

Griggs v. Duke Power Company

Oral Argument - December 14,
1970

Warren E. Burger

Mr. Greenberg, you may proceed.

Jack Greenberg

Mr. Chief Justice and may it please the Court.

This case is here on petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit which affirmed in Court and reversed in Court a decision of the United States District Court for the Middle District of North Carolina by decision in which Judge Sobeloff dissented.

The issue is one of statutory construction of Title VII of the Civil Rights Act of 1964 and the particular statutory provision for which I would like to draw the Court's attention appears on page 2 of our brief.

The statute makes it unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against him with regard to race.

And then in Section 2 which more particularly applies to the issue we have pending here to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunity or otherwise adversely affect the status as an employee because of race and other forbidden reasons.

The question presented in this case is whether intelligence tests and a high school graduation requirement may be use as a pre-requisite

to promotion from the job of laborer to the job of coal-handler and perhaps other jobs at respondent's power plant.

When these tests, that is the intelligence tests which I might say was adopted on July 2, 1965, the effective date of the Title VII of the Civil Rights Act of 1964.

When these tests screen out Negroes at a significantly higher rate than they screen out whites and there has been no demonstration that the tests and the high school requirement predict ability to do the job and indeed there is some evidence to the contrary that they do not predict the ability to do the job.

Now, the court below held in the case of employees employed after the high school requirement was instituted that the statute was not violated and as I read the opinion of the court below and the position of respondents, they rests on three separate grounds, that first of all that there was no demonstration of an intent to discriminate.

Secondly, there's a statutory argument and that is that such tests are privileged as "professionally developed ability tests" under Section 703 (h) of Title VII and then there is an assertion by the respondent which we say has no support in the record.

In fact, the record in some parts of the country that the test survey legitimate business need that is that certain employees are not fully promotable throughout the plant to higher positions and that the high school education requirements help select employees who are.

Now, before elaborating our argument, we would like to make our position clear with regard to ability testing.

No employer, we submit under the statute is required to employ anyone who is unable to do the job and any employer may use tests and educational requirements which predict whether an employee or prospective employee can do the job.

But if the tests that's used or the educational requirement that's used screens out members of a race or of a group protected by the statute and does not predict who can do the job or does not have predictive validity as the industrial psychologist use the terminus this

record use the term, then it cannot be justified merely on the basis of good faith.

A good faith or intent, we submit is an elusive concept which regularly, frequently is advance in civil rights cases.

We hear good faith defenses in school segregation cases, in jury discrimination cases, in voting discrimination cases and the courts have regularly responded that they look to results and not make an effort to read the mind of an employer or indeed something much more difficult to do to read the mind of a corporation as to what it intends to do by the application of certain standards and tests.

Indeed, while it has not been possible on this record to challenge the good faith of the respondent because that's just something that one can very rarely develop evidence on.

Such a test would be an invitation to many who would seek to evade the statute to hide behind the concept of good faith.

Now as I said Duke Power Company adopted the test requirement for initial employment on July 2, 1965 the date of the Act in question.

Until then and until after the filing of the charge in this case in fact, employment of Duke Power Company was rigidly racially segregated.

Black persons worked in the Labor Department only.

White persons worked in the better and higher paying jobs, that is the departments described in the record of Operations, Maintenance, Test and Laboratory, and Coal Handling.

And the highest paid black worker made less money than the lowest paid white worker under the system.

Now, I understand it in the labor department that that was the only growth was it?

Jack Greenberg

Yes.

Well, at one time (Voice Overlap) there was a white foreman in the Labor Department.

What my real question is, as a matter of fact and I don't know that I fully understand it, was the Labor Department all Negro and every other department in the company all white, this is prior up to 1965?

Jack Greenberg

Yes.

Or was it only that the Labor Department was all Negro and that the other departments Coal Handling did have some Negroes in it or not?

Jack Greenberg

The first formulation is the correct one.

There was rigid racial segregation.

The Labor was all black, everything else was all white.

Up until 1965?

Jack Greenberg

Well, indeed until up until after the filing of the charge in this case that's some time after --

1965, wasn't it?

Jack Greenberg

Well, I think the first black men probably got out of the Labor Department in 1966, after the filing of the charge before the employment opportunity.

And there were no Negroes in the other four departments?

Jack Greenberg

That is correct.

There is no question about that on the record.

I don't think the respondent would challenge that for a moment.

I just was surprise as a matter of fact.

Jack Greenberg

Well, the intelligence test was put in at the request of certain non-high school graduate white workers in the Coal Handling Department as a substitute for a high school education and it has been described in the record as a test which would identify the average high school graduate.

So, it's perhaps even somewhat more stringent in the high school education requirement in that that half the high school graduates presumably would be unable to pass these tests.

And to enable them to be promoted to the so-called inside departments, Labor and Coal Handling were outside only the departments or inside.

The high school education requirement was adopted considerably earlier and the date is not certain but it appears to be people talk in terms of about 1955 as a pre-requisite to employment and promotion in all departments but the Labor Department.

Black people can be employed in Labor without a high school education.

Others could be employed in the other departments initially only with a high school education.

But many pre-1955 Duke Power Employees are non-high school graduates at all pay levels throughout the plant and indeed, the -- our brief has an analysis of the pay which is earned by various workers.

The pay earned by an average high school work or an average non-high school worker is about the same the calculations are on page 38 of our brief and the Government's brief engages in a similar analysis of promotability comparable promotability and promotion rates of high school and non-high school graduates and it finds that high school and non-high school graduates within the plant are roughly promoted and approximately the same rate.

Warren E. Burger

Does this record show the total employment figure in 1955 and total employment figure currently?

I couldn't spell it out.

Jack Greenberg

There -- to quote the respondents in this case and I am sure this is right.

There is "a real stable employment situation there and there have been roughly about 95 workers at all times that are relevant to this case."

Warren E. Burger

Well, I wondered if that figure because it certainly would be countered to the general growth of everything in 15 years.

Jack Greenberg

Well, I'm not familiar with the industry.

It just may be that in the power industry, it's possible to expand power production perhaps from other locations without increasing the work force but the employment situation has remained just about the same.

I think that doesn't seem to be any real doubt about that and they characterize it as stable, and it apparently is.

After the passage of the Act and they filed into complaint before the Equal Employment Opportunity Commission, Duke did promote a number of black workers with a high school education over a period of a couple of years.

And the Court of Appeals then ordered the promotability but not the actual promotion of others employed before the high school education requirement was adopted and that is now in further litigation down in the District Court because there is a claim at which the Court has not yet rendered any position that some white people have been brought above this black workers.

The Court has not resolved that.

This case involves four workers frozen in the Labor Department by the test requirement of July 2, 1965 and by the fact that they have no high school education.

Have they taken and failed these tests?

Jack Greenberg

The record is not clear on who has taken and who has not taken these tests.

The record indicates that three of the workers, some of them black and some of them white, we don't know which to a black which one is white.

Half taken and failed the test.

Everyone who has taken the test has failed it.

The record indicates that applicants for employment almost entirely the overwhelming number of the client to take the test.

They don't want to take the test.

This is however class action and our argument about the test is that it is so patently discriminatory as I hope to develop in the moment too that really doesn't matter, that doesn't have any real bearing on the decision of the case.

Well, I thought you said these are four identifiable Negro workers in the Labor Department.

Jack Greenberg

These are four identifiable --

On the class that they represent beyond their own number?

Jack Greenberg

The class in the complaint and in the order allowing an amendment to the complaint is defined as persons presently working at Duke Power and those who may be accepted for employment in the future.

So it is in some sense a rather well-defined class than in the sense quite an open-ended class.

And that open-ended class was accepted was it by the courts?

Jack Greenberg

Oh!

Yes, the District Court right on pages 17 of the complaint files an order allowing amendment to the complaint and defines it.

Well, then on page 19 also, it's the same thing again order allowing class action.

This action is maintainable as a class action.

Only in so far as six injunctive reliefs and so from the class presented are those represent -- are those Negroes presently employed as well as those who make subsequently be employed by defendant standard of the station.

Both those orders on page 17 and 19 (a) may be --

Oh!

May be subsequently employed, it's not future applicants, is it not?

Jack Greenberg

No, that's not future applicants, those who may subsequently be employed.

Its employees?

Jack Greenberg

Yes.

And there are now four identifiable people as I understand your submission.

Jack Greenberg

I'm sorry, and then on page 14, its also who may subsequently seek employment by defendant on page 14 order allowing amendment to the complaint.

So it's both.

You're talking about 14 (a) or the --

Jack Greenberg

14 (a) order allowing amendment to the complaint.

Yes.

Jack Greenberg

Who are now employed that may subsequently seek employment, the first paragraph, the order line.

And then the opinion of the Court --

If these four people, you say it's not clear which --

Jack Greenberg

We do not know --

Which if any have taken the tests --

Jack Greenberg

That is correct.

-- any who have, have all failed.

Jack Greenberg

Everybody who's taken the tests has failed.

But it's not clear that any of these four have taken them, is it?

Jack Greenberg

If -- we do not know.

We do not know.

I might then point out the order of the Court of Appeals defines the class as those who subsequently maybe employed and may hereafter seek employment.

That's in the very sentence of Judge Forman's opinion.

As I was saying, the case involves those workers who want to be promoted from Labor to Coal Handling.

Now white men without a high school education who have not passed the tests and who do not have a high school education are doing the Coal Handling jobs today.

Typically, the way workers qualify for the coal handling job is by on the job training on page 124 of the larger volume of the record.

Official of the company testifies.

We would have to determine that by action or actually putting them in if there was an opening to see how they would perform.

And then he says, you would take the scene, the man if he is qualified to go into job and make a trial of him and try him out.

And then the method of qualifying the job is elaborated also on page 23 as in response to interrogatory 27.

The company provides on-the-job-training.

Warren E. Burger

Prior to 1955, did you say there was no high school test?

Jack Greenberg

That's correct.

Warren E. Burger

And there are -- does the record show how many people are in the non-labor force who did not meet the high school -- would not today be able to meet the high school?

Jack Greenberg

Yes, the record shows that there is a, there is a document filed by the respondents which the education of everyone who on page 126 of this record of everyone who works in the plant by my rough calculation about a third of the people in the plant do not have a -- are not high school graduates.

Warren E. Burger

Would that be -- does this record show how that compares with the change in standards generally and this are comparable industries that I assume many people today will have requirements it be the high school or college who did not have it 15 or 20 years ago --

Jack Greenberg

The --

Warren E. Burger

Does this show any hideous --

Jack Greenberg

There is some statement by respondents that elsewhere in the utility industry tests of this sort are being used.

But I would like to say that there is first of all, there is no demonstration to perform the job of coal handler, you have to have a high school education.

In fact, if you look at the labor's jobs, the labor's jobs and the coal handler's jobs, job specifications are here in pages 48 and 65 of the record and they're roughly the same.

The coal handler just to read a few of them has to operate certain vehicle service and clean coal handling equipment and be able to record weight on page 48.

On page 65, the labor has to operated company vehicles, operate floor sweeping machines, tractors, trucks and so forth, lift trucks and so forth.

Things are comparable.

The jobs are -- people are trained for the job, by on-the-job training.

There is no indication that the high school education in any way qualifies want to do the job.

And indeed if one were to look at the Wonderlic tests which appears here on page 102 of the record, it's difficult to see how for the qualifications put now for coal handler there is any need to know or even have a sense of the difference between the words adopt and adept, reflect -- reflect and reflex, pretensions and pretentious, image and imaginary, enlarge and aggrandize, and various other kinds of test.

Warren E. Burger

Would that have a -- would that have validity and promotability aspect of not?

Jack Greenberg

There is absolutely no evidence that it would at all.

We do not deny that there are jobs which that kind of a test or some kind of a test might have some validity.

The Wonderlic people who prepared the tests themselves say the test is not useful unless it has been -- unless it has what they call predict the validity, you have to see whether or not passing these tests qualifies you to do this job.

This test is not an open sesame to decide who can do any job in the whole world.

Warren E. Burger

Or would it be a violation of the Act if an employer had a general policy that he would not hire anyone in any capacity if they didn't meet certain potential promotability qualifications?

Jack Greenberg

That would not be a violation of the job if he could demonstrate that that kind of capacity to be promotable is necessary to do the job and necessary for the operation if it is planned.

And then it might not be a violation either if he did not disproportionately screen out members of a protected race or national group or --

Warren E. Burger

Now that's the key to your case?

Jack Greenberg

That's the key.

There is --

Warren E. Burger

But if the impact of any tests screens out one particular category whether it happens to be women or Negroes or Orientals or whatever, then its -- it at least suspect to such?

Jack Greenberg

Then it must be justified in terms of some sort of validation of its ability to predict and here we have in the State of North Carolina, one-third as many black people as white people graduate from high school.

Examinations of this Wonderlic test by the Equal Employment Opportunity Commission and now recently in the case in the Eastern District of Louisiana, Hicks against Crown-Zellerbach show that the Wonderlic test by vast disproportions screens out black people for the very same reason that high school education requirement does.

It is really a test of the capacity to do the kind of thing a high school graduate may be able --

Warren E. Burger

Then if the power plant in let us say the State of Maine on the assumption that they would be almost all white population there, if

the power plant in the State of Maine had a high school or other aptitude test that was directed promotability and it did not have any impact -- adverse impact on any particular racial group or national origin group.

It would not put to the Act?

Jack Greenberg

An industrial problem, I would suggest they might be depriving themselves of people otherwise to do the job very well.

But that would not be the problem that --

Warren E. Burger

No, no violation problem?

Jack Greenberg

No violation problem.

If it has a disproportion impact upon black people or members of some of the various protected groups then they can use it if they can justify it in terms of business necessity.

But if these tests of July 2, 1965 screens out blacks and high school education requirements screens them out and they -- it has no bearing on who can and cannot do the job then it's our position and may not refuse it.

I'd like to reserve the balance of my time.

Warren E. Burger

Alright, Mr. Greenberg.

Mr. Ferguson.

George W. Ferguson, Jr.

Mr. Chief Justice, may it please the Court.

visited on 1/24/2019

We are here today to determine the rights, duties, and obligations of employers and employees in private employment.

In the mid 1950s as has been indicated to you, Duke Power Company adopted a practice of requiring a high school education for promotion or hiring into all departments other than the Labor Departments at its Steams Stations.

The heart of this case is whether or not that practice is discriminatory under Title VII of the Civil Rights Act of 1964 as to four Negroes who were hired after the adoption of that requirement.

Since adoption of the requirement, no employee white or black has been hired into departments other than the labor department unless he had a high school education.

A collateral issue in this case in our view is whether or not the tests used by the company as a substitute for the high school requirement violates the Act.

Petitioners assert that the educational requirement is discriminatory because it fails to meet the test of business necessity.

To meet that test, petitioners claim that any such requirement must be validated for job relatedness.

On the other hand, the company claims and the District Court below and the majority of the Court of Appeals below found and concluded that under the record, evidence in this case, the educational requirement had a genuine business purpose and was adopted to upgrade the quality of the defendant's workforce and was not adopted with any intent to discriminate against Negroes hired after adoption of the requirement.

The uncontradicted evidence of record in this case is that employees and the operations and maintenance department are responsible for the safe, efficient, and reliable operations and maintenance of complex machinery used in the production of electric and energy.

visited on 1/24/2019

Those in the Laboratory Department must be able to perform laboratory conditions -- operations which include water analysis, coal analysis and keep accurate logs with respect to those operations.

Those in the Test Department must maintain the accuracy of instruments, gauges, and control devices.

Employees in Coal Handling must be able to read and understand manuals relating to complex machinery and operate that machinery in order to progress through the coal handling classification satisfactorily.

All of these jobs we submit to you require a degree of skill, judgment, and intelligence and we would respectfully say to you that it supports the company's decision to require in overall general intelligence and mechanical comprehension level as reasonably necessary to safely and efficiently operate a plant costing millions of dollars which performs a complex function of electric power production which this company as a public utility is required by law to maintain adequate and continuous service.

Warren E. Burger

If there were no high school graduation requirements to the labor force, how do you suggest that would adversely affect the company's operation?

What's the --

George W. Ferguson, Jr.

There is no high school requirement for the labor force, may it please, Your Honor.

Warren E. Burger

Then I misheard you.

I thought you said every person hired on the labor force.

George W. Ferguson, Jr.

No, sir.

Every person hired since 1955, in all departments other than the Labor Department have a high school education.

Warren E. Burger

I'm glad you corrected that.

I thought your statement was in conflict with what I remembered in the rest.

George W. Ferguson, Jr.

Thank you for calling my attention sir.

In addition, this record shows that --

May I just ask it, clarify this, today if a person applies for a job --

George W. Ferguson, Jr.

Yes, sir.

-- at this plant, he must have a high school education must he if he is to be considered for employment in any of the four departments other than the labor department?

George W. Ferguson, Jr.

Yes, sir.

Is that it?

George W. Ferguson, Jr.

Yes and he must also pass these tests.

He must do both now.

George W. Ferguson, Jr.

Yes, sir.

He must do both.

A new applicant as of now must do both, would he?

George W. Ferguson, Jr.

Yes.

He must have a high school education requirement and he must pass the test with the score of the average high school graduate.

Right.

George W. Ferguson, Jr.

The test that we use here must --

It's a double test, isn't it?

George W. Ferguson, Jr.

Yes, that is for new employees only.

Yes.

George W. Ferguson, Jr.

The test here may it please Your Honor were utilize as an alternate for the high school requirement as to give incumbents only not new employee but incumbents only, the chance to enter and progress into the higher skill lines of progression without the necessity of having a high school education.

And so but a new applicant today must have a high school diploma in the first place?

George W. Ferguson, Jr.

Yes sir.

And then must be also take the both the Wonderlic Test and the Bennett or Bennett tests?

George W. Ferguson, Jr.

Yes, sir.

It must make 20 on the Wonderlic and 39 on the Bennett Mechanical.

And this is true for all, any of the four departments other than the Labor Department?

George W. Ferguson, Jr.

Yes, sir.

And as of today, the Labor Department still requires neither of those qualifications.

George W. Ferguson, Jr.

No, sir.

They have to take a Revised Beta tests that is not in this appendix but they take Revised Beta tests which really is no more than just an appreciation of danger and understanding of how to follow instructions.

In addition, I would say to you that Mr. ACT who is the Vice-President of Power Production and in charge of steam plants on our company system stated that the company instituted the high school requirement because its business was becoming more complex.

It had employees who are unable to grasp situations to read, to write, and who didn't have an intelligence level really to progress upward in the higher skill lines of progression that were talking about and in fact some refuse promotion because they didn't feel that they could do the job.

Now when you say, we're talking about, are you talking about promotion within the department or are you talking about interdepartmental transfer?

George W. Ferguson, Jr.

Interdepartmental transfer.

We, I was -- at that point Your Honor, I was saying this, that we found that we were getting some road blocks, well because we had hired people without a high school education and without the

mechanical and general intelligence level that ultimately, in view of our business become a more complex.

We were hiring people and we were suffering road blocks and these tests and as the petitioners only evidence were designed to exclude -- to include not exclude anybody without a high school education.

But --

George W. Ferguson, Jr.

They have three non-discriminatory alternatives about which they can travel into the other, the higher skill lines of progression.

One, they could take the tests and make satisfaction scores in progress or two, they could take advantage of the company's tuition refund program which we pay 75% of the costs of and get a high school diploma or GED equivalent, or they can do it on their own.

They have those three alternatives.

The --

George W. Ferguson, Jr.

The record makes that clear.

-- existing employees?

George W. Ferguson, Jr.

Yes, sir.

This is for incumbents about which we are talking only.

Remember the court below cured its termination as to the six black employees who were contemporaneously hired with or after the whites who were hired into the better departments and have been progress in law and order that when the District Court fashioned a decree that it would take those six employees, waive the education and test requirement as to them and require plant lab rather than departmental seniority with respect thereto.

Does that answer your question, sir?

Well, I think so.

I've had a little trouble of the facts in these case and I --

George W. Ferguson, Jr.

As to the three high school graduates they were all promoted after the Civil Rights Act became effective on July 2, 1965.

They were all promoted out of labor into the higher skill lines of progression and which we would contend is the precise effect Congress intended.

Because both courts below found and concluded that Negroes were relegated to the Labor Department prior to the effective date of the Act.

Warren E. Burger

Let me see if I can translate what you've said in terms of the factual situation on this record but the operation of it if a man, if any racial or a national origin is hired in the labor department now without a high school education or any other tests.

And at some point, things he can qualify for one of the other operating departments of the company.

Is he permitted to -- does he come within this group whose tuition is paid three-fourths by the company?

George W. Ferguson, Jr.

Yes, sir.

Warren E. Burger

And if you access the test, he can join in this upward movement?

George W. Ferguson, Jr.

Yes, sir.

If he comes in without a -- I see your point Mr. Chief Justice, if he comes in at the -- in the Labor Department without a high school

education, your question is does he have to pass the test and have a high school education requirement also, is that true?

Warren E. Burger

Or to get out of it and move on?

George W. Ferguson, Jr.

Yes, sir.

He could take the tests and move on.

We're speaking about new hires into departments other than Labor must have a high education and in addition thereto pass these two tests that we're talking about.

Warren E. Burger

Now since these tests have been an inaugurated since this policy is in effect, how many people have move out of the labor force by this rout into other branches?

George W. Ferguson, Jr.

Through the testing rout?

Warren E. Burger

Yes.

George W. Ferguson, Jr.

(Voice Overlap) As indicated earlier, three -- two blacks and one white have passed the tests -- have taken the tests but not passed.

So, none have moved out by virtue of the additional promotional avenue we gave them.

Warren E. Burger

Now, had all three of them taken the training course at the shared expense of the company?

George W. Ferguson, Jr.

No sir, they have not.

One -- we have one who has recently passed or given as or shown a satisfactory evidence of a high school education.

He is now the Labor Department foreman.

Hugo L. Black

Who conducted these tests?

George W. Ferguson, Jr.

sir?

Hugo L. Black

Who conducted these tests?

George W. Ferguson, Jr.

A Mr. Richard Lemons at this particular plant, Justice Black.

Hugo L. Black

Was he an employee of the company?

George W. Ferguson, Jr.

Yes, sir.

Hugo L. Black

Anyone else participate?

George W. Ferguson, Jr.

No, sir.

I don't believe anyone else at this particular plant.

Hugo L. Black

Any charge of unfairness of any kind in the tests?

George W. Ferguson, Jr.

No, sir.

They passed by that.

Warren E. Burger

Well, there is a claim that the tests is an inherently an unfair tests, so far as Negroes are concerned.

George W. Ferguson, Jr.

Alright Your Honor, may I speak of that just a moment?

Warren E. Burger

Well, that is -- do I understand the claim in opposition correctly?

George W. Ferguson, Jr.

They claim the tests as to Negroes are unfair because they are culturally deprived and therefore placed at a competitive disadvantage.

Warren E. Burger

And what they're asking is that you tailor a new test that will be directed at the particular job ahead.

George W. Ferguson, Jr.

Yes, sir and I would respectfully submit to you that the legislative history of the Act clearly showed that general intelligence and aptitude tests that Congress intended they should be used.

And I'd point specifically to Senator Tower's language.

This is all discussed in pages 27-340 of the brief.

I would direct the Court's -- the attention of the Court to this when Senator Tower called up his original amendment, he stated, "It is an effort to protect the system whereby employers give general ability and intelligence tests to determine the trainability of employees."

Warren E. Burger

What page were you on precisely?

George W. Ferguson, Jr.

That is page 31 of our brief, Your Honor.

If you'll go on over to page 32, you will see Senator Lawshe's questions demanding to know where there is language in this field that allows the Motorola type test be given.

I would point out even more particularly to you on page 38 the Clark case Interpretative Memorandum prepared by the Justice Department which states this.

There is no requirement in Title VII that employers abandon bona fide classification tests where because of differences and background and education, members of some groups are able to perform better on these tests than members of other groups.

An employer may set his qualifications as a high as he likes.

He may test to determine which applicants have these qualifications and he may hire, assign, and promote on the basis of tests performance.

Now the Justice Department through the Solicitor General's amicus curiae apparently now claims that the tests breveted only if they're specifically job related and apparently repudiates the Interpretative Memorandum on which Congress of the United States relied when it enact that legislation.

Well, nothing that I heard you read would say that the tests could be non-job related.

So that they can be as high as he likes.

George W. Ferguson, Jr.

Yes, sir.

But it doesn't say they can be wholly irrelevant to the job that is being employed to fill.

George W. Ferguson, Jr.

Well, may I answer that this way.

The Bennett and the Wonderlic are of course professionally developed tests.

That alone we realized is not enough.

The courts below found that we have a genuine business purpose in adopting the high school education requirement when they found that the tests were a reasonably satisfactory substitute for the high school education requirement.

Now, if we assume that the tests are professionally developed ability tests and that Congress intended to allow the use of general aptitude and ability tests then and in that event the crucial inquiry becomes this.

Are the tests designed, used, or intended to discriminate.

Now, as to design, the two testing question here were designed by professional psychologists.

The record evidence shows that the Wonderlic was designed to measure general intelligence and that the Bennett Mechanical AA was designed to measure mechanical comprehension.

The use -- the use of the two tests are as a substitute for the high school education requirement.

Purely and simply to determine if the employee has a general intelligence overall mechanical comprehension level of the average high school graduate.

What about the intent?

Well, once the employer establishes a legitimate business purpose for an employment practice testing or otherwise, then that practice is non-discriminatory even if it operates to prefer whites over black.

If the intent and the legitimate business purpose are inextricably bound up together I would submit to the Court.

That statutory were used as kind of a slippery and ambiguous word in this context.

It could be read couldn't it and as I gather how your brothers in the other side read it.

That is if they are used results in discrimination then they're use to discriminate and on the other hand it could be read as if they, that if they're not subjectively used for purposes of discrimination, then they're alright.

I simply suggest that that's not the clearest word in the world in this context.

George W. Ferguson, Jr.

Well sir, I would submit to you that it's factually impossible to use it to discriminate in this case as I point out on page 26 on our brief.

Warren E. Burger

Let me see if I can focus with you for a moment on the difference that you suggested existed between the Department of Justice position previously and now.

George W. Ferguson, Jr.

Alright, sir.

Warren E. Burger

On page 38, the italicized language that you were referring to I think, does the amendment relates to the business or enterprise, the business or enterprise not to the specific jobs that's what the Department of Justice said in that memorandum.

The Department of Justice seems to be saying now, do you suggest that the amendment concerning the tests relates to specific jobs as distinguished from enterprise?

George W. Ferguson, Jr.

Apparently so, what you're referring to Mr. Chief Justice is the First Tower Amendment.

Warren E. Burger

Yes.

George W. Ferguson, Jr.

And this -- I believe the Clark case Interpretative Memorandum was submitted after the First Tower Amendment.

I am not sure about that but the language I had reference to is on page 31 of the brief.

Down about middle of the page where he said it is an effort to protect the system.

I would point out also to you that both the EEOC has held that educational qualifications don't violate the Act.

I believe you'll find that as appendix exhibit number 4.

Warren E. Burger

But general ability and intelligence tests wouldn't universally relate to specific jobs, would they?

Would you ponder on that at lunch while we recess?

George W. Ferguson, Jr.

If you please, Your Honors, someone else has 10 minutes of my time [Laughing].

[Lunch Recess]

Findings and conclusions of the court below should not be set aside unless they're found to be clearly erroneous and in closing I would comment on the petitioner's argument that the educational test requirement has a vast discriminatory potential.

That simply is not a valid contention because the lower court carefully guarded against the broad approval of all educational and testing requirements by restricting its decision solely to the facts of this case and that decision should, we respectfully submit, be affirmed.

Mr. Ferguson, may I ask you one question?

George W. Ferguson, Jr.

Yes, sir.

I'm under the impression that there were 14 original, no 13 original plaintiffs here, is this correct?

Do you know?

George W. Ferguson, Jr.

Yes sir, that is correct.

One Negro who had a high school education was not a plaintiff.

There are 14 Negroes employed at the Dan River Steam Station, one of which had been promoted in the Coal Handling and was not a plaintiff in this action.

Well, I wonder what had happen to him and this is the answer to it then.

George W. Ferguson, Jr.

Yes, sir.

Alright.

Warren E. Burger

Mr. Cohen.

Lawrence M. Cohen

Mr. Chief Justice, may it please the Court.

I appear before you today in behalf of the Chamber of Commerce of the United States to urge affirmance of the decision below.

This case is one which is a vital concern to employers, both small and large throughout the United States.

In today's labor market, there are often many applicants for the job, just as there are many employees who desire to be promoted into a better position.

The employer must make a choice and the choice confine the employers often a difficult one.

We believe employers must be permitted to be able to use objective, generally accepted standards of intelligence, educational achievement or ability in order to make that decision.

Warren E. Burger

Mr. Cohen, let me put this question to you if I can.

Assume area of the country where I suppose in the southwest there are people whose primary language is Spanish and have a rather limited comprehension of English.

Suppose an employer provided for farmworkers that they must pass the test, something like a literacy test in English on official that would be a rational request generally from employers I'm sure.

Its impact in the southwest in that particular area for the farmworkers might have no relationship at all to the job, might or might not, wouldn't that bring it under the Act if the impact was there?

Lawrence M. Cohen

I think this is really the heart of this case.

Most educational test today unfortunately or aptitude test have a discriminatory impact on one and more racial groups.

This is the educ problem of the social economic status of these groups as it historically evolved.

We would -- the position that petitioner's urge says that wherever you have an educational requirement, wherever you have an intelligence test, the employers then are obligated to prove business necessity that he had to use that particular tests.

We believe that where the employer has a legitimate business purpose and can demonstrate to the Court on the basis of the evidence in the case that he had a legitimate business purpose for the tests, he ought to be permitted to use it.

When Congress enacted Title VII, it knew that educational requirements and tests had a potential discrimination on the type that you've just referred to.

It did not allow to use a test.

They did not prohibit the use of educational requirements.

It tried to reach a compromise where employers could use such test and use such educational requirements as long as they were not a pretext or substitute for discrimination.

Warren E. Burger

Well, does the Duke, does it go that far that it must be a subterfuge or is it on the impact?

Lawrence M. Cohen

Well, I -- It's -- It isn't -- it's whether on the basis of the evidence in the case. Did the employer use or intend that the test be discriminatory?

That's the words for example of 703 (h).

Our fear here really is that if a business necessity test is adopted of the type that petitioners varies to this Court, the result would be that employers won't be able to any objective test.

Warren E. Burger

Well, would you regard business necessity and business related as being the same or as one stronger than the other?

Lawrence M. Cohen

No, I think the difference is between business necessity which is the position, the petitioners and the Government urged and legitimate business purpose.

This the way the Court of Appeals split on the case.

In the majority opinion, the court says the respondent had a legitimate business purpose and persist the details some six or seven reasons why it believes that there had a legitimate business purpose.

It approached in a case by case basis and on the based of the entire record.

Judge Sobeloff in his dissent says the test is one of business necessity.

And that in turn is the position that petitioners urge before this Court today.

The problem really is one of what does business necessity mean.

One Court of Appeals recently held that business necessity means that essential to the safe and efficient operation of the employers business.

The trouble is that educational requirements or tests are never can be shown to be essential.

So the test is essential.

The employer must fall back and use something other than objective criteria because under the EEOC's definition of a test, any objective means selecting employees is considered a test.

That's really what we're talking about today.

We're not talking about the Wonderlic test.

We're not talking about the Bennett test.

We're talking about objective means of choosing which employee should fit in to a particular job or which employee should be hired in the first place.

And if the employers cannot use objective means, then the only way they can choose employers is either subjectively who does the interviewer like, or on the basis some arbitrary method like the first person in is the first person hired.

And we feel and that the Court noted in the Porter case that if you use subjective or arbitrary means, it have a vastly greater potential for discrimination and a vastly greater potential for poor business decisions and related business decision than a test in the objective kind of criteria which the Duke Power used here.

And our fear is that if the test --

Thurgood Marshall

Mr. Cohen, what relationship does either these tests have to "Coal Handling?"

Lawrence M. Cohen

The Court of Appeals found that on the facts of this case, the tests served the legitimate business capacity -- business purpose by hiring a reservoir of able employees in Coal Handling who cannot only do the jobs there but were reasonably able to be promoted into the higher skill jobs.

Whether on the -- I would feel that the Court of Appeals decision is a reasonable one here and that should not be disturbed.

But the real -- my real point here is that the test has to be one that --

Thurgood Marshall

Why not put the same test before you hire a laborer?

Lawrence M. Cohen

I'm sorry Mr. Justice Marshall?

Thurgood Marshall

Why don't they have the same test before you're hired as laborer in Duke?

Lawrence M. Cohen

Well, I think the difference is that there's greater skills required of the employees in the Coal Handling Department.

Thurgood Marshall

Well, they might go up to be president too?

Lawrence M. Cohen

That's correct but the question is, does should you in each case require the employer before he uses a tests to first demonstrate that that test is related just to that particular job?

Or can you hire from, have a test that relates to more than that particular job?

Thurgood Marshall

But assume that you can hire somebody as a coal handler and put the requirement that he have a PhD, you have that right, any employer but does he have that right under this Act?

That's the question.

Lawrence M. Cohen

My question is -- my feeling Mr. Justice Marshall is that this is like a case of an employer who discharges a union employee during a union organizational campaign.

He doesn't have a right to discharge if he's discharging the employee because he's engaged in union activities.

But he does have the right if he is acting within for a legitimate business purpose and not because he is trying to get up the employee because of union person.

If someone sets up a standard for the Coal Handling Department and does that with for no business purpose and only so that he can prohibit Negroes from entering that department then I think he has violated this law.

Thurgood Marshall

But he did it none for well that he had a prior policy of rigid segregation and exclusion.

He is not writing on a clean slate.

Lawrence M. Cohen

That's correct.

Thurgood Marshall

And he quit this rule in as I understand it, the day the Bill became effective.

Lawrence M. Cohen

The company put in the -- the policy of permitting as an alternate to the educational requirement of permitting test.

That was put in the day effective, the educational requirement itself and the day of the Act by some 10 years.

Now, what the employer did when the Act became effective was to create an additional avenue for promotion that was over and above what he had done prior to the Act.

Thurgood Marshall

Before that, all you needed to show was a high school diploma?

Lawrence M. Cohen

Right.

Thurgood Marshall

And after that, if you didn't have a high school diploma, you have to give a test which he gave.

He -- Duke gave the test, mark the test, right?

Lawrence M. Cohen

What -- yes, I think that's what the point that I like to make is that, I think what the Court of Appeals needed to consider was often is the timing of the tests, what the employers racial relation, what is generally action was in the area of race relations, what kind of expert opinion he relied on.

What he did later on is back his engage in validation studies now.

It was on the basis of that entire record that the Court of Appeals had to make a decision of whether there was a legitimate business purpose.

The same way the Court of Appeals I say would have considered whether the employer really had a legitimate business purpose in discharging a union employee.

I think the Court of Appeals consider all these facts.

It waived the timing as you've indicated along with the other facts on the record and it reach to what is a reasonable decision and the decision that I think this Court ought not to disturb.

My principle reason here appearing is an amicus is not so much to argue the facts of whether the Court's decision was correct or whether the Court of Appeals applied the correct tests.

That I think is the key issue in this case.

And we would urge that the Court of Appeals did apply the correct tests.

Where they reach the correct result applying the test is a different story.

Well, we think the correct test should be one as the Court of Appeals did of whether the employer and all the circumstances of the case and on a case by case approach adopted a -- had a legitimate business purpose for its testing requirement or for its educational requirement.

Thurgood Marshall

Without regard to job relation?

Lawrence M. Cohen

Yes, I think job relationship is one aspect and not the only aspect of the case.

Thurgood Marshall

But should they consider your brief?

Lawrence M. Cohen

Oh absolutely!

But it should not be determinative either under the EEOC's guidelines or under business necessity test.

Warren E. Burger

Well, let me be sure that I understand your response to my hypothetical question.

If the fruit pickers and farmworkers down the southwest had this English language test, you'd regard that as not very job related?

Lawrence M. Cohen

No, I would -- my feeling is you can never prove that there was a business necessity for that test and nor that it was job related in the sense that the employers had to have that skill in order to perform the job.

It probably would not -- if it had not as I understand the petitioner's position, if it had not been validated and which includes job relatedness.

Under the EEOC's guidelines, the employer could not use it.

Warren E. Burger

There command of English would be relevant only to the extent that was necessary to understand the instructions, isn't that about that?

Lawrence M. Cohen

You would have to demonstrate that the employers could not do the job if they did not have an understanding of English.

Have the employer -- that an understanding of English was essential to the job.

The employer could not prove those two points.

He would have violated the law.

Thank you.

Warren E. Burger

Thank you Mr. Cohen.

Mr. Greenberg you have about 10 minutes left.

Jack Greenberg

Mr. Chief Justice, may it please the Court.

I would like to get to the record in this case because I would like to assert to this Court that this record nowhere demonstrates that this high -- the high school education or the ability to pass the test is related to any job that is from labor to coal handler or from coal handler to anywhere else.

That's saying that in some plants, somewhere and some records, someone might not demonstrate that and if they did, it would be a different case.

It is not demonstrated here and I'd like to read this, "But two of many proportions of the record that indicate that the contrary is --

What -- where are you reading?

Jack Greenberg

Well, I'm going to read from page 179, Dr. Moffie, the respondent's industrial psychologist and he said the same the number of times.

But here he said, "They're trying to validate each job.

We are doing job related validities.

For example, we have completed one study where --

Warren E. Burger

That's about one-fourth of the page down, isn't it?

Jack Greenberg

That's right.

We have completed one study.

We had taken over roughly 100 to 200 people in some categories.

Well, over 200 people of different job levels where we have attempted to validate the Wonderlic.

And we are finding as pointed out this morning by Dr. Barron.

Dr. Barron is the petitioner's expert that we are too broad.

You can find that throughout the record.

Now as to the high school education on page 188 and of course this is redundant because the test in this case is meant to demonstrate whether they are average high school graduate and so it is redundant but in any event, Dr. Moffie says, "High school education would merely tell you that you have the necessary --

Warren E. Burger

Let's locate our spot first.

Jack Greenberg

188, just above the colloquy on the bottom of the page.

Warren E. Burger

Alright.

Fine.

Jack Greenberg

High school education would merely tell you that you have necessary abilities as defined by a high school education and if the company feels that this is required in this job that's all that would tell you.

That's what respondents in the amicus is saying that if the company feels that you ought to have this qualifications then the company ought to have the right to do it and -- but that's not what the statute says.

The statute changes the pre-existing situation and says its unlawful employment practice for an employer too.

And I'll just summarize here, classify employees in any way which would deprive or tend to deprive any individual employment opportunities or otherwise adversely affect the status.

And the statute says you may not classify them.

They have classified them by ability to take the tests and have a high school education and it deprives and certainly tends to deprive them and adversely affects them with respect to employment and promotion and pay.

And we submit that's a violation of the statute.

Now there is an exception in this statute that was referred to.

Section 703 (h) which is the professionally developed ability test provision and that comes out of the Motorola case which was referred to.

The Motorola case was a case quite unlike this case.

Motorola and this case are not the same cases at all.

Motorola was a case in which a Hearing Examiner held that even though a Negro applicant for a job could not pass a test and could not do the job, he nevertheless ought to be employed with some notion of compensatory employment, compensatory credit for being deprived and so forth and so on.

And that's not this case and that's not this statute.

If these petitioners were taking a job validated, job related tests and they could not pass the tests and not passing the tests indicated they could not do the job, we would not be here today.

But these are tests which the respondents have considered throughout the record do not indicate anything at all about the ability to do job.

Non-high school graduates are in Coal Handling, Maintenance, Laboratory and Test, Operations.

They are being promoted at the same -- approximately as the calculations in the Government's brief indicates and promoted at the

same rate as high school graduates, they are earning approximately the same pay as high school graduates and the argument that they have to be able to pass these tests go from Labor to Coal Handling so that that they then can reach some very much higher lever at the plant.

It's just not born out in addition to which I mean just to look at --

Mr. Greenberg, perhaps you're saying that on the facts here there are -- the Company hasn't made out that any of its other jobs, the higher jobs require a high school diploma or an ability to pass these tests.

Let's assume that it shall not though although the jobs in which they were hiring initially didn't require it.

Jack Greenberg

Then we would have a different case.

If it were shown that this --

I know we'll have different case but as you come out on it.

Jack Greenberg

If it were shown that these were a place -- a plant with rapid and frequent promotion which is not true here, the place is stagnant, it were stable as the call it.

But anyway, promotions are from inside mostly?

Jack Greenberg

If promotions were from inside and it were necessary to -- and the company can demonstrate that blocking up the lines of progression would adversely affect the operation of the plant.

We would not be urging the position, our position with respect to that situation.

In other words, it would be job related.

It would be job validated but in some other sense with regard to promotability.

As Judge Sobeloff, I gather would agree with what you just said and he said that however, there's been no showing in this case that any -- that these tests are related in any of these other jobs.

Jack Greenberg

That's right, it's not -- I mean you can divide the job validation issue into two parts.

The job validation as respect to medium employment and future employment over some period of time and that second category is not quite as simple because I think the company might have to demonstrate that there is a regular flow of people through the plant and if they can't function with people stopping of somewhere along the way up the ladder.

But nevertheless, if they could show that and they could show that it would interfere with their functioning properly to have people sort of stop in the line of progression not to conform in and supervise this and so forth, then they would have establish a current of job validation.

But they haven't even done that here.

They just made an assertion about it.

And that's not adequate to divest the petitioners of their rights, we would submit.

You don't think general allegations that there are a lot of jobs on the ladder that require some kind of abstract skills and things like that isn't -- it's just not enough?

Jack Greenberg

I would say that would be enough -- not enough when you're dealing in an area like this where without speaking about any particular case, there's a lot of duplicity going on and a lot of cases.

You have to have something you can deal with objectively but quite a part from that, we have non-high school graduates across the total range of employment in these plants, so it just really doesn't hold the water.

Just a final word about 703 (h), we submit that the Equal Employment Opportunity Commission which is charge by the statute with the enforcement of the statute is in a particular peculiar -- peculiarly advantageous position to construe it and it has construed the term professionally developed ability test to mean a job validated test.

So far as the legislative history is concerned, briefs are full of it.

We think that the conclusion of the Equal Employment Opportunity Commission should be dispositive.

We think that we have demonstrated quite clearly in the brief of legislative history indicates that one ought to be able to pass a test which indicates his ability to do a job not just to pass a test in the abstract which doesn't indicate anything at all.

Mr. Chief Justice you asked the question about the ability to speak Spanish.

There was a case quite like that which was settled that that was against one of the southwestern power companies but involved height.

In order to be a lineman, you had to be above a certain height and for variety of reasons, Mexican Americans in that part of the county were not above the certain height, generally speaking and they could not get the job.

Yet there was no indication that height had anything at all to do with the ability to do the job.

Proceeding was brought and the case was settled but it never came to a decision.

But we would submit that if one could show that this was a height test and that only one-third as many black people qualified for the

height test as white people and that height had nothing whatsoever to do with the ability to do the job, we've exactly this case here and that the result should be the same.

Warren E. Burger

Let me ask you this Mr. Greenberg.

Suppose in terms of eligibility to intern in a hospital.

The hospital standard required that they be persons whose scholastic training and general aptitude is measured by some reasonable tests, such that they would be qualified to become staff members.

In standing alone, would you grant that as a reasonable criteria?

Jack Greenberg

Mr. Chief Justice, it's not a subject of which I know anything at all but it would seem to me that a medical education is really is ought to be directly related to the ability to practice medicine and once the excellence of one's training and what one has learned has demonstrated by his record would bear some relation.

I would assume that's --

Warren E. Burger

The implication of my question are that some medical graduates would and some would not be able to meet that ultimate test of being ultimately qualified to be staff members.

Jack Greenberg

Well, I would assume that relevant criteria would be used and that would be job validated.

I would think that it make sense to me.

I can't imagine why it wouldn't but it's not -- it's anything I really know anything about.

Warren E. Burger

Thank you Mr. Greenberg.

visited on 1/24/2019

Thank you gentlemen.

Thank you.

The case is submitted.
