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Albemarle Paper Company v. Moody: The Aftermath of Griggs and the Death of Employee Testing

By James G. Johnson

Albemarle Paper Co. v. Moody\(^1\) presented the United States Supreme Court with two major questions. First, by what standard should a federal district court determine whether to award or to deny back pay to those applicants for employment who have been discriminatorily denied employment or advancement opportunities? Second, what showing must an employer make to establish that professionally developed employee selection tests which are not “designed, intended or used to discriminate,” but which have a racially disparate impact, are sufficiently job-related to withstand attack under Title VII of the Civil Rights Act of 1964?\(^2\) This article will be limited to a discussion of the latter question and the problems created by the Supreme Court’s answer to it.

The Albemarle decision appears to signal an end to employee testing because in giving great deference to the Equal Employment Opportunity Commission’s Guidelines on Employee Selection Procedures,\(^3\) the Court effectively mandated strict compliance. The commission’s guidelines, however, are unrealistic and unworkable in practical application. If these standards are strictly construed and strictly applied

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\(^{1}\) 422 U.S. 405 (1975).

\(^{2}\) 42 U.S.C. § 2000e to e-17 (1970 & Supp. IV, 1974). Title VII specifically forbids employers, employment agencies, labor organizations, and joint labor-management committees to discriminate on the basis of race, color, religion, sex, or national origin.

by the courts, employers will be forced to abandon altogether the use of professionally developed employee testing procedures. In order to reach acceptable levels of minority representation in his work force, the employer will be forced to resort to hiring by quota or by some other arbitrary selection process. The employer will thus avoid the appearance of discrimination and will avoid the risks of attempting to comply with the guidelines' procedural technicalities. Such a result is contrary to the congressional intent and the legislative history behind section 703(h) of the act. Accordingly, whenever the spirit of Title VII is followed, strict compliance with the guidelines should be recognized as a nicety rather than a necessity.

The Guidelines

With the passage of Title VII of the Civil Rights Act of 1964, Congress gave its stamp of approval to the fundamental concept of equal employment opportunity. Traditionally, minority workers had been discriminatorily relegated to lower paying nonskilled jobs, while better paying skilled jobs were meted out to the White work force. Through Title VII, Congress sought to enhance the relative social and economic positions of America's minority populations by making consideration of race, color, religion, sex, and national origin legally irrelevant to selection and advancement processes, thereby promoting color blind employment decisions.

To implement this color blind employee selection policy, Congress specifically sanctioned the nondiscriminatory use of "professionally developed ability tests." Section 703(h) of the act provides:

Notwithstanding any other provision of this subchapter, 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, color, religion, sex or national origin. . . .

5. Section 703(e) qualifies this statement by specifying that religion, sex, and national origin are legally irrelevant considerations unless the employer first shows that "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." Civil Rights Act of 1964, Title VII, § 703(e), 42 U.S.C. § 2000e-2(e) (1970). Since race and color were not included within this exception, they are never bona fide occupational qualifications and are therefore totally irrelevant in the decision to hire, transfer, promote, or train.
Congress realized, however, that prejudices developed over centuries would not disappear merely with the enactment of Title VII. Recognizing that discriminatory practices in employment, both intentional and unintentional, would surely continue without an agency to administer and enforce Title VII, Congress created the Equal Employment Opportunity Commission. The commission was granted "authority from time to time to issue, amend or rescind suitable procedural regulations to carry out the provisions of [Title VII]." Section 713(a), which vested the commission with this procedural rule making authority, implicitly limited the commission to adopting rules of procedure and rendering administrative interpretations of the act; it did not contemplate that the commission's regulations and statements would be treated as inflexible rules of substantive law and quasi-legislative proclamations enlarging Title VII itself. The courts, however, have given the commission's administrative regulations and legislative interpretations great weight and have tended to apply them strictly, absent compelling reasons for doing otherwise.

On August 1, 1970, the commission published its Guidelines on Employee Selection Procedures. These new guidelines were stringent interpretations of section 703(h), authorizing only employee selection tests which are related to job performance and which are properly validated in accordance with specified procedures.

The guidelines were issued in response to a significant increase in the use of tests and a concomitant increase in "doubtful testing practices which . . . tend[ed] to have discriminatory effects." The guidelines reflect the commission's belief that properly validated professionally developed tests are effective devices which promote the policies of Title VII and which help develop and maintain an effective work force. The commission was disturbed, however, that tests were often used "as the basis for employment decisions without evidence that they [were] valid predictors of employee job performance." Thus, the guidelines were

7. Id. § 713(a), 42 U.S.C. § 2000e-12(a) (1970). This section further provides that "[r]egulations issued under [it] shall be in conformity with the standards and limitations of the Administrative Procedure Act." Id.
8. See text accompanying notes 33-64 infra.
10. The commission stated that because the guidelines are "interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable." 35 Fed. Reg. 12333 (1970).
11. 29 C.F.R. § 1607.1(b) (1975).
12. Id.
designed to measure the ability of a particular test to predict performance on a particular job and thereby to prevent the use of a test which is fair in form but discriminatory in operation.

Employee selection procedures are not generally scrutinized under the guidelines unless they are shown to have an adverse impact upon a protected class. The commission takes the position that whenever a test screens out minority candidates at a disproportionately higher rate than nonminority candidates, the test is presumptively discriminatory unless the employer has fully complied with the guidelines' procedural specifications. Compliance with the guidelines requires the employer to validate the test, to show that it has a "high degree of utility," and to demonstrate that no available alternative selection procedure has a less differential impact.

The guidelines require that testing devices be validated by showing a relation between the devices and actual on-the-job performance. There is no presumption of validity merely because the test is professionally developed; rather, the test must be job-related. To be job-related, the test must measure "important elements of work behavior which comprise or are relevant to the job or jobs for which the candidates are being evaluated." The test is valid to the extent that those who perform well on it also tend to perform well on the job, and vice versa. The kind of evidence required, however, is not merely observation of

13. Id. § 1607.3. Since it is the employer who is often intimately concerned with the legality of his selection procedures and who is the party most often called upon to substantiate his procedures, this article will refer to him. The arguments advanced, however, have equal application to all other persons giving or acting upon the results of a test as defined in the guidelines.

Similarly, since Blacks are generally the minority group most often affected by an employer's alleged discrimination, and the group most heavily involved in Title VII litigation, this article will refer to Blacks as the protected class. Nevertheless, the arguments advanced by this article have equal application to members of other protected classes.

14. See id. § 1607.3. That section states: "The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use." Id. (emphasis added).

15. See id. § 1607.8.

16. Thus, a test which is not properly job-related will not be regarded as "professionally developed" within the meaning of section 703(h), 42 U.S.C. § 2000e-2(h) (1970).

17. 29 C.F.R. § 1607.4(c) (1975).
the job by the employer or his psychological testing expert, but rather statistical proof of job-relatedness. The employer, therefore, must conduct a careful analysis of a particular job or jobs to determine what characteristics are necessary for satisfactory performance. On the basis of that analysis, the employer must select those testing devices which will objectively measure the extent to which each candidate possesses the requisite characteristics. The results must then be empirically verified by using the criterion-related validation technique if feasible, and if not, by using either the content validation or the construct validation method.

The employer may test candidates for a job at a higher level in the line of progression than the one for which he is applying. This testing practice is permitted when it is established that a great majority of the new employees will probably progress to that higher level within a reasonable period of time. The guidelines provide, however, that

where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways [the candidates must be] evaluated for a job at or near the entry level.

Furthermore, a test which has been validated in one unit of a multi-unit organization may be used in another unit without requiring the recompilation of extensive validity evidence whenever "no significant differences exist between [the] units, jobs, and applicant populations."

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18. Criterion-related validation is an empirical demonstration, using concurrent or predictive techniques, of the statistical relationship between a test and significant job behavior. Criterion-related validity is "demonstrated by comparing the test scores with one or more external variables considered to provide a direct measure of the characteristics or behavior in question." American Psychological Association, Standards for Educational and Psychological Tests and Manuals 13 (1966) [hereinafter cited as APA Standards]. The guidelines specifically endorse generally accepted procedures for determining criterion-related validity, such as those set out in the APA Standards. See 29 C.F.R. § 1607.5(a) (1975).

19. Content validation is a subjective comparison between the content of the job and the test, which incorporates some of the specific tasks necessary for successful performance. See 29 C.F.R. § 1607.5(a) (1975).

20. Construct validation establishes the relationship between the physical and/or mental traits (constructs) found necessary for successful performance and a test which is designed to measure those qualities. See id. When either content or construct validation, both generally referred to as rational validation, is used, the validation evidence "should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures)." Id. (emphasis added).

21. Id. § 1607.4(c)(1).
22. Id.
23. Id. § 1607.4(c)(2).
Regardless of which job the test is designed to evaluate, the guidelines require that empirical evidence be developed to demonstrate that:

1. "the applicant sample used for the validation studies [is] representative of the normal or typical candidate group for the job or jobs in question";\(^24\)
2. "[the] Tests [are] administered and scored under controlled and standardized conditions";\(^25\)
3. "[t]he work behaviors or other criteria of employee adequacy which the test is intended to predict or identify [are] fully described";\(^26\)
4. "[t]he supervisory rating techniques [are] carefully developed, and . . . closely examined for evidence of bias";\(^27\)
5. "[i]f technically feasible, [t]he test [is] validated for each minority group with which it is used . . . [so that] any differential rejection rates that may exist . . . [are] relevant to performance on the jobs in question";\(^28\)

The guidelines add that:

6. "[i]f it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible."\(^29\)

In addition to establishing that the test is job-related, the employer must demonstrate that the test has a high degree of utility. Utility is a subjective determination that the test is both statistically\(^30\) and practically\(^31\) significant. The concept has been defined as:

an assessment of the importance of a test [determined] by considering the number of job vacancies, the proportion of applicants who become satisfactory employees when not selected on the basis of the test, and the degree of economic and social risk involved in hiring an unqualified applicant.\(^32\)

\(^{24}\) Id. § 1607.5(b)(1).
\(^{25}\) Id. § 1607.5(b)(2).
\(^{26}\) Id. § 1607.5(b)(3).
\(^{27}\) Id. § 1607.5(b)(4).
\(^{28}\) Id. § 1607.4(a); see id. § 1607.5(b)(5).
\(^{29}\) Id. § 1607.5(b)(1).
\(^{30}\) Id. § 1607.5(c)(1) (significant to at least 95\%).
\(^{31}\) Id. § 1607.5(c)(2).
Judicial Response to the Guidelines

The Griggs Decision

Griggs v. Duke Power Co.\(^\text{33}\) was the first case considering the use of professionally developed ability tests to select employees. Prior to July 2, 1965, the effective date of Title VII, Duke Power Company had openly discriminated against Blacks by assigning them only to the lowest paying of the company’s five departments. In 1955 the company had begun to require a high school education for assignment to any of the higher paying departments, and on July 2, 1965, it had added the requirement that all job applicants receive satisfactory scores on two professionally developed aptitude tests.\(^\text{34}\) By that time, however, all lines of job progression had been opened to all qualified applicants regardless of race.

The company had instituted the tests “on the . . . judgment that they generally would improve the overall quality of the work force.”\(^\text{35}\) No attempt, however, had been made to validate the tests’ relationship to job performance ability.\(^\text{36}\) In fact, “[n]either [test] was directed or intended to measure the ability to learn to perform a particular job or category of jobs.”\(^\text{37}\) Nevertheless, both the district court\(^\text{38}\) and the Fourth Circuit\(^\text{39}\) found no discriminatory purpose in the adoption of the education and test requirements. Although the requirements had not been validated and disqualified a substantially disproportionate number of Blacks, both courts concluded that the employer’s subjective intent should govern. Accordingly, both courts held that there was no violation of Title VII.\(^\text{40}\)

34. See id. at 426-28. Duke Power’s labor department remained open to any applicant and did not require a high school education or satisfactory scores on both tests. Those Blacks who had been employed prior to the new requirements, and who thus had been excluded from the previously all-White, higher paying departments, were eligible for transfer after completion of high school. In September, 1965, those incumbent employees who lacked a high school education could qualify for transfer by passing both the Wonderlic Personnel and the Bennett Mechanical Comprehension tests. See id.
35. Id. at 431. The facts strongly suggest that the company imposed the employment standards for the purpose of limiting the number of Blacks advancing to higher paying positions. The date the requirements were instituted does not appear to be merely coincidental. The courts, however, did not appear to consider this fact in determining the company’s intent.
36. Id.
37. Id. at 428.
40. 401 U.S. 429. The court of appeals, however, reversed that part of the district
In the Supreme Court, the specific question to be resolved was whether Title VII prohibited an employer from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.\footnote{41}  

In reversing the court of appeals, the Court found that selection practices must be job-related to comport with congressional intent.\footnote{42} Furthermore, the Court found that Congress was more concerned with the consequences of employment practices than with the motivation behind them.\footnote{43} Thus the Court rejected the claim that requirements adopted in good faith and without discriminatory intent would satisfy Title VII's mandate for nondiscrimination, concluding that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."\footnote{44}  

In holding that employment tests must be job-related, the Court relied on the legislative history of section 703(h).\footnote{45} Passage of that section was prompted by the Illinois Fair Employment Practices Commission's decision in \textit{Myart v. Motorola, Inc.} The opinion in \textit{Myart} suggested that employers were forbidden to use any standardized tests on which Whites scored higher than Blacks, regardless of whether the tests were job-related or justified by business necessity. During the Senate debate over the Civil Rights Act of 1964, the proponents of Title VII emphasized that it would permit the use of job-related tests.\footnote{47} Despite these assurances, however, a number of Senators were con-
cerned that the commission might follow Myart and ban all forms of employment testing having a differential rejection rate for minorities. To preclude this result, Senator Tower introduced an amendment which specifically authorized the use of "professionally developed ability tests." Although initially rejected because its loose wording appeared to permit the use of any professionally designed test regardless of its discriminatory effect, the amendment was later modified and passed. Given this history, the Court concluded that the Tower Amendment, section 703(h), did not preclude the use of testing or measuring procedures. The Court found that: "What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."

Giving great deference to the commission's guidelines, the Court rejected Duke Power Company's argument that section 703(h) specifically permitted the use of any professionally developed ability test that was not intended or used to discriminate. Chief Justice Burger found it an inescapable conclusion that the guidelines comported with congres-

48. See id. at 13,492; id. at 5614-16 (remarks of Senator Ervin); id. at 5999-6000 (remarks of Senator Smathers); id. at 9025-26 (remarks of Senators Talmadge and Tower); id. at 9034-35 (remarks of Senators Stennis and Tower); id. at 9600 (remarks of Senators Fulbright and Ellender).

49. Id. at 13,492. The original Tower amendment provided: "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—(1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or (2) in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer within such business or enterprise, and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin." Id.

50. Id. at 13,505.

51. See 401 U.S. at 435, 436 n.12.


53. Id. The second Tower amendment was adopted verbatim as section 703(h), 42 U.S.C. § 2000e-2(h) (1970).

54. 401 U.S. at 436.

55. Id.

56. Id. at 433-34.
sional intent insofar as they required that employment tests be job-related. Thus the commissions' interpretation of the will of Congress, expressed in the guidelines, merely buttressed the Court's own interpretation, arrived at after an independent review of the legislative history.

Although the opinion states that the guidelines were entitled to great deference, the Court's endorsement in *Griggs* was limited to the commission's construction of section 703(h) as permitting the use of only job-related tests. Nowhere in the opinion did the Court mandate strict compliance with all of the guidelines' technical provisions relating to test validation. Indeed, the decision left open the question of what is required to validate an employee testing program.

As one commentator noted:

The Supreme Court ... did not explicitly state the degree of validity that it would expect of tests having a discriminatory impact, but its observation that the "touchstone" of permissible employment practices must always be business necessity indicates that in all cases psychological standards must be weighed against business needs.58

Post-Griggs Developments

The judicial response to *Griggs* generally has been to read into the decision more than the Supreme Court intended. As has been discussed, the Court in *Griggs* held only that Title VII did not allow the use of a standardized general intelligence test which was not job-related and which had a discriminatory impact on Blacks. If the Court had wished to mandate strict compliance with the guidelines' procedures for establishing the job-relatedness (validity) of a test, it would have done so in clear and unequivocal language. Nevertheless, by the time the Supreme Court decided *Albermarle Paper Co. v. Moody*,59 several circuits had endorsed the guidelines in toto,60 citing *Griggs* as precedent.

57. Id. at 436.
59. 422 U.S. 405 (1975).
60. The Fifth Circuit in *United States v. Jacksonville Terminal Co.* stated that the "safest validation method is that which conforms with the EEOC Guidelines 'expressing the will of Congress.'" United States v. Jacksonville Terminal Co., 451 F.2d 418, 456 (5th Cir. 1971). Later that year, however, a district court stated that *Griggs* had made validity a reasonable, not absolute, requirement. See United States v. Georgia Power Co., 3 CCH Emp. Prac. Dec. ¶ 8318, at 7073 (N.D. Ga. 1971). In ascertaining the validity of a test, the commission's guidelines are helpful, the court said, but not binding. Id. at 7092 n.8. In fact, the court noted, the government offered evidence in the case that "there was no test known to exist or yet devised which could meet such standards."
Thus for the lower courts the validity of a test was determined by whether the employer had strictly complied with the commission's technical standards.

By unquestioning adherence to the guidelines, the courts have avoided not only the difficult question of whether a test did in fact measure one's ability to perform a particular job, but also the perhaps more critical question of whether the guidelines exceed or conflict with congressional intent. Although the Court in Griggs stated that the commission's guidelines are entitled to great weight, that same Court, in Espinoza v. Farah Manufacturing Co.,\textsuperscript{61} recognized that when "application of [the commission's Guidelines on Discrimination Because of National Origin]\textsuperscript{62} would be inconsistent with an obvious congressional intent not to reach the employment practice in question," courts need not defer to the administrative construction of the statute.\textsuperscript{63} Thus it should also be obvious that if compliance with the commission's guidelines relating to employee selection procedures frustrates a clear congressional intent to allow the use of job-related tests, the guidelines should give way.\textsuperscript{64} It is unfortunate that the courts have not given this second question the analysis it deserves.

Albemarle Paper Company v. Moody

Facts

Albemarle Paper Company operates a pulp and paper mill in Roanoke Rapids, North Carolina. Albemarle's operations, characteris-

\textit{Id.} The Fifth Circuit, agreeing with the district court that Griggs did not require compliance with every procedure set out in the guidelines, said that the procedures should nonetheless be followed absent cogent reasons for noncompliance. United States v. Georgia Power Co., 474 F.2d 906, 913 (5th Cir. 1973). The court did recognize, however, that the guidelines should not be so rigidly applied that they cease to be guidelines and become absolute mandates. \textit{Id.} at 915. In other words, the court acknowledged it is possible to satisfy the job-relatedness standard of Griggs independently of the guidelines. The first and second circuits have adopted this moderate approach. \textit{Compare} Guardians Ass'n v. Civil Service Comm'n, 490 F.2d 400, 403 n.1 (2d Cir. 1973) \textit{with} Vulcan Society v. Civil Service Comm'n, 490 F.2d 387, 394 (2d Cir. 1973) and Castro v. Beecher, 459 F.2d 725, 737 (1st Cir. 1972).

The Fifth Circuit, however, has subsequently read Georgia Power as holding that validation under the guidelines is mandatory. \textit{See} Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 221 (5th Cir. 1974). Both the Sixth and the Eighth Circuits appear to have adopted this strict compliance rule. \textit{See} EEOC v. Detroit Edison Co., 515 F.2d 301, 317 (6th Cir. 1975); Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir. 1975).

\textsuperscript{61} 414 U.S. 86 (1973).
\textsuperscript{62} 29 C.F.R. § 1606 (1975).
\textsuperscript{63} \textit{See} 414 U.S. at 94-5.
\textsuperscript{64} \textit{See} text accompanying notes 103-116 \textit{infra}. 

tic of other pulp and paper mills, are organized into functionally distinct departments, each of which has one or more functionally related lines of progression consisting of several job categories. The mill has eleven departments, seventeen lines of progression, and more than one hundred job categories. Generally, employees enter into each department from a pool termed the “Extra Board” at the lowest paying and least demanding jobs, and are promoted as vacancies occur according to seniority, ability, and experience.

In the 1950's the company began to modernize and install the technologically sophisticated machinery and equipment necessary to increase efficiency and productive capacity. Owing to this modernization, the company developed a strong need for skilled employees. In an effort to fill this need and to create a pool of employees who had the potential to progress to the jobs requiring more skill, Albemarle began to require that all new applicants for skilled lines of progression possess a high school diploma. Albemarle soon realized, however, that the education requirement alone did not adequately predict those applicants who could successfully progress. The company therefore began to use for this purpose the Revised Beta Examination and the Bennett Mechanical Comprehension Test. After conducting a concurrent validation study, the company concluded that the Beta examination correlated positively with job performance. In 1963, Albemarle discontinued the Bennett test in favor of the Wonderlic A and B series tests. Since that time, any applicant for employment in the skilled lines of progression has been required to possess a high school education or its equivalent and to achieve a successful score on the Beta and on either the Wonderlic A or the Wonderlic B examinations.

Prior to the passage of Title VII, Albemarle's lines of progression were strictly segregated. The higher paying skilled lines were predominantly White, and the lower paying lines were predominately Black. Until 1968, the company maintained two separate pools of available employees, one feeding into the skilled lines and another feeding into

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65. The Revised Beta Examination is a professionally developed nonverbal test which measures the intelligence of illiterate and non-English speaking persons.
66. The Bennett Mechanical Comprehension test is a professionally developed test which measures mechanical ability and verbal skills.
67. A concurrent validation study is a professionally recognized validation technique which involves the comparison of test scores and job performance data, in this instance supervisory ratings, on samples of current employees.
68. Wonderlic tests are professionally developed tests designed to measure general mental ability and reading skills.
the unskilled lines. In 1968, the two pools merged, but the employees retained their recall rights to jobs and lines of progression which they had held prior to entering the pool. The effect of the merger, therefore, was merely cosmetic, since White employees tended to be recalled to their “White” jobs and the Black employees to their “Black” jobs. The company did, however, attempt to remedy this situation by giving temporary transfers into the skilled lines to those employees who did not meet the test and education requirements, but who appeared from past experience to be reasonably capable of performing some of the lower-ranking jobs in the skilled lines of progression.

After Title VII was passed, Albemarle attempted to insure that its employment practices would comply with the new law. Prior to the effective date of Title VII, the company began actively to recruit Black graduates from the local high schools. In addition, it encouraged its Black high school graduate employees to take the tests in order to make themselves eligible for transfer into the skilled lines of progression. In December 1964, Albemarle offered its Black employees working in several unskilled lines an opportunity to take the examinations, waiving its education requirement for those who received satisfactory test scores. A similar offer was made in November 1965, this time to all incumbent employees. The majority of those Blacks who took the tests, however, failed to obtain satisfactory scores and thus were not permitted to transfer into the skilled lines of progression.69

On August 25, 1966, four Black employees filed a class action against Albemarle, alleging that the company was engaging in racially discriminatory practices in violation of Title VII.70 The complaint sought a permanent injunction against those practices and also prayed for other equitable relief on behalf of the plaintiffs and the class they claimed to represent.

The case was five years in the pleading and discovery stages before going to trial. During that time, a body of law under Title VII was rapidly developing, and it was becoming apparent that seniority systems and other racially neutral conditions of employment which had the

69. It is unclear from the reported opinions what percentage of Whites similarly situated took and failed the exams.

70. Prior to filing this action, the plaintiffs had timely filed charges with the commission alleging racial discrimination and had received a right-to-sue letter. The plaintiffs’ union, Halifax Local No. 425, United Papermakers and Paperworkers AFL-CIO, and the international union were named as defendants, but the international union was dismissed because it had not been named in the charges filed with the commission. See Moody v. Albemarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1967).
effect of perpetuating past discrimination could be found violative of Title VII. Thus, to bring company practices and policies within the law's requirements, the company and the union negotiated in 1968 a contract which provided for transfers on the basis of mill, rather than job, seniority and for the red circling of each transeree's rate of pay.

The most important judicial development in the law of employment discrimination was *Griggs v. Duke Power Co.* Immediately after the Supreme Court's decision in *Griggs* in 1971, Albemarle employed an expert in the field of industrial psychology and testing to conduct validation studies of its testing and education requirements. The validation studies specifically covered ten job groups in eight of the thirteen lines of progression for which the tests had originally been required, although it appears that the testing requirements in all lines underwent the validation process. The rated and tested sample group was selected from the top and middle of the various lines. Using the generally accepted concurrent validation technique, the employees' test scores were compared with job performance ratings assigned them by two supervisors. The study found statistically significant correlations for at least one of the three tests in nine of the ten job groups. It also revealed that the use of the Beta test together with either the Wonderlic A or the the Wonderlic B test was valid for two of the ten job groups, and that the use of all three tests was valid for one out of the ten groups. Based upon these findings, the expert concluded that the tests could be reasonably used for both hiring and promotion for most of the jobs in the mill.


72. Red circling guarantees an employee transferring to a lower paying job his old rate of pay until in the new line of progression he catches up to his old rate, or until he fails to qualify for further promotion within the new line. See Moody v. Albemarle Paper Co., 4 BNA Fair Emp. Prac. Cas. 561, 564 (E.D.N.C. 1971).

73. See text accompanying notes 33-58 supra.

74. Neither of the supervisors had access to or knowledge of any employee's test performance. See Moody v. Albemarle Paper Co., 4 BNA Fair Emp. Prac. Cas. 561, 567 (E.D.N.C. 1971). The supervisors were asked to rate each employee according to "just how well the guy can do the job when he's feeling right." See Moody v. Albemarle Paper Co., 474 F.2d 134, 138 (4th Cir. 1973). The results of the supervisor's ratings were then averaged to derive each employee's overall job performance ability. See Moody v. Albemarle Paper Co., 4 BNA Fair Emp. Prac. Cas. 561, 567 (E.D.N.C. 1971).

75. The expert also attempted to validate the company's education requirement. Neither a concurrent nor a predictive validation study was feasible, however, because the present group of employees did not constitute a statistically fair sample and because,
The Lower Courts

The district court found that "[a]lthough overt racial discrimina-
tion ceased subsequent to the effective date of Title VII, the effects of
this racial discrimination have not been eradicated." Therefore, the
court reasoned, Albemarle's education and testing requirements had to
be enjoined unless they could be shown to be "necessary to the safe and
efficient operation of the business." The court found, after a personal
trip to the Albemarle mill, that the operation of the complex machinery
"obviously require[d] employees with a high level of native intelligence,
prolonged training and experience." Based on this personal observa-
tion and on its finding that the tests had been validated and shown to be
job-related, the court concluded that Albemarle had proved that the
tests were necessary to the safe and efficient operation of the business.
Accordingly, the court held that the tests were permitted by Title VII.

The Court of Appeals for the Fourth Circuit reversed, with instruc-
tions on remand to enjoin further application or use of the company's
testing practices. Judge Craven, writing for the majority, was con-
cerned that the company had not validated its tests in strict compliance
with the commission's guidelines. In effect, Judge Craven wrote, the
district court had approved a validation study without job analysis,
permitted tests to be used for six lines of progression for which no
validation study had been performed, and allowed requiring a person to
pass two tests for entrance into any of seven lines of progression when
only one of the tests had been validated for those lines.

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77. Id. at 570, quoting Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249
(10th Cir. 1970); accord Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.
1971).
78. 4 BNA Fair Emp. Prac. Cas. at 569.
79. Id. at 570.
80. Id. Since the tests adequately measured the skills needed for the job classifica-
tions, the court held that the high school education requirement was unlawful. Id.
81. Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), aff'd, 422 U.S.
405 (1975).
82. Id. at 138, 139. Judge Bryan dissented. He found that the tests had been
properly validated through an equivalent of job analysis, and had been proved job-related.
Id. at 147. He also felt that the company's two-test requirement was justified under the
business necessity rule. He reasoned that the inspection by the district court judge
Albemarle sought Supreme Court review on the question, "[w]hether the District Court's refusal to enjoin Albemarle's use of employment tests was error as a matter of law?" In essence, Albemarle was asking the Court to decide whether the legality of testing must depend upon rigid compliance with the commission's guidelines.

Justice Stewart, writing for the majority, reiterated the Court's unanimous position in Griggs that Title VII declares unlawful the use of employment tests which prove to be discriminatory in effect unless the employer meets the burden of showing that its tests or "any given requirement [has] . . . a manifest relation to the employment in question." The Court stated, however, that even if the employer can establish the job-relatedness of his testing procedures and selection practices, he is not immune from attack under Title VII. Under the commission's guidelines, a complaining party may show that alternative procedures or practices with a less severe impact are available. Upon such a showing, the burden shifts to the employer to negate the inference that his tests are being used "merely as a 'pretext' for discrimination."

The Supreme Court agreed with the Fourth Circuit that Albemarle's validation efforts were insufficient to meet the requirements of Title VII as interpreted by the commission. Once again stating that the guidelines were "entitled to great deference," the Court concluded, "Measured against the Guidelines, Albemarle's validation study is materially defective in several respects."

The Court disagreed with the district court's order partly because it allowed Albemarle to require tests for those lines of progression for which the tests had not been validated. The Court recognized that the guidelines provide that unvalidated tests may be used in such lines, as long as the tests have been validated in another unit which does not revealed the high level of intelligence required to operate the plant in a safe and efficient manner. He also noted that low scores on one or both tests did not automatically bar an applicant from employment. Id. at 147-48.

83. Petitioner's Brief for Certiorari at 3.
85. Id. at 425, quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). This burden arises, the Court noted, only when the plaintiff has presented a prima facie case by showing that the tests select applicants in a racial pattern significantly different from that of the applicant pool. Id.
86. See id. The Court in Albemarle, however, was concerned with whether the tests were properly validated, not with whether suitable alternatives were available.
87. Id. at 431.
differ significantly in jobs and applicant population. Viewed in light of that provision's requirements, the Court found, Albemarle's study was deficient because it involved no analysis of the attributes of, or the particular skills needed in, the studied job groups. There [was] accordingly no basis for concluding that "no significant differences" exist among the lines of progression, or among distinct job groupings within the studied lines of progression.88

Albemarle's failure to conduct a job analysis sufficient to satisfy the guidelines further rendered its study invalid. The guidelines require that an employer develop specific and objective criteria by which supervisors may make an unbiased evaluation of an employee's job performance.89 The Court noted an absence of job analysis in developing the criteria of job performance by which validity was to be ascertained. Job performance of Albemarle employees was established by supervisory ratings, with each employee being evaluated under a vague and subjective standard which the Court found "fatally open to divergent interpretations."90 The court of appeals had stated that any correlation of the test scores with such possibly inaccurate and biased ratings was of "questionable value."91 The Supreme Court took this argument one step further, stating that there was "simply no way to determine whether the criteria actually considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact."92

The Court also found Albemarle's validation study deficient; while it focused on job groups at or near the top of the studied lines of progression, the results of the study were then used to validate the tests for entry level positions. The Court found that section 1607.4(c)(1)94 of the guidelines presented a reasonable approach to the problem and therefore endorsed its application. Accordingly, the Court said that

88. 29 C.F.R. § 1607.4(c)(2) (1975).
89. Id. at 432. A related problem, although one not addressed specifically by the Court, was whether Albemarle could require job applicants to pass two tests for positions when only one test was validated. The company contended that since it placed all employees into a pool from which vacancies were filled, it was necessary for all members of the pool to be qualified to enter any line of progression. The court of appeals had rejected this argument. Moody v. Albemarle Paper Co., 474 F.2d 134, 140 (4th Cir. 1973).
90. 29 C.F.R. § 1606 (1971).
91. 422 U.S. at 432-33.
93. 422 U.S. at 433.
94. See text accompanying note 22 supra.
before a test on which employees working at the top of a line of progression score well can be used to measure the qualifications of new workers entering lower level jobs, "detailed consideration must be given to the normal speed of promotion, to the efficacy of on-the-job training in the scheme of promotion, and to the possible use of testing as a promotion device, rather than as a screen for entry into low-level jobs." 95

Finally, the Court further criticized Albemarle's validation study because it utilized "job-experienced, white workers" and because it failed to differentially validate the results, at least for the lower-level jobs. 96 In these respects the Court found the study insufficient because it neglected the essential directive of the American Psychological Association standards97 and the requirements of sections 1607.5(b)(1) and (5) of the guidelines.98

Accordingly, the Court found that "the District Court erred in concluding that Albemarle had proved the job relatedness of its testing program . . . ."99 Thus, the Court appeared to be saying that a test which has not been validated in strict compliance with the guidelines' technical requirements is not job-related within the meaning of Griggs, and that its use therefore violates Title VII.

Justice Blackmun, concurring with the result, criticized the majority's requirement that "absolute compliance with the EEOC Guidelines is a sine qua non of pre-employment test validation."100 He cautioned:

We should bear in mind that pre-employment testing, so long as it is fairly related to the job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis. I fear

95. 422 U.S. at 434.
96. Id. at 435. The Court admitted that differential validation was most probably not feasible at this plant because of the years of past discrimination. Id. For a discussion of differential validation see text accompanying notes 106-09 infra.
97. "The validity of a test should be determined on subjects who are at the age or in the same educational or vocational situation as the person for whom the test is recommended in practice." Id., quoting APA Standards, supra note 18, at ¶ C5.4. See 29 C.F.R. § 1607.5(b)(1) (1975).
98. See text accompanying notes 24, 26-27, 28-29 supra.
99. 422 U.S. at 436.
100. Id. at 449 (Blackmun, J., concurring).
that a too rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.101

**Shortcomings of the Decision in Albemarle**

Employment practices are subject to judicial scrutiny under Title VII. Perhaps this scrutiny revealed that Albemarle's testing practices were not ideal. Nevertheless, the Supreme Court's decision, which apparently mandates strict compliance with the commission's guidelines, is misguided in several respects. It should be recognized that the guidelines "are not federal regulations which have been submitted to public comment and scrutiny as required by the Administrative Procedure Act."102 Furthermore, the theories underlying the guidelines are not beyond dispute.108 Finally, when strictly applied, the guidelines are often irrelevant, impossible to follow, and always expensive.

Even when objective tests have been validated under less than ideal circumstances, they are far superior to more widely used selection devices such as unstructured interviews or job application reviews. Tests provide three distinct advantages over less disciplined alternatives: they are standardized, providing every examinee with the same instructions, the same tasks to perform, and the same time limits; they are efficient, enabling the collection of a considerable amount of information about a person in a short amount of time; and they are amenable to objective analysis, furnishing test results which may be quantified and subjected to statistical evaluation.

Strict compliance with the guidelines, however, may force employers to forego the benefits of testing. In at least three areas, job analysis, differential validation, and the availability of alternative selection procedures, cases may often arise in which the spirit of Title VII may be followed without strict compliance with the guidelines.

**Job Analysis**

The job analysis required by the guidelines104 serves three purposes

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101. *Id.* Chief Justice Burger stated that "slavish adherence to the EEOC Guidelines regarding test validation should not be required; those provisions are, as their title suggests, guides entitled to the same weight as other well-founded testimony by experts in the field of employment testing." *Id.* at 452 (Burger, C.J., concurring and dissenting).
102. *Id.* at 452 (Burger, C.J., concurring and dissenting).
103. *Id.* at 449 (Blackmun, J., concurring).
104. 29 C.F.R. § 1607.5(b)(3) (1975).
in a validation study. First, it assists the test developer in selecting the test or series of tests which might predict job success. Second, it provides an objective basis for rating and comparing employee performance on a particular job. Third, it can be used to compare two jobs to determine whether they involve similar abilities. Job analysis, therefore, unquestionably has a valid function. Its absence, however, should not automatically constitute a substantive deficiency in any validation study provided that other nondiscriminatory means of validation are utilized and do in fact demonstrate job-relatedness.

For example, when the test has already been selected and the purpose of the validation study is to determine whether the test significantly correlates with job performance, as in Albemarle, job analysis is an unnecessary exercise. Validation results will not turn upon whether the employer conducted a detailed job analysis before test selection; rather, they will depend upon whether the test is demonstrably job-related.

Moreover, a validation study should not be rendered inadequate merely because supervisors are not provided a list of specific and objective criteria by which they are to evaluate employee performance. It cannot be argued seriously that supervisors are ignorant of the relevant factors for successful job performance. Therefore, requiring the considerations to be in the form of written job analyses constitutes an elevation of form over substance. Courts should remember that all evaluations are subjective by nature, regardless of the criteria utilized; they often require the controlled use of human judgment, from which subjective considerations cannot be divorced.

As mentioned above, job analysis facilitates the comparison between two jobs. Again, however, it is unnecessary to require that the analysis be written. A testing expert familiar with the plant or the industry may have sufficient knowledge of the relevant job criteria to analyze two jobs informally, without preparing written job analyses, and to reach a professionally sound conclusion that no significant differences exist between them. If challenged, of course, the expert would have to substantiate his conclusions. The mere absence of written analyses, however, should not automatically cause rejection of an otherwise valid study.

105. Objective measures of an employee’s performance do not always exist. Therefore the supervisor’s subjective evaluation often comes into play. In all likelihood, the supervisor’s impression of the employee’s overall performance will influence each separate rating. This result is the so-called halo effect. Thus, any attempted quantification of these ratings will merely pay lip service to the requirement of objectivity.
Differential Validation

The term "differential validity" is defined as "the notion that tests can be valid for one race but not for another, or that a lower score for one race may be equally as predictive of job success as a higher score is for another." This concept has come under heavy attack in recent years and is generally regarded by psychologists as empirically unsound. Although differential validation is highly suspect, the guidelines require that the employer generate data for each minority group to which the test is administered and validate the test for each such group.

The requirement that tests be differentially validated may enjoy emotional support when a minority employee who did not meet the entry level test qualifications later proves to be a satisfactory worker. It must be remembered, however, that all predictive processes rely on probability theory. Specific instances of deviation from the predicted result are inherent in the concept of probability. Any validation study merely ensures that the selection device chooses a successful employee with significantly greater frequency than could be expected from pure chance. There will always be exceptions, namely high scorers who become poor employees and low scorers who become good employees. Nonetheless, to allow these exceptions to dictate the rule by requiring that the only approved tests are those which have been differentially validated may be to reject needlessly the benefits of employee testing.

Requiring differential validation in every case fails to recognize the enormous expense involved in validating tests and the impracticability of validating tests for several groups unless each is sufficiently large to be statistically significant. Thus, unless there is demonstrable evidence...

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108. 29 C.F.R. § 1607.5(b)(5) (1975).
that a test is differentially invalid, failure to validate a test for each minority group should not render a study inadequate.

**Availability of Alternative Selection Procedures**

Once a test has been proved to be job-related, the employer has met his burden of proof under *Griggs*. The guidelines, however, impose two additional requirements before an otherwise valid test may be utilized in the employee selection process. First, the guidelines require that the test demonstrate a "high degree of utility." This requirement adds nothing. A test's utility lies in its ability to predict significantly which candidates will successfully perform their job functions. Therefore, a test which has been validated is, by definition, useful. By listing several factors which should be considered in assessing the test's usefulness, the guidelines do little to further Title VII's objectives. The utility requirement further complicates the validation process, and it very likely discourages employers from utilizing a most effective, objective tool for employee selection: valid, professionally developed tests.

The second, and more serious, obstacle to the use of tests is the requirement that the employer demonstrate the unavailability of alternative suitable selection procedures which would have a less adverse impact upon Blacks. Reflection reveals that this requirement imposes the impossible burden of proving a negative. How can an employer prove that an alternative suitable selection procedure does not exist? At what point has he exhausted all possible alternatives?

The unavailability requirement is entirely unrealistic. The employer is hampered by very real constraints, primarily his limited financial resources. Yet the number of alternative procedures is virtually unlimited. Certainly, an employer may under some circumstances have to abandon the use of a validated test. Nevertheless, in the absence of a readily identifiable and clearly applicable alternative selection technique of equal validity which is proved to have a significantly less adverse effect on minorities than the technique used by the employer, it would seem more reasonable to permit the employer to continue to use a validated test without requiring him continually to explore the validity of other selection devices. To impose more stringent requirements would force the employer to abandon employment tests altogether.

110. 29 C.F.R. § 1607.3(a) (1975).
111. *Id.* § 1607.5(c).
112. *Id.* § 1607.3(b). Even if it is established that some alternative selection procedure exists, it is not clear whether such a finding merely subjects the invalid testing procedure to injunctive remedy, or also subjects the employer to the economically disastrous back pay provisions of Title VII.
Validated employment tests are obviously valuable tools to the employer. They aid in selecting employees who are qualified to function well on a given job; they "[clothe] employment decisions with objectivity, [give] comfort to the employer who feels he now has the most qualified employee, and [protect] him from charges of nepotism or discrimination." Testing is therefore an attractive, efficient, and economical means by which the employer can develop a productive work force while at the same time discharging his obligations under Title VII. It is an economic fact of life, however, that validation costs vary directly with the amount of highly complex, and sometimes futile, research required. Even if significantly predictive of performance, the more expensive testing becomes, the more likely it is that the employer will forego the use of professionally developed tests and will resort to employee selection based upon quotas rather than qualifications. Thus, to remain an economically viable and attractive option to the employer, validation should require no more than that which is reasonably necessary to demonstrate that the test predicts satisfactory job performance.

If strictly enforced, the guidelines go beyond the standard established in Griggs that the test should reasonably predict job success. In Albemarle, the Supreme Court failed to recognize that the commission's validation procedures are merely theoretical ideals, or standards of perfection. They are not intended to be rigidly applied once a test is shown to be significantly job-related, since the over-validation which would result would raise the cost of testing beyond tolerable limits for most employers. The American Psychological Association recognizes that a set of standards cannot cover every situation, and that therefore its standards, which are endorsed by the commission, should not be inflexibly applied. The association's standards are

a set of standards to be used in part for self-evaluation by test developers and test users. An evaluation of their competence does not rest on the literal satisfaction of every relevant provision of this document. . . . Instead, an evaluation of competence depends on the degree to which the intent of this document has been satisfied by the test developer or user.

Conclusion

Courts must recognize that the art of psychological testing is imprecise. It is based upon the exercise of professional judgment, even

114. See 29 C.F.R. § 1607.5(a) (1975).
115. APA Standards, supra note 18, at 6, 8.
though couched in empirical methodology. Testing depends on the industrial psychologist, not for his ability to correlate empirical data, but rather for his ability to adapt generally accepted procedures to a particular situation. In determining whether a validation study has provided a sufficient demonstration of a test's job-relatedness, therefore, the commission and the courts should allow variations in method "so long as the study under review does not disregard or clearly misapply professionally recognized standards and principles." Despite the adoption of this enlightened approach by some groups, however, present practice has been to disallow variations in validation methodology.

Given the problems the guidelines may pose, the employer has good reason to insure that his selection processes do not trigger the guidelines' application. Naturally, the easiest way to avoid exhaustive validation techniques is to avoid a demonstrably adverse impact upon Blacks. Thus, the employer is encouraged to lower the cutoff test score and other applicable job qualifications for Black applicants so that their representation in his work force approximates the percentage of Blacks available in the relevant labor pool. In this way, the employer's hiring policies will appear, at least, to comply with Title VII.

Hiring by quotas, however, offends the basic precepts of Title VII. Congress intended that employment decisions be based upon color blind qualifications, not quotas. Unfortunately, the apparent effect of the Supreme Court's decision in Albemarle Paper Company v. Moody is to nullify congressional intent in favor of the Court's own intent. It is hoped that the Court will reappraise its position and uphold the validity of employment tests which follow the spirit of Title VII, even though they may fail to comply with some of the requirements found in the guidelines. Until that time, however, Albemarle poses a serious threat to equal employment opportunity and, perhaps misguidedly, signals an end to meaningful employment testing.

117. See Civil Rights Act of 1964 § 703(j), 42 U.S.C. § 2000e-2(j) (1970); 110 Cong. Rec. 6563-64 (1964) (remarks of Senator Kuchel); id. at 6549, 12,723 (remarks of Senator Humphrey); id. at 7217 (remarks of Senators Clark and Case).