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NOTES

EMPLOYMENT TESTING AND PROOF OF JOB-RELATEDNESS: A TALE OF UNREASONABLE CONSTRAINTS

I. Introduction

The use of aptitude tests in employment situations is the subject of much controversy in the area of fair employment law. The controversy extends to experts in their efforts to develop valid aptitude tests, to the courts in the interpretation and application of Title VII of the Civil Rights Act of 1964,¹ and to conflicts between judicial and psychological points of view over the use of and methods of verifying aptitude tests in employment situations. Only through the effective resolution of these conflicts can the ultimate purpose of employment testing be achieved.

The purpose of employment testing is to provide a decision maker with a tool that will better enable him to form an opinion and make a decision about an employee based on merit. This purpose is recognized and upheld under Title VII.² Numerous judicial opinions, however, have tended to use aptitude testing systems as a means of implementing affirmative action plans for disadvantaged groups.³ Clearly, where such groups have been improperly discriminated against, remedial actions may be necessary to correct past inequities. This, however, does not mean that any device or measuring tool that highlights the educational or aptitudinal differences, although caused in part by past or present discriminatory policies, should be declared invalid. To do so, as many courts have, might be described as the modern version of killing the messenger who brings the bad news.⁴

It is important to realize that aptitude testing is a scientific discipline within the broader field of applied psychology. As such, cases involving aptitude testing are very similar to those involving technical medical, engineering or economic issues. In these areas the questions presented to the court are primarily factual questions, related to the respective disciplines, and are resolved as such without a validation of scientific theories through judicial decree. Courts must be cognizant of the need to extend this type of treatment to other cases which involve primarily factual issues. Thus, in employment testing cases, the courts must be particularly sensitive to the necessity of avoiding the temptation to treat what are actually factual determinations as legal precedents. Failure to do so results in the adoption of factually limited standards as controlling legal precedents. This concern is highlighted since the area of aptitude testing does not represent an exact science, but a changing and expanding one based on scientific experiment and empirical analysis.

¹ 42 U.S.C. §§ 2000e-2000e-17 (Supp. I, 1972), *amending* 42 U.S.C. §§ 2000e-2000e-17 (1970).

² 42 U.S.C. § 2000e-2(h) (1970).

³ Hunt, *Civil Service Testing and Affirmative Action: A Psychologist's Perspective*, 44 U. CIN. L. REV. 690, 697 (1975).

⁴ *Id.*

Employment testing is a rapidly expanding field that is currently experiencing inevitable growing pains. Consequently, uncertainty in what the law requires is not infrequent. However, in an effort to clarify at least one aspect of this vast field, job-relatedness, the Equal Employment Opportunity Commission (EEOC) and the courts are attempting to establish rigid policy. In so doing the tendency of the decisions is to restrict the use of employment tests by imposing unreasonable requirements which stifle the progression of this field. The focus of the following discussion will be directed not only toward the powers granted to the EEOC and the courts pursuant to Title VII, to enable them to play a role in the effort to end discrimination in employment testing, but also toward the methods of proving job-relatedness, which is the major manifestation of these powers.

II. Title VII: The Statutory Basis

Title VII of the Civil Rights Act of 1964 forms the basis of minority discrimination claims relating to employment testing. Title VII expressly provides that it shall be an unlawful employment practice for an employer to refuse to hire, discharge, limit, or classify employees or applicants in any way that would adversely affect their status because of an individual's race, color, religion, sex, or national origin.⁵

Special recognition, however, is made for the use of professionally developed ability tests. Under the Act, it is stated that it shall not be an unlawful employment practice 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."⁶ While Title VII does form the basis of testing claims, it only attempts to set out in a broad manner the substantive requirements, not the procedural ones. These latter rules have been developed over the years by the courts.

The procedures governing discrimination testing claims have been reviewed most recently by the Supreme Court in *Albermarle Paper Co. v. Moody*.⁷ The initial burden of proof necessary to establish a prima facie case of discrimination rests with the complaining party or class.⁸ Such a burden will be carried when it has been shown that the test in question has selected applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.⁹ Once the prima facie case has been made out the employer will be required to show that his test has a "manifest relationship to the employment in question."¹⁰ Courts have generally referred to this requirement as the burden of showing job-relatedness. This burden can be demonstrated through the use of empirical data verifying that an employment test accurately measures some

5 42 U.S.C. § 2000e-2 (1970).

6 42 U.S.C. § 2000e-2(h) (1970).

7 422 U.S. 405 (1975).

8 As an example in *McDonald Douglas Corp. v. Green*, 411 U.S. 792 (1973), it was only necessary to show that (1) the employee was black, (2) the employee applied for a vacant job for which he was qualified, (3) the employee was rejected, and (4) the employer continued to seek applicants.

9 422 U.S. at 425 (1975).

10 *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

skill, knowledge, aptitude or characteristic which is relevant to the performance of the job in question.

However, proof of job-relatedness may only dispose of a portion of the employer's total burden of proof. If the complainant presents evidence showing that alternate tests or devices would also serve the employer's legitimate interest, and would do so without the discriminatory effect being challenged, the court may conclude that the employer's use of the test was merely a pretext for discrimination.¹¹ Thus, the employer would be required to introduce further evidence to rebut such a conclusion. However, in the absence of case law dealing with attempts to prove the availability of alternate testing procedures, the actual extent of this secondary burden remains an open question.

While it is relatively clear what burdens of proof must be carried, and which party must carry them, the methods for successfully satisfying some of them, particularly job-relatedness, remain substantially unclear. It is especially important for the employer that approved methods of proving job-relatedness be reasonable since most complainants can easily satisfy the burden of establishing a prima facie case, and consequently, switch the burden of proof to the employer. As a result, decisions in employment testing cases turn on the employer's ability to prove job-relatedness. Such a result is due to the interpretation given Title VII, lessening the requirements imposed on a complainant for the establishment of a prima facie case.

As noted, the initial burden of showing that an employment test discriminates against a protected group rests with the complainant. In order to establish a prima facie case it is only necessary to show that discrimination did in fact occur; one need not show that the testing procedure was used with an intent to discriminate. The focus on the consequences rather than the motivation of a specific practice has been found to be the thrust of Title VII.¹² As a result, the burden of establishing a claim of improper discrimination through employment testing is significantly lessened. The burden can thus be met with a relatively simple showing that a disproportionate number of minority group persons have performed poorly on the employment test when comparison is made to the results achieved by the population as a whole.

It should be noted that while the showing of a discriminatory result is sufficient to establish a claim based on Title VII, the Supreme Court has declined to permit a constitutional claim of invidious racial discrimination unless the discriminatory result is accompanied by proof of discriminatory intent. In *Washington v. Davis*,¹³ the Supreme Court denied a constitutional cause of action based solely on claims of discriminatory impact and lack of job-relatedness against the questioned employment test. Although it rejected the constitutional claim that the employment test violated respondents' rights under the due process clause of the fifth amendment, the Supreme Court did not say that a disproportionate impact alone could never form the basis of such a claim. The Court stated that where the relevant facts, in their totality, infer an invidious

11 422 U.S. at 425; *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971).

12 401 U.S. at 432.

13 44 U.S.L.W. 4789, 4790 (U.S. June 7, 1976).

discriminatory purpose that cannot be explained on nonracial grounds, a claim based on a violation of constitutional rights may be justified.¹⁴ While, as the concurring opinion points out, the line between discriminatory purpose and discriminatory impact may not be clear or very critical in every situation,¹⁵ this decision indicates an intent to restrict the testing of claims to Title VII standards.

Thus, an employer or test user is required to meet the burden of proof showing job-relatedness when a complainant sets forth a prima facie case that the employment test used violates standards under Title VII. In this critical stage of the litigation the employer must show that the test he is using is job-related. In attempting to show that an employment test is valid because it is job-related, the employer must follow the rules established in the Guidelines issued by the EEOC and subsequent court decisions which have applied those rules.

III. Proving Job-Relatedness

A. EEOC Guidelines: Their Basis and Judicial Acceptance

The judicially adopted procedures for showing job-relatedness have been greatly influenced by the actions of the Equal Employment Opportunity Commission, a creation of Title VII of the Civil Rights Act of 1964. Under powers granted to it, the EEOC has promulgated Guidelines¹⁶ to be used in the validation of aptitude tests in employment situations. Although the EEOC has been granted the power to promulgate procedural rules, it does not have authority to establish substantive rules.¹⁷ The Guidelines were developed and issued without a hearing, or public participation,¹⁸ as would be required by the substantive rule-making provisions of the Administrative Procedure Act.¹⁹ Thus, the Guidelines themselves represent only the EEOC's interpretation of Title VII requirements, and as such are interpretive rules which, while entitled to appropriate respect, are not binding on the courts.

Considering their nature, the EEOC Guidelines should be more appropriately viewed as opinions of an advocate, subject to debate and review, than as the more persuasively viewed rules of a regulatory agency. The Supreme Court in *Albermarle Paper Co. v. Moody* noted that where studies are closely controlled by a party that has an interest in the litigation, these studies must be examined with great care.²⁰ Although *Albermarle* did not directly involve the EEOC, courts should be mindful of this general principle when considering cases involving conflicts between an employer's testing procedures and EEOC Guidelines. Understandably, then, there has been much criticism concerning the great deference courts have given to the Guidelines.

14 *Id.* at 4792.

15 *Id.* at 4800.

16 29 C.F.R. § 1607 (1975).

17 42 U.S.C. § 2000e-12(a) (1970).

18 Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

19 5 U.S.C. § 553(c) (1970).

20 422 U.S. at 433 n.32.

In the landmark decision of *Griggs v. Duke Power Co.*, the Supreme Court found that the

administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . . Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the Guidelines as expressing the will of Congress.²¹

This notion of great deference has been followed by the lower courts and was again enunciated in *Albermarle Paper Co. v. Moody* by the Supreme Court.²² However, unlike many of the lower courts that have routinely accepted the Guidelines as controlling, the *Albermarle* Court did caution that "EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress."²³ Thus the Court indicated that there is a limit to the persuasive authority of the Guidelines. In any event, attempts to accord the Guidelines "great deference" are confusing and unpredictable since the standards established in the Guidelines are oftentimes applied in varying degrees. It may be more appropriate to say that an interpretation by the EEOC should always be open to rebuttal and that the weight of the EEOC's interpretation

in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.²⁴

Although this limited interpretive aspect of the Guidelines has been judicially recognized, it has not been generally followed by the courts.

B. EEOC Guidelines: Judicial Application of Specific Provisions

Operating under the Guidelines issued by the EEOC, numerous courts have taken these interpretive rules, which are often theoretical propositions, and stated them as if they were law.²⁵ This approach has been taken without an attempt to ensure that the interpretive rules hold true for the factual setting of a particular case. The result of this is that what are actually factual determinations become transformed into legal precedents. Among these scientifically controversial concepts are included the preference for criterion-related validity in proving job-relatedness and the requirement that testing undergo differential validity analysis.

1. Single Method Preference

The preference for a single method of proving job-relatedness developed

²¹ 401 U.S. at 434.

²² 422 U.S. at 431.

²³ *Id.*

²⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

²⁵ Brief for American Society for Personnel Administration as Amicus Curiae at 7, *Washington v. Davis*, 44 U.S.L.W. 4789 (U.S. June 7, 1976) [hereinafter cited as ASPA Amicus Brief].

after the American Psychological Association cited three methods of test validation in its Standards for Educational and Psychological Tests and Manuals (1966). These methods include what has commonly been referred to as construct, content and criterion-related validity. Content validity is the most direct test of an employee's skills. In actuality, it is a demonstration of job duties disclosed in the job analysis, or a measure of job knowledge or skills that are critical and essential for immediate performance on a job. Construct validity is a more indirect validation method that seeks to measure identifiable characteristics that are associated with successful performance on the job. Criterion-related validity is also an indirect measure but one that requires a statistical demonstration of a relationship between the test and job performance criteria.²⁶ Of these three methods, the EEOC has established a preference for criterion-related validation.

In its Guidelines, the EEOC requires that a test's validity be based on studies employing generally accepted procedures for determining criterion-related validity.²⁷ The Guidelines limit the use of construct and content validity methods to instances where criterion-related validity is not feasible. Notably, the Guidelines fail to mention the possible existence of other methods of proof. Thus, the EEOC's inclusion of only these three methods, when taken with the general acceptance of the Guidelines, has resulted in severely limited judicial recognition of various alternative test validation methods.

This limited recognition has become deeply entrenched as a result of a series of recent cases. In *Douglas v. Hampton*,²⁸ the District of Columbia Circuit was faced with an action challenging the use of the Federal Service Entrance Examination (FSEE) in the employment and promotion of federal employees. The federal government was not able to demonstrate that the FSEE had criterion-related validity, but did maintain that they had shown the FSEE to be job-related through construct validity. After noting the Supreme Court's²⁹ general approval of the Guidelines, and that a sister circuit³⁰ had already recognized the Guidelines as controlling, the District of Columbia Circuit³¹ found it unwise to depart from these accepted principles. The court concluded that construct validity would be acceptable only with a showing that criterion-related validity was not feasible.

This preference for criterion-related validity became even more firmly

26 For example, content validity can be demonstrated by a typing test used to hire a typist. Construct validity can be demonstrated by a physical fitness test for a fireman since this characteristic is an important element for good job performance. Criterion-related validity is demonstrated by comparing test scores with one or more external variables or criteria to provide a direct measure of the job behavior which the test is intended to predict or identify. Such external criteria might consist of work proficiency data, supervisory ratings or regularity of attendance at work. A criteria-related validity can be predictive or concurrent. A predictive validity study consists of testing job applicants and comparing their test scores with some criteria data of job performance collected at a later date. A concurrent validity study consists of tests administered to present employees and comparing their test scores with criteria collected concurrently with the testing.

27 29 C.F.R. § 1607.5 (1975).

28 512 F.2d 976 (D.C. Cir. 1975).

29 401 U.S. at 433-34.

30 *United States v. Georgia Power Co.*, 474 F.2d 906, 913 (5th Cir. 1973).

31 512 F.2d at 986.

implanted with the Second Circuit decision in *Kirkland v. New York State Department of Correctional Services*.³² This case in effect reversed the policy of the Second Circuit as previously established in *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission*.³³ In *Vulcan* the Second Circuit said:

The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics. Experience teaches that the preferred method of today may be the rejected one of tomorrow. What is required is simply that an examination must be shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.³⁴

The later reversal of this policy was due to what the Second Circuit called a strong endorsement of the EEOC Guidelines by the Supreme Court in *Albermarle Paper Co. v. Moody*. With such an endorsement, the court fully accepted the Guidelines that provided that evidence of content or construct validity may be appropriate only where criterion-related validity is not feasible.³⁵

Of significance is that although the *Albermarle* Court in its endorsement did say that the EEOC Guidelines were "entitled to great deference," it prefaced that conclusion by emphasizing that the Guidelines were administrative interpretations and not regulations.³⁶ This distinction recognized that the EEOC Guidelines had not undergone formal procedures under the Administrative Procedure Act, and as a result were of more limited persuasion than actual regulations. By its blanket acceptance of the EEOC provisions, the Second Circuit has given controlling weight to the Guidelines despite the lack of procedural safeguards in their promulgation. Such safeguards would have forced the Guidelines to undergo a stricter scrutiny by interested parties through the administrative hearing process and possibly would have uncovered many of the difficulties that are currently being experienced with the use of the criterion-related validity method.

Partly as a result of the manner in which the Guidelines were developed, the requirement that all employment tests be validated by criterion-related methods had developed without a full understanding as to what such a policy would later entail. When using the criterion-related method the employer must not only construct the employment test to examine the skills or characteristics necessary for successful job performance, but he must also develop a separate means of rating and quantifying successful job performance. The score on the employment test must then be correlated with the successful job performance rating. This correlation must be based on valid statistical data the obtaining of which oftentimes represents an insurmountable burden to the employer.

The use of statistical methods of proof is currently common in all discrimination suits and is likely to be relied upon to an even greater extent in the future.³⁷

32 520 F.2d 420 (2d Cir. 1975).

33 490 F.2d 387 (2d Cir. 1973).

34 *Id.* at 394.

35 520 F.2d at 426.

36 422 U.S. at 431.

37 See generally Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975).

However, total dependence upon statistical evidence in employment testing situations can be very misleading. For example, a statistical sample that is too small for proper mathematical analysis can give results that on their face are very convincing. In actuality, however, those results may be more accurately attributed to chance and thus prove nothing.³⁸ To date, the decisions reached by courts in testing cases have frequently lacked the necessary data that would enable courts to perform a thorough and accurate statistical analysis.³⁹ Most large employers using tests have numerous job positions which, for statistical purposes, have small populations. Since an employment test should be analyzed separately for each distinct job, and the small populations involved have inherently large standard deviations, it is extremely difficult to generate meaningful data. Furthermore, statistical methods become more difficult for employers when they are trying to quantify subjective type criteria such as successful job performance.

While the test may be scrutinized from an objective standpoint, job performance ratings cannot always be measured with the same objectivity. Decisions concerning the hiring and promotion of personnel in supervisory and managerial jobs cannot realistically be made using objective standards alone. Often job performance must be rated by the use of a supervisor's opinion and not by a series of written answers as is the case with the correlated employment test. As the Eighth Circuit recognized in *Rogers v. International Paper Co.*,⁴⁰ there are greater possibilities for abuse in subjective evaluations than in objective evaluations when determining employment selection and promotion criteria. The difficulty in defining variables such as job performance can do much to defeat the analysis required in validating a test by criterion-related methods. It has been noted by psychologists that:

[B]oth the Supreme Court and federal agencies have seized on the logical simplicities of predictive validity without full recognition that they are imposing a standard of excellence that does not exist in other areas of decision making. Little attention has been given to the fact that correlation coefficients are dependent on both predictor and criterion variables with the distinct possibility that the latter are more difficult to define operationally than the former.⁴¹

While the federal judiciary has been steadfast in its acceptance and implementation of the specific requirements of the EEOC Guidelines, there has been an inroad into this area with the Supreme Court's recent decision in *Washington v. Davis*.⁴² The dispute arose when black applicants for positions as police officers in the District of Columbia were rejected because they failed a written personnel test (Test 21) measuring verbal skills. The rejected applicants filed suit alleging that Test 21 bore no relationship to job performance and excluded a disproportionately high number of black applicants. There was no

38 Schmidt, Berner & Hunter, *Racial Differences in Validity of Employment Tests: Reality or Illusion?* 58 J. APPLIED PSYCH. 5, 8(1973).

39 ASPA Amicus Brief, *supra* note 25, at 5.

40 510 F.2d 1340, 1345 (8th Cir. 1975).

41 Fincher, *Personnel Testing and Public Policy*, 28 AM. PSYCH. 494 (1973).

42 44 U.S.L.W. 4789 (U.S. June 7, 1976).

claim of intentional discrimination on the part of District of Columbia officials. The District of Columbia moved for summary judgment. It contended that Test 21 did not discriminate against otherwise qualified blacks, and was a useful and valid indicator of training school performance. As such, the District continued, the need to show validation in terms of job performance was removed.

Without substantial reference to the EEOC Guidelines, the Supreme Court in *Washington v. Davis* affirmed the grant of the defendants' motion for summary judgment, thus finding that the employees were not entitled to relief on either constitutional or statutory grounds.⁴³ Instead of the Guidelines, the Supreme Court referred to Civil Service Commission instructions on "Examining, Testing, Standards, and Employment Practices" in finding that Title VII standards were satisfied.⁴⁴ This decision is important because it indicates that the trend of accepting only criterion-related proof is reversing and that alternate methods, regardless of their exclusion from the EEOC Guidelines, will be accepted in attempting to show job-relatedness so long as the fact finder is satisfied that the employer's burden of proof has been met.

In addressing the claim that Test 21⁴⁵ violated respondents' statutory rights under Title VII, the Supreme Court found that relating Test 21 to performance in the police training program instead of actual job performance "seems to us the much more sensible construction of the job-relatedness requirement."⁴⁶ Such an appraisal appears to be based on the assumption that the police department developed the extensive training program to prepare an employee for the demands that he will actually encounter on the job.

Of added importance is that the holding in *Washington v. Davis* appears to give weight to the district court's factual determination that some minimum verbal and communicative skill, as measured by Test 21, is directly related to the requirements of the police training program. In reviewing the district court's decision the Supreme Court found it necessary to determine only whether sufficient evidence existed for such a conclusion, and did not review the evidence in a de novo manner as has become the practice of appellate courts in employment testing cases. Such a review procedure indicates a recognition of the factual nature of a job-relatedness determination, as opposed to prior decisions

⁴³ *Id.* at 4790.

⁴⁴ These instructions establish the following policy:

a. *Policy.* The Commission's staff develops and uses applicant appraisal procedures to assess the knowledges, skills, and abilities of persons for jobs and not persons in the abstract.

(1) Appraisal procedures are designed to reflect real, reasonable, and necessary qualifications for effective job behavior.

(2) An appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as:

(a) Effective job performance;

(b) Capability;

(c) Success in training;

(d) Reduced turnover; or

(e) Job satisfaction. 37 Fed. Reg. 21557 (1972).

⁴⁵ The Court of Appeals was "willing to assume for purposes of this appeal that appellees have shown that Test 21 is predictive of further progress in Recruit School." 512 F.2d 956, 962 (D.C. Cir. 1975).

⁴⁶ 44 U.S.L.W. at 4795.

which indicated that the determination must be made within the framework of strict legal guidelines.

The *Washington v. Davis* decision thus reverses the trend among appellate courts to closely adhere to the EEOC Guidelines and review lower court decisions in a very strict sense. This is evident from the language in *Washington v. Davis* which states "[i]t appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance."⁴⁷ Furthermore, with regard to the proper standard of review, the Supreme Court only looked to see if the "District Court's judgment was warranted by the record before him."⁴⁸ Thus, the impact of such a trend could do much, both in requiring that EEOC Guidelines be followed only where its conclusions are supported and persuasive, and in insuring that job-relatedness is judged at the fact-finding level instead of being reviewed de novo at the appellate level.

The foregoing discussion has traced a portion of the evolution of employment testing cases. While initial decisions found criterion-related validation to be virtually the only approved method of validating a test, the Supreme Court, in *Washington v. Davis*, criticized the requirement that job-relatedness must be shown through criterion-related validation. In so doing, it indicated that criteria other than job performance, specifically, performance in a training program, can be used in appropriate factual circumstances to validate a test. The Supreme Court thus appears to be attempting to soften some of the rigid policies that have previously created enormous barriers to the validation of employment tests. However, another significant and circumspect policy remains prevalent in employment testing decisions. This policy requires that employment tests undergo a differential validity analysis prior to final acceptance.

2. Differential Validity

Along with the preference for a single method of proving job-relatedness, another judicially approved criterion relating to proof of job-relatedness, which is of doubtful validity, is the requirement that a differential validity analysis be conducted.⁴⁹ While presented as a theory of aptitude testing, in reality differential validity has tended to be adopted as a convenient means of implementing affirmative action programs for disadvantaged groups.

The validation methods previously discussed try to establish a correlation between the employment test and job performance irrespective of a subject's race. In contrast, differential validity is based on the premise that a member of a minority race whose job performance equals that of a majority member will achieve a significantly lower score on a given employment test. When applied, differential validity would account for past social and environmental deprivations and adjust the employment test score for the minority member. In its application, differential validity should actually be viewed as an additional re-

47 44 U.S.L.W. at 4794 n.13.

48 *Id.* at 4796.

49 29 C.F.R. § 1607.5(b)(5) (1975).

quirement to be considered only after initial job-relatedness has been shown. However, such has not been the case. The requirement that such an analysis be performed in conjunction with proving job-relatedness, whenever feasible, was included in the interpretive Guidelines of the EEOC, and was subsequently adopted by the courts and established as a mandatory rule.⁵⁰

The Fifth Circuit initially established the precedent of requiring differential validation in *United States v. Jacksonville Terminal Co.*⁵¹ In finding the evidence insufficient to establish job-relatedness for the test in question, the court concluded that:

[A]ny probability of correlation [between the test and job performance] seems dubious in light of the experience of Roger Stamper, who achieved a relatively low score on the test but who has admittedly functioned satisfactorily as a group 1 employee.⁵²

This thin line of evidence prompted the court to commit itself, in *United States v. Georgia Power Co.*, to what it termed a salient principle of test validation: "Accepting *arguendo* that whites scoring high on the test perform satisfactorily in group 1 positions, to conclude that therefore blacks scoring low could not adequately perform the same jobs is a *non sequitur*."⁵³ Thus, in noting that the employee was unfairly discriminated against, the Fifth Circuit determined that the employer would be required, as per EEOC Guidelines,⁵⁴ to substantiate its employment tests based on differential validity analysis. The evidence upon which this decision was based did not verify the theory of differential validity; indeed, the evidence presented to the court was scant and, at best, merely indicated that for one particular employee the employment test failed to predict successful job performance. Furthermore, the court adopted differential validation despite its own observation that "viewed scientifically, [differential validity] is the subject of a considerable amount of professional debate."⁵⁵ Thus, the court actually exceeded its expertise in accepting the differential validity theory and consequently requiring that the absence of such an analysis render a validation study inadequate.

The Fifth Circuit, however, has not been the only court to weigh the merits of differential validity. Both of these Fifth Circuit decisions, dealing with an area in which the expertise of the court should have limited its opinion, were decided on scant evidentiary records.⁵⁶ Nevertheless, the Eighth Circuit⁵⁷ followed these decisions in striking down other test validation studies when a

50 422 U.S. 405 (1975), *Rogers v. Int'l Paper Co.*, 510 F.2d 1340 (8th Cir. 1975), *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973), *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971).

51 451 F.2d 418 (5th Cir. 1971).

52 *Id.* at 456.

53 *Id.*; 474 F.2d at 914.

54 29 C.F.R. § 1607.5(b)5 (1975).

55 474 F.2d at 914.

56 In *United States v. Georgia Power Co.*, the evidence consisted of testimony that failed to demonstrate any specific relationship between test scores and job performance for a study that was initiated shortly after the Attorney General filed the suit. In *United States v. Jacksonville Terminal Co.*, validation was attempted to be shown by comparing employment test scores with supervisor estimates of job potential instead of actual job performance.

57 510 F.2d at 1350.

differential validity analysis had not been conducted. In requiring such an analysis, the court cited only the Fifth Circuit and the EEOC Guidelines for support.

Additionally, the Supreme Court, in *Albermarle Paper Co. v. Moody*,⁵⁸ had an opportunity to rule on the application of differential validity. In a manner similar to the circuit courts, the Supreme Court also gave "great deference" to the EEOC Guidelines in adopting the theory.⁵⁹ Again, the only evidence before the Supreme Court was what it labeled an odd patchwork of results that attempted to prove job-relatedness; no evidence concerning the acceptability of differential validity was offered.⁶⁰ It was shown that the employer made no attempt to investigate job-relatedness until four months before the trial. Furthermore, the investigation was headed by a consultant who visited defendant's plant for only half a day, and was actually conducted by plant officials without the consultant's supervision. The Supreme Court's ultimate reliance on the EEOC Guidelines as authority for the validation of differential validity prompted Chief Justice Burger, as one of two dissenting Justices, to note:

Its entire analysis is based upon a wooden application of EEOC Guidelines which, it says, are entitled to "great deference" as an administrative interpretation of Title VII . . . [but] the Guidelines upon which the Court now relies relate to methods for *proving* job-relatedness; they interpret no section of Title VII and are nowhere referred to in its legislative history.⁶¹

Despite the criticism in Chief Justice Burger's dissent, courts have tended to accept differential validity and to apply it to all employment testing situations.

During this period in which the courts have been steadfast in their acceptance of the differential validity theory, many experts are having doubts that such a phenomenon does exist.⁶² The theory had wide appeal a decade ago and appeared to gain strength in the courts just as the experts were disproving it. The possible unreliability of differential validity was first acknowledged judicially by the Fifth Circuit in *United States v. Georgia Power Co.*,⁶³ but it chose instead to adopt the EEOC Guidelines.⁶⁴ The Fifth Circuit recognized, but gave little weight to, an American Psychological Association report that concluded:

This hypothesis, that test scores have different meanings for different subgroups, requires extensive research for confirmation or rejection; existing

58 422 U.S. 405 (1975).

59 *Id.* at 431.

60 *Id.* at 432.

61 *Id.* at 451-52.

62 See J. KIRKPATRICK, TESTING AND FAIR EMPLOYMENT (1968); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1663 (1969).

63 474 F.2d at 914.

64 The American Psychological Association in its amicus brief points out that the conclusion reached after an extensive six-year study conducted jointly by the Educational Testing Services, Princeton, New Jersey, and the United States Civil Services Commission, was that where a differential validity study is not technically feasible, and where the tests have been chosen on the basis of careful job analysis, a reliable relationship found for whites will usually hold true for blacks. See J. T. Campbell, AN INVESTIGATION OF SOURCES OF BIAS IN JOB PREDICTION (Educational Testing Service, Princeton, New Jersey, 1972).

evidence is inadequate to determine whether aptitude tests actually discriminate unfairly because of their different validities from one subgroup to another.⁶⁵

Indeed, later published studies have shown that some of the mathematical models that supported older reports upholding the differential validity theory were statistically invalid.⁶⁶ Additionally, further tests have resulted in findings which conclude that "no evidence [exists] that selection tests are more often valid for whites than for blacks."⁶⁷ In similar studies, conclusions were also reached that "psychologists concerned with the applicability of employment tests to minority groups should direct their future efforts to the study and determination of test fairness rather than to the pseudoproblem of racial differences in test validity."⁶⁸ Thus, under *Albermarle* and its predecessors, it now appears that the theory of differential validity has the force of law although it lacks the support of experts in the field of applied psychology.

IV. Conclusion

In the area of employment testing it is becoming increasingly apparent that the roles of the EEOC Guidelines and the courts must be redefined. This is especially so because of the tendency to treat the Guidelines as administrative regulations and job-relatedness as a legal instead of a factual determination.

The Guidelines issued by the EEOC are quite different from administrative regulations promulgated by an administrative agency. They are different both because the EEOC does not have the power to issue substantive regulations and because the procedures under the Administrative Procedure Act, affording interested parties a chance to express their views, have not been used. The courts, however, have been treating the Guidelines as administrative regulations while disguising their action in terms of a vague standard called "great deference." Instead of such treatment the Guidelines should be viewed more appropriately as those of an advocate and accepted only because of the validity of their individual reasoning.

It may also be appropriate for the courts to reassess their perspective of job-relatedness. Job-relatedness is a question of fact that should be decided at the trial court level. The judicial establishment of unreasonable legal requirements, such as requiring that criterion-related validity be established and a differential validity analysis be performed, on employment testing and the employers who use them can in the long run only work more of a burden on minority groups and lessen the likelihood that superior minorities will be recognized. There are more than just three methods of proving job-relatedness and

65 APA Task Force on Employment Testing of Minority Groups, *Job Testing and the Disadvantaged*, 24 AM. PSYCH. 637, 641 (1969).

66 Humphreys, *Statistical Definitions of Test Validity for Minority Groups*, 58 J. APPLIED PSYCH. 1 (1973).

67 O'Connor, Wexley & Alexander, *Single-Group Validity: Fact or Fallacy?*, 60 J. APPLIED PSYCH. 352, 354 (1975), accord, Gael, Grant & Ritchie, *Employment Test Validation for Minority and Nonminority Clerks with Work Sample Criteria*, 60 J. APPLIED PSYCH. 420 (1975).

68 Schmidt, Berner & Hunter, *supra* note 38, at 5.

any method that carries the burden of proof should be accepted.

In applying the mandates of Title VII, it is not necessary for courts to destroy an employer's right to use employment tests in order to stop discriminatory practices. Employment tests have a certain objectivity that is necessary if decisions based on merit are to appear fair as well as be fair. The development of employment tests is not an exact science; indeed, it has the most difficult task of trying to predict the future actions of a human being. Employment tests try to measure a person's aptitude to perform in a certain area, but it must be realized that aptitude is only one factor in determining how a person will perform on a job. Above all, it must be remembered that employment tests are important tools for decision makers in hiring and promoting on the basis of merit and can benefit both employers and employees.

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