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## Constitutional Law - Racial Discrimination in Employment. *Griggs v. Duke Power Co.*, 91 S. Ct. 849 (1971)

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two situations may ordinary operational negligence create an unseaworthy condition: by bringing into play a previously unseaworthy condition, or by creating an unseaworthy condition which, after a break in the continuity of events, subsequently causes injury.

FRANK F. ARNESS

**Constitutional Law—RACIAL DISCRIMINATION IN EMPLOYMENT.**  
*Griggs v. Duke Power Co.*, 91 S. Ct. 849 (1971).

Griggs and twelve other black employees brought this class action under Title VII of the Civil Rights Act of 1964<sup>1</sup> to enjoin Duke Power Company from discriminating against them.<sup>2</sup> Prior to 1965, when the Act went into effect, Duke employed negroes only in its labor department. Thereafter, Duke required a high school diploma and satisfactory scores on two aptitude tests for all new employees—black and white—who wished to transfer to any other department.<sup>3</sup> The district court found no violation, holding that the tests were probably related to necessary job skills.<sup>4</sup> The court of appeals agreed that there was no violation, holding that such tests need not be job-related.<sup>5</sup>

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tional negligence. The Court in *Usner* distinguished the earlier decision of *Crumady* in terms of a defective winch and *Mascuilli* in terms of a prior unseaworthy condition arising from the tightline condition. In following *Mitchell's* standard of reasonableness, *Usner* is technically on firm ground, but Mr. Justice Harlan, in his dissent also appears correct in stating that "*Crumady* cannot justly be distinguished" from *Usner*. 91 S. Ct. at 520. While litigation on the question of whether instantaneous operational negligence equates to unseaworthiness should abate as a consequence of *Usner*, the voluminous and costly litigation on the other aspects of unseaworthiness will continue.

1. 42 U.S.C. § 2000e-2(a)(2) (1964) provides that:

It shall be unlawful employment practice for an employer—. . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .

*Id.* § 2000e-2(h) provides:

Notwithstanding any other provision of this [title], it shall not 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. . . .

2. *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 244 (M.D. N.C. 1968).

3. *Griggs v. Duke Power Co.*, 91 S. Ct. 849, 852 (1971).

4. 292 F. Supp. at 250.

5. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1235 (4th Cir. 1970).

The Supreme Court reversed, declaring that "Congress has commanded . . . that any tests used must measure the person for the job and not the person in the abstract."<sup>6</sup> Since blacks fare worse than whites in both the education and testing requirements, and since the requirements were not shown to be related to successful performance of the jobs for which they were used, the effect was unlawful discrimination.<sup>7</sup> Duke's lack of intent to discriminate was irrelevant when the consequence of its requirements was discrimination, and there was a failure to show a relationship between the requirement and the employment.<sup>8</sup>

Before the passage of the Civil Rights Act of 1964, there was no uniform protection against discrimination in employment. The Civil Rights Act of 1871 forbade only the violation of one's constitutional rights by state action.<sup>9</sup> In *Whitner v. Davis*,<sup>10</sup> the Court of Appeals for the Ninth Circuit said by way of dictum that no one had a constitutional right to public employment but that, once employed, he had a right to be free from unreasonable discrimination with respect to that employment.<sup>11</sup> Under the Railway Labor Act,<sup>12</sup> the Supreme Court held that labor unions must represent minority groups among railroad workers without "hostile discrimination."<sup>13</sup> Thus, there was limited protection for government employees and railroad workers once they had been hired, but no federal guarantee of freedom from racial discrimination in hiring, transfers, or promotions.<sup>14</sup>

However, thirty-five states had statutes prohibiting racial discrimination in employment by the time the Civil Rights Act of 1964 went into effect.<sup>15</sup> Most of the states which had no such laws were in the

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6. 91 S. Ct. at 856.

7. *Id.* at 853.

8. *Id.*

9. 42 U.S.C. § 1983 (1964).

10. 410 F.2d 24 (9th Cir. 1969).

11. *Id.* at 30. There was no race issue in this case, and the court found for the defendant who had fired plaintiff, a state university faculty member, for unprofessional conduct. *Id.* at 27.

12. 45 U.S.C. §§ 151-63 (1964).

13. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944). See also *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

14. One can infer from the cases cited in notes 10 and 13 *supra* that only highly unreasonable discrimination was thought to be unlawful, and no cases were found which dealt with promotions or departmental transfers.

15. Purdy, *Title VII: Relationship and Effect on State Action*, 7 B. C. IND. & COM. L. REV. 525, 527 (1966).

South, including North Carolina where the *Griggs* case arose.<sup>16</sup> The definitions of discriminatory practice, of course, differed.<sup>17</sup> As with Title VII, voluntary compliance and agency hearings were the usual practice,<sup>18</sup> and most conciliation attempts were successful.<sup>19</sup>

One of these agency cases was a factor in the inclusion of section 703(h) in Title VII.<sup>20</sup> The commission found that testing of the culturally deprived was discriminatory.<sup>21</sup> Section 703(h) was designed to protect the employer's right to use "professionally developed ability tests,"<sup>22</sup> while prohibiting their discriminatory use.<sup>23</sup> Early commentaries recognized that if de facto discrimination resulted from the use of tests, courts could find that they were "used"<sup>24</sup> to discriminate and were, therefore, unlawful.<sup>25</sup>

Title VII has been held to be a clear mandate to end racial discrimination in employment, unhampered by strict construction or semantic arguments.<sup>26</sup> Each case is to be decided on its own merits.<sup>27</sup> In the only reported case involving section 703(h) prior to *Griggs*, the court declined to decide whether the tests had to be related to job skills because that point was not argued.<sup>28</sup> It did hold, however, that the tests

16. *Id.* The states not having such laws were Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maine, Mississippi, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, and Virginia.

17. *Id.* at 526.

18. *Id.* at 532.

19. Kovarsky, *The Harlequinesque Motorola Decision and Its Implications*, 7 B. C. IND. & COM. L. REV. 535, 537 n.12 (1966). Because of this success, there are no reported cases in point.

20. *Id.* at 541.

21. *In re Leon Myart*, complainant, and Motorola, Inc., respondent, Charge No. 63C-127 (1964), in 110 CONG. REC. 5662 (1964).

The examiner ordered Motorola to hire the Negro applicant tested. On appeal, the order to hire was reversed, and the applicant was awarded damages of \$1,000. Commission Decision on Review, Charge No. 63C-127, State of Ill. F.E.P.C. (1964). The Chicago Circuit Court denied the agency's right to award damages, thus leaving the applicant uncompensated and jobless, but did not reverse the examiner's findings of discrimination. *Motorola, Inc. v. Illinois F.E.P.C.*, 38 L.R.R.M. 2573, 2574 (1965).

22. 42 U.S.C. § 2000e-2(h) (1964).

23. 110 CONG. REC. 7246 (1964); *id.* at 13724.

24. 42 U.S.C. § 2000e-2(h) (1964).

25. Rachlin, *Title VII: Limitations and Qualifications*, 7 B. C. IND. & COM. L. REV. 473, 487-8 (1966); Vaas, *Title VII: Legislative History*, 7 B. C. IND. & COM. L. REV. 413, 449 (1966).

26. *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

27. *See United States v. H. K. Porter Co.*, 296 F. Supp. 40, 52 (N.D. Ala. 1968). The court declined to set up guiding rules, saying the purposes of the Act would be best served by case-by-case decisions. *Id.*

28. *Id.* at 72.

used were "validated," in part, by their relationship to necessary job skills.<sup>29</sup>

The *Griggs* case gives the first useful judicial interpretation of what tests may or may not legally be used in a merit system scheme of promotion. Section 703(h) may be violated even when no intent to discriminate on a racial basis is shown.<sup>30</sup> If the educational requirement or aptitude test is not shown to be related to necessary job skills, and if it results in discrimination against blacks, it is unlawful.<sup>31</sup> This holding gives judicial support to the Equal Employment Opportunity Commission's guideline on the subject,<sup>32</sup> and requires that employers be prepared to demonstrate the relevance of the tests to the qualifications for the job for which they are required. This is particularly true if proportionately more whites than blacks meet the requirements. From the tenor of the opinion, it is fair to predict that the *Griggs* rationale will be extended to pre-employment tests when such a case arises.

NATALIE C. GILLETTE

**Criminal Law—EXPLOITATION OF ILLEGAL ARREST.** *United States v. Edmonds*, 432 F.2d 577 (2d Cir. 1970).

After making a lawful arrest, FBI agents were assaulted by an angry mob and forced to let their prisoner escape. The following day other agents who had not been involved in the affray arrested four defendants on the pretext of failure to have Selective Service cards in their possession.<sup>1</sup> Defendants were then escorted to FBI headquarters in the hope that they could be identified by the victims of the assault. The ensuing identification resulted in courtroom identification testi-

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29. *Id.* at 78. The court found that the tests were validated as plaintiff argued they must be, by the company officials' evaluation and a showing that they were job-related. *Id.* at 76, 78. The court also said the tests need not be validated anyhow, since plaintiff had not shown a discriminatory result. *Id.* at 77. The injunction sought against the use of the tests was denied. *Id.* at 119.

30. 91 S. Ct. at 853.

31. *Id.* at 856.

32. § 1607.4(c), 35 Fed. Reg. 12333 (1970) demands that employers keep "data demonstrating that the test is predictive of . . . important elements of work behavior . . . relevant to the job. . ."

1. Military Selective Service Act, 50 U.S.C.A. APP. § 462(b)(6) (1968). Testimony showed that the government had never prosecuted for inadvertent failure to have draft cards on an individual's person, and subsequent actions at FBI headquarters indicated they never intended to prosecute in this instance. *United States v. Edmonds*, 432 F.2d 557, 582 (2d Cir. 1970).