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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners,*

v.

ALFRED E. DAVIS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

American Society for Personnel Administration ("ASPA") moves the Court under Rule 42 for leave to file a brief herein as *amicus curiae.*

ASPA's interest in this case arises from its position as the country's largest association of personnel and industrial relations executives, representing nearly 15,000 professionals in business, government, and education dedicated to the furtherance of personnel and industrial relations management. ASPA and its members are accordingly intensely interested in aptitude testing in employment as a tool for making decisions purely on merit. As such, testing has statutory blessing. 42 U.S.C. § 2000e-2(h). That it not be inadvertently undercut by the courts is of the utmost importance.

Numerous cases in the lower courts in recent years have displayed a tendency to depart from long-established judicial standards in dealing with aptitude testing cases. This is a matter of broad concern transcending the immediate interests of the parties to the case at bar. Consideration of this matter from a broader perspective than those of the immediate parties will, it is hoped, be of substantial assistance to the Court.

ASPA recognizes that this case involves public employment, and that different principles may apply to public and private employers in some situations. However, the problems with which ASPA is here concerned have arisen in both contexts, and guidance applicable to both is needed.

ASPA therefore seeks leave to file a brief as an *amicus curiae* in the classical traditional sense: not to weigh in on one side or the other, but to try to further "the public interest in the administration of justice," *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575, 581 (1946), by ensuring that the Court is

made fully aware of the context of decisions such as that in this case, and is alerted to the kinds of pitfalls into which some opinions of lower courts have occasionally fallen and may fall in the future unless given guidance. ASPA hopes both that such an exposition may be useful to the Court in deciding this case, and that the Court may find it appropriate to give the lower courts guidance in this respect. ASPA takes no position on the merits of the case at bar.

Respectfully submitted,

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November 20, 1975

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BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of American Society for Personnel Administration as *amicus curiae* is set forth in the foregoing Motion.

SUMMARY OF ARGUMENT

In cases involving aptitude testing in employment, there is a strong tendency among the lower courts to enunciate broad, and sometimes highly controversial

or indeed erroneous, general principles and to treat such propositions as if they were precedents of law. The Court should take the opportunity afforded by this case to reaffirm appropriate judicial standards in the treatment of such cases.

ARGUMENT

A. Observations on the Issue of What Constitutes a Prima Facie Case.

We touch briefly on the first issue raised by the case at bar: whether plaintiffs below had made out a *prima facie* case of employment discrimination.

We confess to some uncertainty as to the precise way in which the record here presents that issue. We will merely point out that what the court below *may* have held was that a selection process, whose *net effect* is non-discriminatory, becomes nevertheless *prima facie* unlawful if any one sub-element thereof has an adverse effect on a protected group. If so, it is clearly wrong on general legal principles, on the words of the statute, and on the decisions of this Court. Wrong on general legal principles because the law takes no account of abstract circumstances without tangible results. *E.g., Clark* v. *Kansas City*, 176 U.S. 114, 118 (1900); *Wolff* v. *Selective Service*, 372 F.2d 817, 823 (2d Cir. 1967). Wrong on the words of the statute because a right of action arises only if there is some "person claiming to be aggrieved," 42 U.S.C. § 2000e-5(f)(1), and there can be no "aggrievement" if there is in fact no discrimination. Wrong on the decisions of this Court, because the touchstone of lawfulness in allegedly discriminatory employment practices is the bottom-line *result*

and nothing else, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); and because with specific respect to aptitude testing, what makes a *prima facie* case is a showing that the tests in question do in fact "*select* applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975) (emphasis added).

What follows herein assumes that a *prima facie* case has been made, and is therefore addressed to considerations bearing on an employer's showing of job-relatedness of aptitude tests.

B. The Court Should Take This Opportunity To Reaffirm Appropriate Judicial Standards In Cases Involving "Professionally Developed Ability Tests."

Aptitude testing [1] is an established, growing, scientific discipline within the broader field of applied psychology. Like any scientific discipline, testing is a progressive science. The frontiers of knowledge advance; controversies rage and are settled; once-popular theories are disproved and discarded. The superstructure of the discipline is scientific experiment and analysis of empirical results. Its underpinning is mathematics, especially but not exclusively mathematical statistics. This is because the validation of tests—that is, the demonstration of their "job-relatedness," in the terminology of the *Griggs* and *Albemarle* cases—is often done by correlation analysis and similar statistical methods. As a result, like any scientific discipline testing has a formidable jargon and a wealth

[1] We use this term for convenience to cover the whole field of "professionally developed ability tests" whose appropriate use is sanctioned by 42 U.S.C. § 2000e-2(h).

of technicality among which the uninitiated must tread warily.[2]

While evaluation of such issues should thus not be lightly undertaken, their evaluation on a proper record is perfectly within the competence of the district courts. For all its technicality, aptitude testing is not an arcane mystery beyond the ken of intelligent judges. With competent advocacy and the aid of qualified expert testimony, testing issues are no more and no less difficult than technical medical issues in personal injury cases, or abstruse engineering and chemical questions in patent cases, or obscure points of metallurgy in aviation accident cases, or complex valuation factors in condemnation cases, or dozens of other technical issues that judges are called upon to examine every day. The courts are fully qualified to examine and pass on such issues *when they are presented to them on proper records.* Indeed, they would be abdicating their function if they did not do so—particularly where, as in the field of equal employment opportunity, the Congress has been scrupulously careful to confide enforcement powers to the courts and not to an administrative agency. Job-relatedness is an issue of fact like other issues of fact; and "if justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try." O. W. HOLMES, THE COMMON LAW 48 (1881).

We are concerned by a seeming trend away from the normal judicial function in testing cases which we submit, with greatest respect, deserves the Court's atten-

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[2] A. ANASTASI, PSYCHOLOGICAL TESTING (3rd ed. 1968), is a particularly lucid introduction to the whole field. The author is a former President of the American Psychological Association.

tion. We have no desire to impose upon the Court a long catalogue of examples; confining ourselves rather to a few specifics that of themselves warrant concern over the whole.

1. THE IMPORTANCE OF CAREFULLY DEFINED HOLDINGS GROUNDED IN THE SPECIFIC RECORD IN TESTING CASES.

First, the Court should be aware that existing precedents on testing sometimes rest on very thin records. This fact is evident from the number and nature of such cases that have reached this Court. *In the ten years since the effective date of Title VII, this Court has never had before it a substantial and fully-developed record in a testing case.* In *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), there was no such record at all, for the employer had made no effort whatever to show that the tests were job-related; indeed, that was the key point of the case. 401 U.S. at 431. In *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), the employer had likewise made no effort to investigate job-relatedness until the issuance of the *Griggs* opinion on the eve of trial made such an effort imperative; whereupon it retained a consultant who spent half a day at the plant and suggested a study which was conducted by plant officials without his supervision and produced a set of results which this Court properly called an "odd patchwork." 422 U.S. at 429-30, 432. Since there was no showing of job-relatedness at all in *Griggs,* the "quick and dirty" study in *Albemarle* is the *only* test validation record before this Court in the ten years of the statute's history.

Cases that reach this Court are generally fair samples of the cases in the courts below; and consistently with this general rule the records in many cases before the lower courts have, we believe, been little or no

more extensive.[3] And a related consideration is that an extraordinary number of often-cited testing cases —including *Griggs, Albemarle,* the case at bar, and many of the testing cases cited by the court below in the case at bar—have involved evidence on the subject of aptitude testing presented by the same witness.[4] We note these facts for no invidious purpose. They simply underscore that although an appreciable body of case law on testing has been developed in the lower courts, its real precedential value is not robust; for it is comparatively lacking in that "clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument

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[3] See, *e.g.,* Vulcan Soc. v. Civil S.C. of N.Y., 490 F.2d 387, 396-97 (2d Cir. 1973); United States v. N. L. Industries, 479 F.2d 354, 371-72 (8th Cir. 1973); Officers for Justice v. Civil S.C. of S.F., 371 F.Supp. 1328, 1337-38 (N. D. Calif. 1973); Bridgeport Guardians v. Members, 354 F.Supp. 778, 792-93 (D. Conn.), *affirmed in part and reversed in part,* 482 F.2d 1333 (2d Cir. 1973).

[4] Including at a minimum Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *petitions for cert. pending,* Nos. 75-239 and 75-393; Kirkland v. New York State D. of C. S., 10 E.P.D. ¶ 10,357 (2d Cir. 1975); Rios v. Enterprise Association, 10 E.P.D. ¶ 10,272 (2d Cir. 1975); Smith v. Troyan, 10 E.P.D. ¶ 10,263 (6th Cir. 1975); Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); N.A.A.C.P. v. Allen, 493 F.2d 614 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. H. K. Porter Co., 491 F.2d 1105 (5th Cir. 1974); Young v. Edgcomb Steel, 499 F.2d 97 (4th Cir. 1974); Bridgeport Guardians v. Members, 497 F.2d 1113 (2d Cir. 1974), *cert. denied,* 95 S. Ct. 1997 (1975); Guardians Association v. Civil S. C. of N. Y., 490 F.2d 400 (2d Cir. 1973); Harper v. Baltimore City Council, 486 F.2d 1134 (4th Cir. 1973); Pennsylvania v. O'Neill, 473 F.2d 1029 (3rd Cir. 1973); Allen v. Mobile, 466 F.2d 122 (5th Cir. 1972), *cert.*

exploring every aspect of a multifaceted situation embracing conflicting and demanding interests. . . ." *United States* v. *Fruehauf,* 365 U.S. 146, 157 (1961). Case-law built on such foundations necessarily consists to a substantial degree either of *obiter dicta* or of propositions reached by default—perhaps as a form of judicial notice—because of the absence of countervailing evidence. Neither type of proposition should have precedential force under our system. Yet both tend to receive it; for, as a high authority has warned, "dicta are not always ticketed as such, and one does not always recognize them at a glance." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30 (1921).

The testing cases already contain a number of general theoretical propositions stated as if they were law. Support can be found in them for such intensely controversial—if not downright idiosyncratic—concepts as that a properly articulated and supervised assessment of overall job performance is never an acceptable

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denied, 412 U.S. 909 (1973); Castro v. Beecher, 459 F.2d 757 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Colbert v. H-K Corp., 444 F.2d 1381 (5th Cir. 1971); United States v. Jacksonville Term. Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); Pennsylvania v. Rizzo, 8 E.P.D. ¶ 9681 (E.D. Pa. 1974); EEOC v. Garland Bank & Trust Co., 9 E.P.D. ¶ 9875 (N.D. Tex. 1974); Kinsey v. Legg, Mason & Co., 8 E.P.D. ¶ 9767 (D.C. 1974); United States v. Chicago, 385 F.Supp. 543 (N.D. Ill. 1974); Holliman v. Price, 7 E.P.D. ¶ 9069 (D. Mich. 1973); Shield Club v. Cleveland, 370 F.Supp. 251 (N.D. Ohio 1972); Hart v. Buckeye Industries, 46 F.R.D. 61 (S.D. Ga. 1968); Wilson-Sinclair Co. v. Griggs, 211 N.W.2d 133 (Iowa 1973); plus various cases unreported or still under submission, including James v. Stockham Co., No. 70-G-178, N.D. Ala., from Exhibit 103 in the record of which the foregoing list was taken. See also G. Cooper and R. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1637 n.1 (1969).

criterion measure;[5] that a test is to be judged in arbitrary dichotomous "pass/fail" and "job success/job failure" terms rather than as the rank-ordering device that a test usually represents in practice;[6] that blacks and whites are so different, and the abstract likelihood that tests will be job-related for whites but not for blacks is therefore so great, that employers must conduct separate studies and may even have to hire enough blacks to do so;[7] that it is not enough to show a test to be job-related, but it must further be shown to be job-related in exactly the way the employer thought it

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[5] *Contrast, e.g.,* Rogers v. International Paper Co., 510 F.2d 1340, 1350-51 (8th Cir.), *cert. granted, judgment vacated and remanded,* No. 74-1446 (October 6, 1975), *and* United States v. Chicago, 385 F.Supp. 543, 549 (N.D. Ill. 1974), *with* E. McCormick & J. Tiffin, Industrial Psychology 195 (6th ed. 1974); C. Lawshe & M. Balma, Principles of Personnel Testing 42, 50 (2d ed. 1966). By contrast, when this Court touched on a similar question in *Albemarle* it was careful to point out that there was "simply no way to determine" the adequacy of the ratings on the record in that case. 422 U.S. at 433.

[6] This concept is implicit in the argument that something is wrong with a test because there exist employees who scored low on it and yet are "performing satisfactorily." See, *e.g., Rogers, supra,* 510 F.2d at 1351; United States v. Jacksonville Term. Co., 451 F.2d 418, 456 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972). Discussion of this matter would entail concepts which cannot be treated briefly here but which include the proposition that in many jobs there may be a broad continuum of "success" between the outstanding performer and the employee who barely manages not to get fired. Advanced mathematical analysis reveals a connection between this concept and the question of test utility. See L. Cronbach & G. Gleser, Psychological Tests and Personnel Decisions 50-51, 68 (2d ed. 1965).

[7] *Compare* United States v. Georgia Power Co., 474 F.2d 906, 914-15 (5th Cir. 1973), *with* L. Humphries, *Statistical Definitions of Test Validity for Minority Groups,* 58 J. Applied Psych. 1, 2 (1973); see pp. 11-12, *infra.*

was;[8] that the most meticulous showing that a test is a valid actual sample of the work itself would be insufficient as a matter of law unless the employer proved that complex mathematical validation was unfeasible;[9] that success in training for a job cannot possibly be a proper criterion of success on the job itself.[10]

And there is a great temptation in this field to treat factual determinations as if they were legal precedents. At least one court has gone to the extraordinary length of, in effect, holding a specific test to be "race-oriented" in one employment context because of *another* employer's *failure of proof* with respect to it in a wholly *different* case involving a wholly *different* industry and in a wholly *different* circuit. *Franks* v. *Bowman Transp. Co.*, 495 F.2d 398, 412 (5th Cir.), *cert. denied*, 419 U.S. 1050 (1974).[11] The very case at bar presents

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[8] *Cf.* the opinion below in the case at bar, 512 F.2d at 963; United States v. Georgia Power Co., 474 F.2d 906, 917 (5th Cir. 1973).

[9] *I.e.*, that as a matter of law "content validity" or other types of validity cannot be shown unless "criterion-related" validation has been shown to be unfeasible. *E.g.*, Kirkland v. New York State D. C. S., 10 E.P.D. ¶ 10,357 (2d Cir. 1975); Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Western Addition C.O. v. Alioto, 360 F.Supp. 733, 736 (N.D. Calif. 1973), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir. 1975), *petition for cert. pending*, No. 75-309.

[10] Despite the disclaimer of the court below, 512 F.2d at 964 n.59, that is the strong import of its holding in the case at bar. See *id.* at 963 n.50.

[11] *Contrast* Wilson-Sinclair Co. v. Griggs, 211 N.W.2d 133, 141-42 (Iowa 1973). This reflects a not uncommon line of argument in these cases. See, *e.g.*, Brief for Respondent in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), at 19n. 23 and 21. It is to be hoped that the Court's language in *Albemarle*, 422 U.S. at 432, has laid this argument to rest; if validity of a test is not transferable from one job to another without appropriate evidence, neither is the converse true.

an example both of the unwitting adoption of scientific fallacy by one court and the following of it as a precedent by another. In an obscure and innocuous-seeming footnote in *Boston Chapter* v. *Beecher,* 504 F.2d 1017, 1024 n. 13 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975), the court evidently endorsed a measure of test utility that has been mathematically disproved since 1946;[12] and the court below cited this error with evident approval in the case at bar.[13]

In the memorable language of Mr. Justice Jackson, "It is timely again to remind counsel"—and perhaps the lower courts—"that words of [judicial] opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other

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[12] Stated very briefly, the proposition is that test utility varies as the square of the validity co-efficient, so that a test of validity .20 is only one-forth as "useful," rather than one-half as "useful," as a test of validity .40. Widely accepted forty years ago, this approach was mathematically disproved, with respect to the normal type of employment selection, in H. Brogden, *On the Interpretation of the Correlation Coefficient as a Measure of predictive Efficiency,* 37 J. EDUC. PSYCH. 65 (1946). See also L. CRONBACH & G. GLESER, PSYCHOLOGICAL TESTS AND PERSONNEL DECISIONS 68 (2d ed. 1965); *cf.* H. TAYLOR & J. RUSSELL, *The Relationship of Validity Coefficients to the Practical Effectiveness of Tests in Selection,* 13 J. APPLIED PSYCH. 565 (1939).

[13] 512 F.2d at 962 n. 38; *accord,* Douglas v. Hampton, 512 F.2d 976, 985 n. 68 (D.C. Cir. 1975). Incidentally, the court below seemingly confused the well-defined concept of "statistical significance," see, *e.g.,* A. ANASTASI, PSYCHOLOGICAL TESTING 76-77 (3d ed. 1968); United States v. Georgia Power Co., 474 F.2d 906, 915 (5th Cir. 1973), with the nebulous one of "practical significance," *i.e.,* the appropriate absolute magnitude of the validity coefficient, see 29 C.F.R. § 1607.5(c)(2). *Contrast* Boston Chapter v. Beecher, *ibid., with* ANASTASI, *supra* at 131, *and* L. CRONBACH, ESSENTIALS OF PERSONNEL TESTING 135 (3d ed. 1970), *and* E. MCCORMICK & J. TIFFIN, INDUSTRIAL PSYCHOLOGY 111 (6th ed. 1974).

facts are often misleading." *Armour & Co.* v. *Wantock,* 323 U.S. 126, 132-33 (1944). And in the equally memorable language of Lord Justice Bowen, "*obiter dicta,* like the proverbial chickens of destiny, come home to roost sooner or later . . . ." *Cook* v. *New River Co.,* 38 Ch. D. 56, 70-71 (1886). Such propositions are especially true in a technical field of social science like testing.

2. TWO SPECIAL PROBLEMS

Particularly worth noting are two problems which have already begun to afflict the courts and with respect to which a warning against any dogmatic approach is especially timely. They are not directly involved in this case on the present record, but they are adumbrated by the language of the opinion below, 512 F.2d at 961, and may well come up if the case is remanded for a full trial.

The first is the theory of "differential validity"—the theory that tests valid for whites might be less valid, or invalid, for blacks, thus unjustly rejecting blacks for employment by erroneously predicting their inability to perform the job. Nothing in testing has been more dramatic than the rise and fall of this theory. It has a manifest appeal. It was widespread in the 1960's. See, *e.g.,* G. Cooper and R. 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); J. KIRKPATRICK ET AL., TESTING AND FAIR EMPLOYMENT (1968). But subsequent more carefully designed research failed to find any substantial evidence of such a phenomenon, *e.g.,* J. CAMPBELL ET AL., AN INVESTIGATION OF SOURCES OF BIAS IN THE PREDICTION OF JOB

PERFORMANCE: A SIX-YEAR STUDY (1973); while at the same time the mathematical soundness of many of the studies purporting to find the phenomenon came into grave question, see, *e.g.*, L. Humphries, *Statistical Definitions of Test Validity for Minority Groups,* 58 J. APPLIED PSYCH. 1 (1973), and more sophisticated mathematical analysis showed that the experimental results purporting to support the concept could be accounted for by chance and thus proved nothing. *E.g.*, E. O'Connor et al., *Single-Group Validity: Fact or Fallacy?,* 60 J. APPLIED PSYCH. 352 (1975); F. Schmidt et al., *Racial Differences in Validity of Employment Tests: Reality or Illusion?,* 58 J. APPLIED PSYCH. 5 (1973). The theory of black/white differential validity, once widely accepted, would now, we believe, be shown on a full record to command the adherence of at most a small minority of qualified professionals. Yet more than one court has accepted it in terms that suggest that it has the force of law.[14]

Above and beyond the differential validity theory, a second and thornier set of problems lies ahead: the question of test "fairness" or "unfairness" to minorities. The initial difficulty will be to define "fairness" itself, for there are competing and inconsistent definitions, and adoption of any one means tacit and perhaps unwitting adoption of a legal position that may by no means be immediately apparent. At least four such

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[14] *E.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 313 (6th Cir. 1975), *petitions for cert. pending,* Nos. 75-239 and 75-393; Rogers v. International Paper Co., 510 F.2d 1340, 1350 (8th Cir.), *cert. granted, judgment vacated and remanded,* No. 74-1446 (October 6, 1975); United States v. Georgia Power Co., 474 F.2d 906, 913-15 (5th Cir. 1973); see Vulcan Soc. v. Civil Service Commission of New York, 490 F.2d 387, 395 n. 10 (2d Cir. 1973).

definitions have already been advanced, differing in subtle respects.[15] Although each of these definitions can be plausibly phrased in lay language, they are in fact mathematically inconsistent with one another. See, *e.g.,* Q. McNemar, *On So-Called Test Bias,* 30 AMER. PSYCHOLOGIST 848 (1975). Research has generally failed to find tests "unfair" to blacks under the most widely accepted definition.[16] *And it can be mathematically demonstrated that each of the other definitions requires quota hiring in order for a test to qualify as fair. E.g.,* F. Schmidt et al., *Racial and Ethnic Bias in Psychological Tests: Divergent Implications of Two Definitions of Test Bias,* 29 AMER. PSYCHOLOGIST 1 (1974).

We do not raise any of these technical matters to ask that the Court here make any substantive pronouncement on them. It would not be appropriate to impose

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[15] In technical terms, one defines "unfairness" in terms of comparative regression lines for blacks and whites. A. Cleary, *Test Bias,* 5 J. EDUC. MEASUREMENT 115 (1968). Another defines it in terms of population subgroup differences on the tests versus population subgroup differences on the criterion measure. R. Thorndike, *Concepts of Culture-Fairness,* 8 J. EDUC. MEASUREMENT 63 (1971). Another definition is based on a reverse regression formulation: whether scores on job performance underpredict test scores. N. Cole, *Bias in Selection,* 10 J. EDUC. MEASUREMENT 237 (1973). A fourth defines fairness in terms of the correlation between test scores and subgroup membership. R. Darlington, *Another Look at "Cultural Fairness",* 8 J. EDUC. MEASUREMENT 71 (1971).

[16] *E.g.,* S. Gael et al., *Employment Test Validation for Minority and Non-Minority Clerks,* 60 J. APPLIED PSYCH. 420 (1975); S. Gael et al., *Employee Test Validation for Minority and Non-Minority Telephone Operators,* 60 J. APPLIED PSYCH. 411 (1975); J. CAMPBELL ET AL., AN INVESTIGATION OF SOURCES OF BIAS IN THE PREDICTION OF JOB PERFORMANCE: A SIX-YEAR STUDY 170-71 (1973); W. RUCH, A RE-ANALYSIS OF PUBLISHED DIFFERENTIAL VALIDITY STUDIES (1972).

on the Court's time at this stage even to elucidate the jargon in which these problems are expressed. Nor would we expect respondents to agree with the positions set forth above on any of them. That they are disputed issues is exactly the point. We mention these issues to alert the Court to the kinds of questions that can be involved in testing cases, and to the kinds of pitfalls that lie in wait for courts if craftsmanlike caution is not exercised in these cases as in any other. And if the Court enjoins such restraint on the lower courts it will be echoing the strong cautionary language of the authoritative standards of the psychological profession itself.[17]

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[17] "... [T]est users can never follow all the procedures that might be desirable."

"...."

"... Any test or testing situation may present some unique problems; it is undesirable for the standards to be treated as unduly rigid ...."

"...."

"It is important to recognize that there are different definitions of fairness, and whether a given procedure is or is not fair may depend upon the definition accepted. Moreover, there are statistical and psychometric uncertainties about some of the sources of apparent differences in validity or regression. Unless a difference is observed on samples of substantial size, and unless there is a reasonably sound psychological or sociological theory upon which to explain an observed difference, the difference should be viewed with caution."

GUION ET AL. (AMERICAN PSYCHOLOGICAL ASSOCIATION ET AL.), STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 6, 44 (1974).

It should be noted that these standards are far different from, and more comprehensive than, the earlier APA Standards of 1966, which were written for test producers, not test users, and were outdated by 1971. *Id.* at 1. The court below in the companion case of Douglas v. Hampton, 512 F.2d 976, 984 n. 59 (D.C. Cir. 1975) failed to note the sharp difference between the two.

3. THE MATTER OF THE "GUIDELINES"

Much of the problem in the lower courts reflects wrestling with the testing "guidelines" promulgated five years ago by the Equal Employment Opportunity Commission. 35 Fed. Reg. 12333 (August 1, 1970), codified at 29 C.F.R. Part 1607.[18] The Court may find it advisable in this case to enlarge upon its recent warning with respect to these "guidelines." Just last term in *Albemarle,* the Court cautioned anew that, though obviously entitled to "great deference," these "guidelines" most definitely "are *not* administrative 'regulations' promulgated pursuant to formal procedures established by the Congress." 422 U.S. at 431 (emphasis added). As such they have no legislative force; Congress has studiously withheld from the EEOC the authority to promulgate substantive rules. 42 U.S.C. § 2000e-12(a).[19] At most they are interpretive rules, and interpretive rules are in no sense binding upon courts. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973); *cf. Detroit & T.S.L.R. Co.* v. *United Transportation Union,* 396 U.S. 142, 158-59 (1969).

This is particularly true of EEOC "guidelines." The EEOC is not a true regulatory agency, engaged pursuant to delegated authority in the quasi-legislative and quasi-judicial administration of a complex regula-

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[18] While the "guidelines" have been only indirectly involved in this case hitherto, in a companion case the court below has leaned heavily on them as governing public employment. Douglas v. Hampton, 512 F.2d 976, 986 (D.C. Cir. 1975). They will unquestionably be involved in any full hearing of this case on remand.

[19] Such a power would have been granted under § 714(a) of the parent bill as reported by the House Judiciary Committee, see H. REP. No. 914, 88th Cong. 2nd Sess. 14, 31 (1964), but was limited to *procedural* rulemaking by a floor amendment sponsored by Representative Celler. 110 CONG. REC. 2575 (February 8, 1964).

tory scheme entailing continuing expertise in a host of technical and economic factors into whose arcana courts are ill-equipped to delve. Contrast *Railroad Comm.* v. *Rowan & N. Oil Co.*, 311 U.S. 570, 575-76 (1941).[20] It is not "charged with [the] execution" of the statute, *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969). It is the *courts* that are so charged; the EEOC is an advocate, with both the power and the duty to come into the courts to achieve its goals like any other litigant, 42 U.S.C. § 2000e-5(f); see A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 40-41, 46-47, 81-86 (1971); and as such its interpretations are peculiarly open to rebuttal. "Studies so closely controlled by an interested party in litigation must be examined with great care." *Albemarle,* 422 U.S. at 433 n. 32. And the EEOC "guidelines" had their genesis in precisely such "interest." See A. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59, 60 (1972). The deference owed even to "an expert tribunal"—much less that owed to an advocacy agency—"cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 318 (1965).

More than a generation ago Mr. Justice Jackson spelled out in a statesmanlike opinion for the whole

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[20] It is not even "the only game in town." Both the Department of Labor and the Civil Service Commission have authority—in the case of the former, substantially overlapping authority as far as major employers are concerned—to issue far more immediately-binding directives concerning employee selection techniques. See 41 C.F.R. Chapter 60, issued under Executive Order 11246, 3 C.F.R. 339 (Department of Labor); Civil Service Commission Examining Practices, 37 Fed. Reg. 21552 (October 12, 1972), implementing 42 U.S.C. § 2000e-16(a) as amended by P.L. 92-261, 86 STAT. 111 (1972).

Court the appropriate deference due to such an agency as the EEOC, with respect to which "Congress did not utilize the services of . . . [the] agency to find facts and to determine in the first instance whether particular cases fall within or without the Act," but "instead, . . . put this responsibility on the courts." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137 (1944). The Court there concluded that the weight of such an agency'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, if not power to control. . . . Each case must stand on its own facts." *Ibid.* In other words, such an interpretation by such an agency is always open to rebuttal in a particular case.[21] (And regardless of particular cases, such an interpretation may be open to general review by declaratory judgment and injunction if it imposes an unreasonable burden. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).) Some similar exposition, reaffirming and clarifying *Albemarle*, is particularly timely now for testing cases.[22]

C. Proper Disposition of the Case at Bar

To repeat: we take no position on the merits of the case, or on the interrelationship between these principles of judicial administration and the record below. Rather, we make three specific points:

1. We reiterate our uncertainty on the state of the issue as to whether respondents made out a *prima facie*

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[21] In *Albemarle*, of course, the employer offered on the record below no evidence questioning the "guidelines."

[22] *Compare* Vulcan Soc. v. Civil S. C. of N. Y., 490 F.2d 387, 394 (2d Cir. 1973), *with* Kirkland v. New York State D. of C. S., 10 E.P.D. ¶ 10,357, at 5483 (2d Cir. 1975).

case. The Court may or may not wish to remand for additional evidence and findings on this matter.

2. In no event should this Court hold as a matter of law on this record that training success cannot be a proper criterion of "job-relatedness." It may or may not be one, depending on the specific facts in a specific case. If the evidence in this record is conclusive that in this case training success has been shown to be a proper criterion, then petitioners should prevail. If the evidence in this record is conclusive that in this case training success has been shown *not* to be a proper criterion, then respondents should prevail on that issue. The Court may conclude that the case should be remanded to develop a full record on this point.

3. The Court should in any event provide guidance to the lower courts in the handling of these cases. Such guidance should include salutary warnings against overbroad statements of principles and against uncritical reliance on such statements from other cases, together with reconfirmation that the EEOC's "guidelines", while entitled to "weight," are not sacrosanct and are subject to appropriate examination. Such guidance will be particularly appropriate if, as seems not unlikely, the Court concludes that this case is not one for summary judgment and should be remanded to the district court for a full trial.

CONCLUSION

The Court should take this opportunity to reaffirm basic judicial principles in the handling of cases involving "professionally developed ability tests." This subject is no less and no more technical than innumerable other subjects with which courts deal. The courts can handle such issues and have the statutory duty to

do so. They should not abdicate this responsibility through overdone deference to the "guidelines" of an agency to whom the Congress has squarely denied both rulemaking and adjudicatory authority. Nor should they overlook the fact that job-relatedness is a *fact* question to be dealt with on an evidentiary record, not on broad principles amenable to judicial notice and precedential treatment. *Cf.* FED. R. EVID. Rule 201, and the Advisory Committee's Notes on Rules 201(a) and (e). The Court's reminder in *Albemarle* that the "guidelines" are not "regulations" was wise and opportune. This case affords a chance to reiterate that and other principles of sound judicial policy.

Few errors in history have been so fraught with mischief as the enshrinement of scientific theory in dogmatic law. *Cf.* D. JORAVSKY, THE LYSENKO AFFAIR (1970); G. DE SANTILLANA, THE CRIME OF GALILEO (1955); H. EVES, AN INTRODUCTION TO THE HISTORY OF MATHEMATICS 97 (1974) (legislative definition of *pi*). The Court should be alert to prevent that from happening here.

Respectfully submitted,

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