first claim on vacancies in any entry level job they may have held.\textsuperscript{32} The extra boards, like the lines of progression, were segregated by the employer.

After the effective date of Title VII, Crown Zellerbach merged all black and white lines of progression within each department and this merger was effected on the basis of existing pay rates.\textsuperscript{33} With the exception of one job in the entire plant, this merger by pay rates resulted in the tacking on of black lines of progression at the bottom of white lines, since black jobs were invariably the lowest paying. This plan had many practical consequences which resulted in advantages to white employees. First of all, whites on the extra boards who had rights of recall to jobs which were formerly entry jobs into the whites' lines of progression, retained those rights to the same jobs, even though the position was no longer at the entry level, but in the middle of the merged lines of progression. More crucially, Crown Zellerbach continued to award promotions according to job seniority, that is, that the man with the most years in the job slot immediately below the vacancy had first call. Thus, total time worked in the mill meant nothing as such. As a result, blacks had no seniority in bidding for formerly white jobs except as against each other at entry positions to the formerly all white jobs. Thus, the system conditioned job advancement upon a qualification that the company itself had limited racially, regardless of whether that qualification—seniority in previously white jobs—was necessary to do the work.\textsuperscript{34}

Despite the absence of administrative guidelines such as those issued for testing, the courts were surprisingly uniform in their condemnation of seniority systems which served to freeze in discrimination practiced before the effective date of the Act, and in their development of a legal standard to be applied to seniority promotion cases under Title VII. The leading case which declared that present policies perpetuating pre-Act discrimination constitute forbidden present

\textsuperscript{31} Id. at 983.
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 984.
\textsuperscript{34} Id.
discrimination was a Virginia district court case, **Quarles v. Philip Morris, Inc.** In declaring illegal a seniority merger plan similar to that used by Crown Zellerbach, the court concluded, “[t]he plain language of the Act condemns as an unfair practice all racial discrimination . . . that originated in seniority systems devised before the effective date of the Act.” This finding has been accepted by virtually every court considering the question after **Quarles**.

The next step to be taken by the courts was the formulation of the precise standard used to determine whether a seniority system which has the effect of freezing in past discrimination could still be considered “bona fide” and therefore permissible. **Quarles** had suggested that an “economic purpose” for the plan in the absence of signs of discriminatory intent would suffice to sustain such a seniority system. However, this standard, closely analogous to the lenient “business purpose” standard in testing cases, was soon replaced by the test announced by the Fifth Circuit in **Local 189, United Papermakers and Paperworkers v. United States**. In that case, Judge Wisdom ruled that “business necessity” must be found to justify the use of a seniority system having a discriminatory impact on blacks. In attempting to justify the merger plan, the company had argued that the plan was a business necessity because its implementation would prevent the eruption of labor unrest and because the company feared that some blacks would not be qualified to hold many of the jobs in the formerly white line of progression. The court rejected the first contention, ruling that danger of labor strife did not constitute business necessity, and then made clear that the company need not promote any black to a position for which he was not qualified. In another case, **Jones v. Lee Way Motor Freight Co.**, it was suggested that only those seniority systems which are essential to the safe and efficient operation of the business meet this standard.

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36. 279 F. Supp. at 515.
38. **Developments** at 1161.
39. 416 F.2d 980 (5th Cir. 1969).
40. Id. at 989.
41. Id. at 989-90.
42. It is worthy to note at this point the similarity between the “business necessity” test and the “job related” standard of the testing cases.
43. 431 F.2d 245 (10th Cir. 1970).
EMPLOYMENT DISCRIMINATION

The Griggs Decision

In 1971, the United States Supreme Court in Griggs v. Duke Power Co.\textsuperscript{44} issued its only declaration to date with regard to permissible employment criteria under Title VII. Duke Power Co. operated a hierarchically organized plant which, before Title VII became effective, restricted blacks to the lowest of five departments, labor. When the operation of the Act mandated the end of overt discrimination, a high school diploma or the passing of an intelligence test and a mechanical comprehension test became prerequisites for transfer from the labor department to an “inside job” in one of the other departments.\textsuperscript{45} Thus, the Court was faced with a situation in which a non-validated test was being used as a criterion for promotion from one department, to which all blacks had been relegated by prior hiring discrimination, to another department which was all-white and contained the preferable jobs.

The Supreme Court reversed both the district court, which had held the company not liable on the ground that Title VII did not reach frozen-in discrimination,\textsuperscript{46} as well as the court of appeals, which used the rationale that Title VII applied only to intentional employer discrimination.\textsuperscript{47} The Court said, “[p]ractices, 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.”\textsuperscript{48} Congress intended 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 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.\textsuperscript{49}

In outlawing the use of broad or general testing devices as well as diplomas and degrees as fixed measures of capability, Chief Justice Burger emphasized that Congress directed the thrust of the Act to the consequences of employment practices, not simply their motivation, and “placed on the employer the burden of showing that

\textsuperscript{44} 401 U.S. 421, 424 (1971).
\textsuperscript{45} Id. at 428.
\textsuperscript{46} Id. at 430.
\textsuperscript{48} 401 U.S. 421, 430 (1971).
\textsuperscript{49} Id. at 431.
any given requirement must have a manifest relationship to the employment in question.55 Moreover, the Court quite significantly endorsed the EEOC guidelines as being in harmony with legislative intent, remarking that “the administrative interpretation of the Act by the enforcing agency is entitled to great deference.”56

In one sweeping stroke the Court (1) approved the Hicks rationale that no discriminatory intent need be shown in order to constitute a violation of Title VII;52 (2) accepted the conclusion reached in Hicks that once an employee has demonstrated the adverse differential impact of an employment practice, the burden of proof shifts to the employer to demonstrate job relatedness; (3) adopted the Local 189 standard of “business necessity”53 and the “job relatedness” test of Hicks; (4) affirmed Quarles’ concept of Title VII reaching present effects of past discrimination;54 and (5) consolidated the standards to be applied by courts in testing, seniority and promotion, or other similar cases by grouping them into the category “employment practices.” Thus, whenever an employment practice is shown to have an adverse impact on blacks, the burden shifts to the employer to prove that the practice is a business necessity, which, in the case of testing, will presumably require a showing of job relatedness.

The questions left unanswered are: (1) the permissibility of promotability testing; (2) the extent to which job relatedness must be proved by empirical validation; (3) the necessity or propriety of differential validation; and (4) the general issue of seniority systems. Regarding the first three unanswered questions, the Court’s strong endorsement of the guidelines would seem to indicate a possibility of future adoption of the Commission’s liberal standards in these matters. However, it must be recognized that much of what was said in the Griggs opinion was dicta. The particular fact situation dealt with was the combination of (1) a non-job related test which (2) also operated to freeze in past discrimination, and it is at least theoretically possible that a different result would be reached if only one of the above elements were present.

Lower Court Response to Griggs: Employment Practices Standards

The courts of the Fifth Circuit have provided the dominant forum for Title VII cases, and their interpretation of Griggs has been

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50. Id. at 432.
51. Id. at 433.
52. See text at note 12 supra.
53. See text at note 38 supra.
54. See text at note 34 supra.

fairly representative of judicial response in other circuits. *Griggs* left no doubt that proof that an employment practice has an adverse impact on blacks as a group immediately establishes a prima facie case of discrimination, forcing the employer to justify its use. The first Fifth Circuit case after *Griggs*, and one which has given as expansive an interpretation of Title VII as any court of appeals case in the country, was *United States v. Jacksonville Terminal Co.* In that portion of the decision involving testing procedures which had been used in conjunction with other standards to determine promotions, despite the government's failure to show that the test was preventing blacks from being promoted, the fact that blacks scored poorly on the test together with a showing that no blacks had been promoted since the test was adopted, led the court to hold that "the inference that test scores are important factors in the selection . . . becomes conclusive." In another case, *Hester v. Southern Railway Co.*, a lower court followed the lead of *Jacksonville Terminal Co.* by not requiring specific statistics regarding which part of the screening process, involving both a test and other procedures, was the deciding factor in disqualifying the applicant. The court declared illegal an invalidated intelligence test when statistics indicated that though only slightly larger numbers of whites applied for the job, there were three times more whites hired than blacks.

Thus, the decisions from the Fifth Circuit have generally adhered to and even enlarged the *Griggs* position on use of statistics to make out a prima facie case of discrimination in employment practices under Title VII. Generally, any showing of a substantial difference in black and white disqualification rates by use of a particular criterion for making employment decisions will trigger an inquiry by the court into the business necessity of the practice.

Although *Griggs* adopted the use of the business necessity standard as the showing required to justify a discriminatory employment practice, it did not spell out exactly what that term meant. The Supreme Court did say that the job relatedness quality of a test, which enables it to predict which applicant is best able to perform

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55. 451 F.2d 418 (5th Cir. 1971).
56. Id. at 456.
58. Id. at 812-16.
59. The courts of the Fifth Circuit have failed to award relief because the plaintiff did not show differential impact in only two cases since *Griggs*. See *Ochoa v. Monsanto Co.*, 473 F.2d 318 (5th Cir. 1973); *Johnson v. Goodyear Tire & Rubber Co.*, 349 F. Supp. 3 (S.D. Tex. 1972).
in a particular position, justified the use of even a discriminatory test. The apparent logic is that one, and perhaps the only business necessity is that the employer hire applicants who can perform the work required. But, are there other means and goals so essential to the functioning of a business as to meet the business necessity standard? Thus far, the Fifth Circuit has found none. Once again, *Jacksonville Terminal Co.* set the tone with a bold declaration that “necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster the safety and efficiency of the plant, but must also be essential to those goals.”\(^6\) The court further noted that crucial to the assertion that the existing seniority system was a business necessity was proof that “[the] current occupants of a class or craft are necessarily the only employees qualified to fill vacancies in that craft or class.”\(^6\)

In *Bing v. Roadway Express, Inc.*,\(^6\) the court of appeals, applying the “overriding, legitimate, non-racial business purpose” test as equivalent to business necessity, ruled that a “no-transfer” rule which served to freeze blacks into a lower department to which they were relegated by pre-Act discrimination was not justified by the three business purposes advanced by the employer: (1) additional costs to the company; (2) labor problems which would be caused by allowing transfers; and (3) the requirement of different skills for the more desirable job. As to the third justification, the court made clear that Roadway Express was not obliged to transfer a black employee if he was not qualified for the job, but neither could the company place an arbitrary barrier in the way of his transfer.

In another court of appeals case, *United States v. Hayes International Corp.*,\(^6\) a system involving “recall rights”\(^6\) based upon seniority, which served to prejudice blacks who had been excluded from the department before Title VII became effective was declared illegal. In rejecting the claim of the corporation that this system was a business necessity because it was “necessary” in times of rapid employee expansion to have experienced men in the higher positions, the court said, “[w]hile this may be a non-racial business purpose, we do not find it to be sufficiently overriding to outweigh the discriminatory effect . . . .”\(^6\) *Rowe v. General Motors Corp.*\(^6\) is precisely in accord

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61. *Id.* (Emphasis added.)
62. 444 F.2d 687 (5th Cir. 1971).
63. 456 F.2d 112 (5th Cir. 1972).
64. See text at note 31 supra.
65. 456 F.2d at 118.
66. 457 F.2d 348 (5th Cir. 1972).
in an analogous situation of using "experience" as the criterion in
determining which employees would be laid off in a department
which was compulsorily all-white before 1962.67

It would seem that the business necessity test as applied by the
courts of the Fifth Circuit means this: an employment practice which
has a discriminatory impact cannot be justified under the doctrine
of business necessity unless it serves as an unequivocal predictor of
job performance for the positions from which it serves to bar a dispro-
portionate number of the protected group.68 As a practical matter,
this meaning of business necessity has resulted in the elimination of
any seniority or transfer system which serves to bar blacks from
higher positions or to disadvantage them from that attainment. This
is true even though the system operates in such a way that each job
successively trains the employee for the next job, because the courts
have recognized that there is no absolute certainty that none of the
employees involved is qualified to fill any higher position which he
may deserve on the basis of his seniority.69

1972), a district court in Alabama upheld a rigidly validated test which had been
proven accurate in predicting success in an apprenticeship program for which it was
given to screen applicants.

68. Though not articulated concisely a decision by a federal district court in
California in Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971),
seems to agree with this analysis of business necessity: "The (Supreme) Court (in
Griggs) has stated that the only permissible reason for tolerating discrimination is
business necessity which is 'related to job performance.' The ability of the individual
effectively and efficiently to carry out his assigned duties is, therefore, the only justifi-
cation recognized by the law." Id. at 495.

69. Lest an improper conclusion be drawn, it is incumbent that the significance
of the business necessity test as what may seem to be a highly liberal interpretation
of the terms of Title VII be qualified somewhat. In applying this test to discriminatory
seniority systems, it is true that a mere assertion that each job serves to train employ-
ees for the next successively higher position cannot be used to justify a system using
employees' present status in the business structure as a criterion for promotion if such
status is predicated upon the employer's prior discrimination. Rather, the employer is
required to demonstrate that an employee is unqualified for the particular position to
which he is entitled according to his total plant seniority in order to deny him that
position when it becomes vacant. In practical terms, however, it must be noted that
the minority employee who has been relegated by prior discrimination to the lowest
rungs of employment in the company will usually not be qualified for the position
which he would presently occupy but for past discrimination, for the very reason that
each job trains its holder for the next position in the employment structure. It would
seem, therefore, that the fact that an employee is unqualified for his rightful position
should be considered as incident to the "frozen in" discrimination, the perpetuation
of which the Act has been interpreted to prohibit. Accordingly, employers should be
required to train their minority employees for the positions to which they are entitled,
in the same manner they would have been trained had they been allowed to progress
While the adjustment of seniority systems presents few technical or financial problems to employers themselves, the same is not true in the case of meeting judicial testing standards. The strict empirical validation of every employment test disqualifying a higher proportion of blacks than whites, a standard equally required under the business necessity rationale, sometimes poses real problems, and the actions of the courts in this matter has reflected this situation.

As with the other areas considered, an analysis of the stringency of the validation requirements imposed by the courts of the Fifth Circuit must begin with the *Jacksonville Terminal Co.* case. There, a test with discriminatory effects was struck down because the validation procedure did not meet the *Griggs* standard of a “demonstrable relationship” between test results and job performance. The test had been developed “professionally” by railroad personnel, and “validation” was effected by correlating the test scores made by the candidates for promotion with estimations given by their present supervisors of the candidates’ job potential in the positions they sought. In holding the validation procedures deficient, the court endorsed the validation standards of the EEOC guidelines and stated

*Griggs* demands more substantial proof, most often positive empirical evidence, of the relationship between test scores and job performance.

. . . .

Test scores have been compared only with predicted, not actual, job performance of blacks. The Terminal did not even bother to use those persons holding Group I jobs (the positions sought) at the time the test was devised as a control group, so that a demonstrable correlation—or lack thereof—between test scores and Group I job performance could have been ascertained.72

Thus, the use of disciplined empirical validation was strongly endorsed.73
However, the latest case to be handed down on testing by the court of appeals can only be described as an anomaly. In *Allen v. City of Mobile*, the court was confronted with a complaint by a black police officer that a test given by the police department, the passing of which was a requirement for promotion to sergeant, discriminated against him in violation of his civil rights. The case involved a long history of overt racial discrimination with only a small proportion of blacks on the police force as compared to their presence in the community. There had been only one black police sergeant in the city's history. The lower court and the court of appeals thus found that the test, which whites passed at a rate of sixty percent and blacks passed at a rate of only fourteen percent, was discriminatory. Consequently, the burden shifted to the city to prove that the test was job related and the district court allowed the use of very lenient content validity evidence to establish that showing.

The test was based entirely upon a “job description” prepared in 1959 by an outside consulting agency having no part in formulating the test itself, and there was strong evidence, upon which the district court made no finding, questioning the accuracy of the description even at the time it was formulated. The testing agency failed to make any studies correlating job performance of present officers with the test scores. In addition, the testimony supporting the validity of the test was given by a representative of the company which itself formulated the test.

The court of appeals affirmed the finding and Judge Goldberg issued a vigorous dissent, declaring that the district court and majority had failed to apply the exacting requirements demanded by *Griggs* to prove the relationship of a test to job performance. While...
the district court had ruled that the test was "rationally related" to the job to be performed, Goldberg maintained that Griggs required a showing of a "manifest relationship" between the two.\textsuperscript{80} "To stop at this low denominator (rational relationship) is to ignore both any sort of purposive analysis of testing and the thrust of Griggs."\textsuperscript{81} Concluding that the analysis of content was "completely superficial and wholly insufficient as a matter of law"\textsuperscript{82} to constitute even content validity, Goldberg argued that the test should have been disallowed.

The dissent in this case is in harmony with the rest of the jurisprudence. Perhaps the decision is explainable by the majority's view of the economic realities of the situation. According to the district court,

To require a small police department, suffering from inadequate funding to expend probably more than $30,000 to conduct a test study for examinations in an effort to mitigate the problems of socially and culturally disadvantaged Negroes is not practical or constitutionally required.\textsuperscript{83}

One possible answer to this argument is that if courts are uniform in their application of strict validation requirements, those private and public employers who can afford the costs will pay them and those who sincerely cannot will generate enough political pressure to force Congress, as is only proper, to make available funds to conduct validity studies in order to enforce its own law affording equal employment opportunity to all citizens.

One area that courts have hardly approached at all, even since Griggs, is differential validation, probably because of the even greater costs required by the process and perhaps also because of some misunderstanding of the concept. Jacksonville Terminal Co. seems to imply the necessity of something in the nature of differential validation when the court says, "[a]ccepting arguendo that whites scoring high on the test perform satisfactorily in Group I positions, to conclude that therefore blacks scoring low could not adequately perform the same jobs is a non sequitur."\textsuperscript{84} Judge Goldberg also intimated the necessity of such a procedure in his dissent in Allen.\textsuperscript{85} However, much more typical of the attitude of judges toward differential validity was

\begin{itemize}
\item \textsuperscript{80} Id. at 126.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id. at 127-28.
\item \textsuperscript{83} Allen v. City of Mobile, 331 F. Supp. 1134 (S.D. Ala. 1971).
\item \textsuperscript{84} 451 F.2d at 455.
\item \textsuperscript{85} Allen v. City of Mobile, 466 F.2d 122, 127 (5th Cir. 1972).
\end{itemize}
EMPLOYMENT DISCRIMINATION

the declaration in Cooper v. Allen:84 "The law does not require lower standards of employment for blacks. If the test is substantially related to the demands of the job and no black can pass the test, an employer need not hire any blacks."

The apparent conclusion to be drawn from the validation cases is that the strictness in the showing of job relatedness will probably vary directly with the size and wealth of the employer, and that the tendency will presumably be to require strict empirical validation wherever feasible, with a special leniency afforded to underfinanced governmental entities.

Since Griggs, the lower courts have followed the Supreme Court's lead in avoiding the issue of promotability testing.85 Either the issue has not been presented or the courts have found it unnecessary to consider it. It is not unlikely, however, to become a question for future judicial consideration.

The Griggs business necessity—job relatedness standard has been applied to many varying kinds of employment practices besides testing procedures and seniority promotions. In the Fifth Circuit, these include the subject interview,88 the policy of placing the burden of lay-offs on the least senior employees,92 recruitment practices,90 and a no-transfer rule.91 In addition, two interesting California district court decisions bear notice.

In Gregory v. Litton Systems, Inc.92 an employer was proscribed from using arrest records as a criterion for denying employment to an applicant. Johnson v. Pike Corp. of America93 held that a management policy of discharging employees who had their wages garnished several times violated Title VII. The rationale in both cases was that, evidence having been presented that blacks were arrested more often and had their wages garnished more often, the employer had to prove business necessity to justify continuing the use of those criteria. That necessity was the relatedness to job performance, and neither employer being able to furnish such proof, the practices were outlawed.

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86. 467 F.2d 836, 838 (5th Cir. 1972).
87. 401 U.S. at 432.
89. Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).