TITLE VII: DISCRIMINATORY USE OF TEST SCORES WATCHDOG

Evolution of the Regulation over Employment Test Score Usage from 703(H) to 703(L)

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I. INTRODUCTION

More than 200 years ago, Declaration of Independence drafter Thomas Jefferson opined that an individual's positioning and classification in the fledgling nation should be based on a "natural aristocracy" of his or her "virtues and talents."[1] Proponents of general aptitude examinations, such as those used by universities, surmised that one's "virtues and talents" could be correlatively methodized via one's individual problem-solving abilities under intense time constraints.[2] The College Board attempted to measure "essential intellectual qualities" such as "alertness, power, and endurance" through such intelligence tests.[3]

A testing experience in which many college goers can most certainly empathize is the infamous exam conducted nationally by the Educational Testing Service (ETS), the SAT – the most pervasively used college entrance exam.[4] In 1947 its initial year of operation, ETS instantly created a stir in the post-secondary community with its new, supposedly objective

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1. Andrea L. Silverstein, *Standardized Tests: The Continuation of Gender Bias in Higher Education*, 29 HOF. L. REV. 669, 673 (2000).

2. *Id.*

3. *Id*.

4. *See generally* DAVID OWEN, NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE xx (1985).

multiple-choice exams.[5] Firm in its belief that "a person's position in society should be determined by their scores on a series of multiple-choice tests," as well as "human superiority and inferiority can and [must] be measured scientifically,"[6] the ETS presumably believed that its new college entrance exams provided a remedy for the growing national concern of minorities being afforded an equal opportunity for access to higher education. After the passage of the Civil Rights Act of 1964, the ETS again marketed the SAT as a test that provided equality according to merit, with those marketing efforts resulting in the SAT successfully cornering the college exam market.[7]

Prior to the widespread use of the SAT in 1948, during the World War I military draft, military authorities conducted the Army Alpha and Army Beta tests.[8] The results of those tests were used to sort soldiers according to their perceived "abilities and potential,"[9] since the pending war undoubtedly afforded little time for any elaborate evaluative measures. Individuals scoring well on the exams were graded as officer material, while lesser performers were sorted into the less prestigious roles.[10]

Stated objectives of both the ETS as well as the military authorities were congruent with a widely held mid-twentieth century view: no person should be employed in work either above or below his or her ability.[11] That view was soon challenged by many involved in the great movement for social change in the latter half of the century.During the subsequent years of the 20th century, general aptitude testing became a hotly contested debate. Many questioned whether general tests were valid for comparing two employees holding different jobs within the same company, or comparing two employees holding similar jobs in different locations.[12] There was even a growing concern for whether the administering of tests between the different ethnicities was proper.[13]

This concern continued to grow as it became clear that minorities were regularly being excluded from employment opportunities based on

5. *See id.* at 6.
6. *Id.* at xxi.
7. *See id.* at 7.
8. Silverstein, *supra* note 1, at 672.
9. *Id.*
10. *Id.*
11. *Id.*
12. *See generally* John U. Ogbu, *Cultural Amplifiers of Intelligence: IQ and Minority Status in Cross-cultural Perspective*, *in* RACE AND INTELLIGENCE 241, 256-59 (Jefferson M. Fish ed., 2001).
13. *Id.*

disproportionately low test scores.[14] After all, although officially emancipated from slavery for more than 100 years, U.S. blacks were only negligibly assimilated into the workforce. If the tests evaluated prospective job applicants based on their intelligence and aptitude, it was inherently deplorable for a system in place which consistently excluded minorities at extraordinarily high rates. Enter Title VII of the Civil Rights Act of 1964, better known as Title VII, which was a post-World War II Act created to legislate the area of equal employment opportunity.

This writing takes you through a chronological advancement of the nation's use of employment related tests for evaluative and hiring purposes in the Title VII era. It first provides a basis for the rationale behind evaluative testing with regards to how employers utilize it in their hiring practices. It also describes, through case law and legislative history, what constitutes an unlawful use of tests by employers. Certain approaches in evaluative testing are reviewed, from the more general aptitude tests, to the more specific skill testing which seeks to supply the employer with a predictive measure of future work performance.

This paper also demonstrates how a Title VII claim is enforced, and by whom, along with remedies which are available to victims of a Title VII violation. It shows how companies have generally progressed in adhering to anti-discriminatory testing practices, a far cry from some of the blatant violations that – as this writing shows – were cleaned up during the early days of Title VII.[15] With the labor pool usually far exceeding the available work, employers have both the burden and delight of selecting amongst an abundance of qualified candidates. This writing establishes that while it is acceptable to use evaluative tests, certain guidelines ensure that persons of different demography enjoy an equal chance to be hired, as it is the role of the government to ensure that all opportunities are shared amongst its citizens.

Part II of this paper begins with an introductory sub-section on the Civil Rights Act of 1964, summarizing the developments leading up to its enactment, as well as detailing the language contained in its testing provision, 703(h). The second sub-section of Part II introduces the controversial Motorola case, a testing claim decided by the FEPC during the same juncture as the congressional debates for Title VII.[16] Next, a portion of Part II illustrates some of the legislative history behind the testing provision. During Title VII congressional hearings, there was much

14. *Id.*
15. *See infra* Part II.
16. *See infra* Part II.B.

discussion about Motorola, as Congress drafted 703(h) in light of its perceived fallacies.[17] The next sub-section introduces the Equal Employment Opportunity Commission ("the EEOC"), and defines its general powers and purposes. Also, there, a delineation of the grievance procedures for Title VII is explained, which details the manner in which a grievant's case progresses, from arbitration to, eventually, federal court.

Thereafter, a sub-section is then apportioned to the most influential 703(h) case, Griggs, outlining its important doctrines and standards which create stringent hiring guidelines that companies using tests must follow. Next, a sub-section is attributed to analyzing the different types of EEOC employment testing regulations. There, the regulatory agency for Title VII expands on the Griggs doctrines by imposing disparate impact standards that monitor the minority hiring rate of companies.[18] Further, psychological testing studies are examined, as the EEOC and American Psychological Association ("APA") cope with the concern of determining testing validity. And, the final sub-section of Part II explains the dubious practice of "race-norming." A controversial period of the 703(h) era, during the 1980s, many employers hired based on test score results with percentile adjustments tied to race.[19] This became the easiest employment method for some companies seeking to avoid Title VII disparate impact violations.

Part III of this paper details the modern day Title VII testing provision, as amended in the Civil Rights Act of 1991. Its first sub-section discusses the process of getting the CRA 1991 ratified through the executive and legislative branches. It also includes some congressional discussion about concerns on the state of testing that prompted its amending to the current version, 703(l), and exhibits the new language. And finally, the latter sub-section of Part III discusses the most recent litigation on the issue, observing that many current companies have adopted such measures as "race banding."[20] This technique allows the grouping of all test scores within a certain range by placing them on a single "band," thus overcoming 703(l)'s policy of prohibiting score adjusting.[21] Further, this sub-section is divided into two parts: the public and private sectors. The type of testing lawsuits brought in each sector usually differs, as does the court's evaluation process, with employment testing in the public sector typically carrying more weight, and causing more litigation, than the private sector.

17. *See infra* Part II.C.
18. *See infra* Part II.E-F.
19. *See infra* Part II.G.
20. *See infra* Part III.B.
21. *See id.*

II. HISTORICAL DEVELOPMENTS UP TO 1990

A. The Civil Rights Act of 1964

Originally, the Civil Rights Act of 1964 was derived from Fair Employment Practice legislation, a post-World War II proposal created to address the area of equal employment opportunity.[22] President Kennedy sought civil rights legislation by sending a draft proposal to the 88th Congress in 1963.[23] Soon after, H.R. 7152 was introduced by Congressman Celler of New York as the Administration's omnibus civil rights bill.[24]

Following the assassination of President Kennedy, civil rights legislation received high priority under the Lyndon Johnson administration.[25] The House Rules Committee cleared the bill for House action at the beginning of 1964.[26] The House adopted H.R. 7152 as amended by the Senate, with President Johnson ratifying on July 2, 1964.[27]

H.R. 7152 was a broad civil-rights measure with 10 titles.[28] The equal-employment opportunity provisions were contained in Title VII.[29] Other titles dealt with voting, public accommodations, public facilities, public education, federally assisted programs, registration and voting statistics, procedure in civil-rights cases, and appropriations and separability.[30] Title VII barred certain practices in an employment environment.[31] Among the sections of Title VII was 703(h), which governed the use of written examinations for the hiring or internal promotion evaluation process.[32] The language of 703(h) read, in relevant part:

> . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not

22. *See, e.g.*, Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941).

23. H.R. Doc. No. 124; *see also Delivering on a Dream: The House and the Civil Rights Act of 1964*, HISTORY, ART & ARCHIVES, http://history.house.gov/Exhibitions-and-Publications/Civil-Rights/1964-Essay/ (last visited Dec. 22, 2014) [hereinafter *Delivering on a Dream*].

24. *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules*, 88th Cong. 253 (1964) [hereinafter *Hearing on H.R. 7152*]; *see also Delivering on a Dream*, *supra* note 23.

25. 233 CONG. REC. 22838-39 (1963).

26. *See Delivering on a Dream*, *supra* note 23.

27. *See id.*

28. *Hearing on H.R. 7152*, *supra* note 24, at 91.

29. *Id.* at 2.

30. *Id.* at 91.

31. *See id.* at 95.

32. 42 U.S.C. § 2000e-2(h).

> designed, intended or used to discriminate because of race, color, religion, sex or national origin.[33]

B. Motorola

Actually, litigation for *Motorola, Inc. v. Illinois Fair Employment Practices Commission* did not end until two years after the enactment of Title VII.[34] Because the plaintiff, a black Motorola employment candidate, commenced action prior to the Civil Rights Act of 1964's enactment, he used his state's own fair employment grievance procedures already in place via the Illinois Fair Employment Practices Commission ("FEPC").[35]

The FEPC's ruling in *Motorola* sparked congressional debate over whether too much authority was granted to state governments to dictate employer hiring.[36]

Leon Myart, who was black, applied for a job as an analyzer on July 15, 1963, at Motorola's employment office in Franklin Park, IL.[37] Myart filled out the application and took the "general ability test No. 10."[38] Among other reasons for not being hired, Myart failed test No.10 with a score of "4," (a passing score was "6").[39] The interviewer conducted a regular interview with Myart, then subsequently rejected his application.[40]

On July 29, 1963, Myart filed a charge of unfair employment practice with the Illinois FEPC.[41] He claimed that he was not employed because of his race.[42] The FEPC investigated, filed a complaint against Motorola, and a public hearing was held on January 27, 1964.[43] Myart claimed to have received education and related training at Chicago high schools and trade schools to qualify him for the analyzer position.[44] On February 26, 1964,

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33. *Id.*

34. *Compare* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (enacted July 2, 1964), *with* Motorola, Inc. v. Ill. Fair Emp't Practices Comm'n, 215 N.E.2d 286 (Ill. 1966) (decided Mar. 24, 1966).

35. *See generally Motorola, Inc.*, 215 N.E.2d 286.

36. BRUCE P. LAPENSON, AFFIRMATIVE ACTION AND THE MEANINGS OF MERIT 4 (2009).

37. *Motorola, Inc.*, 215 N.E.2d at 288.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 95 (1996).

44. *See* ROBERT SAMUEL SMITH, RACE, LABOR, & CIVIL RIGHTS: GRIGGS VERSUS DUKE POWER AND THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY (MAKING THE MODERN SOUTH) 95 (2008).

the hearing officer issued a decision ordering Motorola to hire Myart as an analyzer, and to cease using test No. 10 in its employment screening.[45]

The FEPC determined that despite the fact Myart's test score yielded a passing result, Motorola nevertheless rendered his score as not passing, solely for discriminatory purposes.[46] "In addition to the evidence of prior discrimination" in Motorola's hiring practices, there was an "adverse inference which the [FEPC] derived from Motorola's failure to produce the actual test taken by Myart."[47] It was determined that Myart's test paper was destroyed just two months after administration, by which time Myart's complaint had already been filed.[48] As a result Motorola was under investigation by the FEPC.[49] The FEPC was thus reasonable in ruling that "[t]he destruction of the test under [those] circumstances . . . [was] evidence adverse to Motorola's contention that Myart did not pass the test.[50]

The state Circuit Court affirmed the FEPC's findings that the employer had committed unfair employment practice, which led to another appeal.[51] A little more than a year later, on March 24, 1966, the Supreme Court of Illinois reversed the decision after holding that the employer's "alleged unfair employment practice" in falsely recording the examination grade of Myart, in order to avoid hiring him, "was not established by preponderance of the evidence."[52] The court reasoned that the test might have been destroyed innocently.[53] If Myart's test score was falsely recorded because he was black, the court contended that at least two of Motorola's employees must have participated in that dishonest act, since all tests were re-graded by a different department.[54] The court concluded that the suspicion of impropriety in handling the exam score was not enough, because any sort of accusation must be proven under the preponderance of the evidence standard, which did not occur.[55]

45. *See Motorola, Inc.*, 215 N.E.2d at 288.
46. *Id.* at 292.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 289.
51. *Id.* at 288.
52. *Id.* at 294-95.
53. *Id.* at 294.
54. *Id.*
55. *Id.* at 294-95.

C. 703(h): Congressional Response to Motorola

Considerable congressional discussion was prompted by the initial hearing examiner's decision in Motorola, which suggested that standardized tests on which whites performed better than blacks were in fact prohibited.[56] "The decision was taken to mean that such tests could never be justified even if the needs of the business required them. A number of Senators feared that Title VII might produce a similar result."[57] However, Senators Case of New Jersey and Clark of Pennsylvania, co-managers of the bill that eventually became 703(h), attempted to abate concern by issuing a memorandum providing explanation of the bill: "[It] expressly protects the employer's right to insist that any [prospective] applicant," black or white, "meet the applicable job qualifications."[58]

Despite these assurances, Senator Tower of Texas introduced an amendment authorizing "professionally developed ability test[s]."[59] Proponents of Title VII opposed the amendment because it, as written, would permit an employer to give any test, "whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute."[60] Therefore, this amendment was defeated two days later, and Senator Tower offered a substitute amendment, which was adopted verbatim, becoming 703(h).[61] This new provision provided the EEOC with a sound basis for employment testing administration, hoping to balance the fine line between enforcement of discriminatory conduct, and not infringing upon the rights of employers.

D. The EEOC: Title VII Enforcement

Title VII authorizes the establishment of a Federal Equal Employment Opportunity Commission, and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title.[62] Pursuant to section 706, this organization is to provide a national, uniform method of enforcing alleged discriminatory practices by any

56. *See* 110 CONG. REC. 4, 5614-5616 (1964).

57. GERTRUDE EZORSKY, RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION 119 n.10 (1991).

58. 110 CONG. REC. 6, 7246 (1964) (statement of Sen. Clifford Case).

59. 110 CONG. REC. 10, 13492 (1964).

60. *Id.* at 13504 (statement of Sen. Clifford Case).

61. *See id.* at 13724.

62. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, § 705(a), 78 Stat. 253, 258−59 (codified as 42 U.S.C. §§2000e to 2000e-17 (2000)).

national employer of 25 or more persons affecting interstate commerce.[63] Such uniform guidelines would have likely provided assurances to national employers that the aims of anti-discriminatory statutes were not to necessarily encroach on the hiring prerogatives of the particular companies, but instead to provide transparency and predictability in the review process.

The EEOC has been empowered to investigate specific charges of discrimination, attempting to mediate or conciliate such disputes.[64] The first stage in the Title VII enforcement process is the filing of a charge in writing to the EEOC by a person claiming to be aggrieved – alleging that an employer has engaged in an unlawful employment practice.[65] When the EEOC receives such a charge, it will furnish the employer being charged with a copy, and notification of an imminent investigation.[66] If two or more members of the EEOC believe, after such investigation, that there exists reasonable cause for the charge, the EEOC must "endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[67] All aspects of the settlement attempts are inadmissible evidence in any subsequent proceeding.[68]

If a settlement agreement is not reached, the EEOC may seek redress in the Federal court system.[69] There, proof is required that the accused employer had in fact discriminated against one or more of his employees because of race, religion, or national origin.[70] The employer would then have an opportunity to disprove any of the charges and would have the benefits afforded to any defendant in a civil judicial proceeding.[71] If, however, the EEOC fails or declines to bring suit within 90 days of the grievance charge, the individual claiming to be the aggrieved may, with the written consent of any one member of the EEOC, bring a civil action to obtain relief.[72]

In the event "the court finds the [charged employer] has engaged or is engaging in [an] unlawful employment practice, the court may enjoin the

63. *Id.* at § 701(b), 78 Stat. at 253.

64. *Id.* at 259.

65. *Id.*

66. *Id.* at 259.

67. *Id.*

68. *Id.*

69. *See id.* at § 706(f), 78 Stat. at 260-61.

70. *See generally* Michael Szkodzinski, *An Analysis of the EEOC's Issuance of Early Right-To-Sue Letters: Does It Promote Judicial Efficiency or Encourage Administrative Incompetence?*, 150 U. PA. L. REV. 690 (2001).

71. *Id.*

72. *See* Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, § 706(e), 78 Stat. 253, 259 (codified as 42 U.S.C. §§2000e to 2000e-17 (2000)).

party from engaging in such practice, and order such affirmative action as may be appropriate.[73] This action "may include the reinstatement or the hiring of employees with or without backpay – payable by . . . [the party] responsible for the unlawful employment practice."[74] On the other hand, in order to avoid the pressing of any "stale" claims, the title provides that no suit may be brought with respect to a practice occurring more than six months prior to the filing of a charge with the EEOC when there is no state equivalent anti-discriminatory agency; when there is an equivalent state agency, the aggrieved may bring a federal suit within 300 days.[75]

Again, the EEOC was enacted to provide enforcement for the Title VII statutes. This commission was the product of considerable congressional discourse over the creation of a regulatory arm that would enforce Title VII in a rigid, predictable manner. In its early days, the EEOC worked aggressively to clean-up blatant discrimination with many companies' prevailing employment tests, making examples of such companies appearing continuous in their traditionally inequitable practices.

E. Griggs

About 6 years after the promulgation of 703(h), its first major application occurred in the landmark Supreme Court case of *Griggs v. Duke Power Company*.[76] In this case, Duke Power Company ("Duke") was accused by a class of black employees of using a discriminatory series of tests, purported by the company as general intelligence tests: the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test.[77] The results of these tests determined whether applicants were hired, or current employees were allowed to transfer between one of its five departments (labor, coal handling, operations, maintenance, and laboratory).[78] Prior to the enactment of the CRA of 1964, the District Court found that Duke clearly demonstrated discrimination in its hiring, transfer, and promotion process, as all black employees were assigned to the least prestigious and lowest paying department, labor.[79] Also, the District Court held that the general aptitude exams eliminated a disproportionate number of blacks, and

73. *Id.* at 260.
74. *Id.* at 261.
75. *Id.* at § 706, 78 Stat. at 260.
76. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
77. *See id.* at 425-26, 428.
78. *Id.* at 427-28.
79. *Id.* at 426-27.

were unlawful under Title VII unless shown to be job related.[80] The Court of Appeals reversed this finding, "conclud[ing] that a subjective test of the employer's intent should govern," and absent a discriminatory purpose, use of the tests were permissible.[81] The Supreme Court eventually reversed the Court of Appeals, for the reasons that follow.

After Title VII's enactment, Duke no longer formally excluded blacks from any department other than labor. Duke decided to instead use the median score for a high school graduate in its Wonderlic and Bennett exams as a measurement for whether a person qualified for hire or transfer to one of the "inside job" departments, which were less physically demanding and better paying.[82] The EEOC investigated and uncovered that in the state of North Carolina, the jurisdiction of this suit, about 34% of white males had completed high school, with about 58% of these whites passing these two evaluation tests.[83] On the other hand, 12% of black males had graduated from high school in North Carolina, while only 6% obtained passing scores on the Wonderlic and Bennett general intelligence tests.[84] Despite this, the Court of Appeals accepted that Duke did not intentionally discriminate against blacks, and that its exams were objective measures that just seemed to favor whites for some unverifiable reason.[85] Nevertheless, these statistics observed by the EEOC exhibited practices which may had seemed neutral on their face, yet appeared to generate discrimination by only yielding a token amount of black workers actually hired into the company, or who qualified for a transfer into one of its more prestigious "inside job" departments.[86]

The *Griggs* court held that the purpose of Title VII is to "remov[e] any artificial, arbitrary, [or] unnecessary barriers to employment when [those] barriers operate to exclude on the basis of racial or other impermissible classification."[87] Also, here the term "business necessity" is emphasized in contemplation of employment exams; meaning, that "[i]f an employment practice which operates to exclude [any particular protected group] cannot be shown to be related to job performance, the practice is prohibited."[88] And, despite the employer's contention that the passage of its general

80. *Id.* at 429.
81. *Id.* at 428-29.
82. *See id.* at 427-28.
83. *Id.* at 431 n.6.
84. *Id.*
85. *Id.* at 432.
86. *See id.* at 430.
87. *Id.* at 431.
88. *Id.*

intelligence exams would improve the overall quality of the work force, such tests did not bear any sort of demonstrable relationship to successful performance of the particular types of work in question here.[89]

So, the *Griggs* court outlined three factors that are particularly critical in consideration of a potential Title VII testing violation: (1) whether the test is shown to be "significantly related to a successful job performance"; (2) whether the test "operate[s] to disqualify" a protected group "at a substantially higher rate" than others; and (3) where "the jobs in question had formerly been filled only by [a limited class] as part of a longstanding practice of giving preference to [that class]."[90] Further, as emphasized in *Griggs*, the EEOC defines a "professionally developed ability test" as "a test which fairly measures the knowledge or skills required by the particular job . . . the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job."[91] Employers using such tests, per the EEOC, must have "available 'data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise of or are relevant to the job or jobs for which candidates are being evaluated.'"[92]

Accordingly, in light of *Griggs*, a standard was proposed that any test used must measure the person for *that* job, with such test being designed to determine or predict whether the individual is suitable or trainable with respect to his employment there.[93] And, subsequent circumstances saw some employers sued for using employment tests demonstrating a *disparate impact* on protected groups – another important concept delineated in *Griggs*. The United States Supreme Court defined disparate impact discrimination as "employment policies that are facially neutral in their treatment of different groups, but fall more harshly on one group than another, and cannot be justified by business necessity."[94] Moreover, based on *Griggs*, the Supreme Court developed a three-step analysis for disparate impact.[95] First, the plaintiff must establish a prima facie case that a facially neutral practice by the employer affects a certain minority group disproportionately.[96] The defendant must then rebut this presumption of an

89. *Id.*

90. *Id.* at 426.

91. *Id.* at 433-34 n.9.

92. *Id.*

93. *Id.* at 436 n.12.

94. Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation–How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 22 (1993) (citing Int'l Bhd of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

95. *Id.* at 23.

96. *Id.*

established prima facie case by proving that the facially neutral practice is "justified by 'business necessity'" (which must be tied directly with "legitimate employment goals" of the company).[97] If the defendant can show "business necessity," then the burden once again shifts back to the plaintiff to show that the defendant could have instituted other practices to achieve this necessity which have less of an impact on the minority group.[98]

Another approach for the EEOC is to prove that the employer's "stated policy is not legitimate," or that its goals could be equally met by alternative practices.[99] The EEOC also must "isolat[e] and identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities."[100] After the EEOC establishes this, then the employer carries the burden to demonstrate a valid, nondiscriminatory motive.[101] Liability attaches when the EEOC successfully proves that the employer's stated reasoning is "a mere pretext for discrimination."[102]

Griggs was the principal authority referenced for 703(h) disputes for about 20 years after the nation's high court rendered the opinion. In many ways, certain aspects of its tests and standards still influence the way employment testing and adverse impact cases are reviewed today. The post-Griggs 1970s included new EEOC definitions for "business necessity," which was perhaps the newly establish standard for employers.[103] The importance of companies establishing a link between the materials tested with work performance eventually helped clear up a lot of the testing litigation.

F. The EEOC Regulations

1. Impact

As stated above, 703(h) of Title VII aimed to provide equal employment opportunity with regards to the usage of written pre-employment tests.[104] In *Griggs*, the use of these testing results frequently denied employment to minorities, in many cases without evidence that the

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id*. (citing Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 993 (1988)).

101. *Id.* at 24.

102. *Id.*

103. Susan Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 389-90 (1996).

104. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 241, 257 (codified as 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

tests were related to future on the job success.[105] Yet, employers were generally justified in using tests to assist in their selection of qualified employees.[106] Thus, 703(h) addressed both concerns, as Congress authorized the use of "any professionally developed ability test provided that such test, its administration or action upon the result is not designed, intended, or used to discriminate."[107]

Initially, some employers assumed that 703(h) allowed for any professionally developed test, so long as it did not intentionally exclude minorities, even if exclusion resulted.[108] In 1966, the EEOC adopted guidelines advising employers what the law and good industrial psychology practice required.[109] The Department of Labor adopted a similar approach in 1974.[110] The government's view was that the employer's actual intent in employment testing was irrelevant.[111] If the test or other practice had an adverse impact on protected groups, screening out a proportionally high percentage, then it was deemed unlawful unless proven valid.[112] This validity was shown by a test that measured or predicted performance on the job.[113] Otherwise, it would not be considered "professionally developed."

Testing practices that adversely impact employment opportunities of persons of a certain race, sex, or ethnic group are illegal under Title VII unless justified by "business necessity."[114] "Business necessity" is shown through testing "validation," which demonstrates a relation between the selection procedure and performance on the job.[115] The EEOC guidelines adopt the "4/5ths" or "80 percent" rule as a means of determining adverse impact for use in enforcement proceedings.[116] It is not a legal definition of discrimination, but rather a method to quantify serious discrepancies in the hiring or promotion rates between races and ethnicities.[117] In determining whether a selection procedure violates the "4/5ths rule," an employer

105. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

106. *See id.* at 436.

107. Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290, 38,290 (Aug. 25, 1978) (to be codified at 29 C.F.R. § 1607).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 38,291; *see generally* Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995).

116. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4 (1978).

117. Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. at 38,291.

simply compares its hiring rates for the different racial groups, insuring that the protected group is being hired at a rate of "4/5ths" as the majority group, whites.[118]

2. Validation

The EEOC typically seeks to implement testing evaluative measures in harmony with those implemented by such influential organizations as the American Psychological Association ("APA").[119] In 1978, the APA produced testing validation studies examining the nexus between certain testing instruments with the test-taker's eventual job performances.[120] During the APA studies, employers were advised to consider alternatives that would achieve their business purposes with lesser adverse impact on certain groups.[121] This resulted in employers delicately balancing a proposed test's effect on different racial groups, while validating the test to ensure that any disparate impact on such a group would be traceable solely to the skill-level required for adequate job performance, and not racial bias.[122]

APA guidelines provide three circumstances in which employers should be permitted to utilized testing scores: (1) To eliminate grossly under-qualified candidates; (2) For the categorization of applicants based on perceived skill level; (3) For the ranking and filing of the most promising candidates to the least promising.[123]

The setting of a "cutoff score" to determine who will be screened out may have an adverse impact pursuant to EEOC guidelines.[124] If so, an employer would be required to justify a cutoff score by demonstrating that individuals scoring below it typically cannot perform the tasks required in an effective manner.[125] Comparable or more severe adverse results could be yielded from scoring procedures that group and rank candidates.[126] If an employer uses a rank order method, there must be a specific showing of the

118. *Id.*

119. *See* Brief of Industrial-Organizational Psychologists As Amici Curiae in Support of Respondents at 6, Ricci v. DeStefano, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328) [hereinafter Amici Curiae Brief].

120. *See* General Standards for Validity Studies, 29 C.F.R. § 1607.5(c) (1978).

121. *See* General Standards for Validity Studies, 29 C.F.R. § 1607.5(g) (1978); Amici Curiae Brief, *supra* note 119, at 5-8.

122. *See* General Standards for Validity Studies, 29 C.F.R. § 1607.5(b) (1978); Amici Curiae Brief, *supra* note 119, at 7.

123. Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. at 38291.

124. *Id.*

125. *Id.*

126. *See id.* at 38291-92.

importance of hiring the absolute high scorer to justify such narrow test score usage.[127]

Validation has become highly technical and complex, and is a constantly changing concept in industrial psychology. The APA declares that there are three concepts that can be used to validate a selection procedure.[128] These concepts reflect different approaches to investigating the job relatedness of selection procedures and may sometimes interrelate.[129] They are (1) criterion-related validity, (2) content validity, and (3) construct validity.[130] In criterion-related validity, a selection procedure is justified by a statistical relationship between the scores on a test and the measure of job performance.[131] In content validity, a selection procedure is justified by showing that it representatively samples significant parts of a job – such as a foreign language test for an interpreter.[132] Construct validity involves identifying the psychological trait (the construct) that underlies successful performance on the job, and then devising a selection procedure to measure the presence and degree of the construct.[133] An example of this would be a test of "leadership ability."

The APA testing guidelines contain technical standards and documentation requirements for the application of each of the three approaches.[134] One of the problems the guidelines try to address is the interrelatedness between "content validity" and "construct validity."[135] The extreme cases are easy to grasp. A secretary, for example, may have to type. Many jobs require the separation of important matters which must be handled immediately from those which can be handled routinely. For the typing function, a typing test is appropriate. It is justifiable on the basis of content validity because it is a sample of an important or critical part of the job. The second function can be viewed as involving a capability to exercise selective judgment in light of the surrounding circumstances – a mental process which is difficult to sample.

In addressing such situations, the guidelines attempt to make it practical to validate the typing test by a content strategy, but do not allow the validation of a test measuring a construct such as "judgment" by a

127. *See id.* at 38291.

128. *See* SOC'Y FOR INDUS. AND ORGANIZATIONAL PSYCHOLOGY, INC., PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES 13 (4th ed. 2003).

129. *See id.*

130. *Id.*

131. *See id.* at 67.

132. *See id.* at 21, 67.

133. *See id.* at 10, 24-25.

134. *See id.* at 27, 38.

135. *Id.* at 25.

content validity strategy.[136] Thus, it is important to consider the APA guidelines, mostly adopted by the EEOC, relevant in the context of testing evaluations as the APA demonstrates the intricate, scientific manner in which a test is in fact "business related," the causal link that would have placed an employer in compliance with the *Griggs* standard.

But as companies grappled with the concepts of "validity" and "business relatedness" with their testing procedures in the 1970s and 80s, there became increasing difficulty to stay on top of the APA's scientific evaluative processes, while juggling the EEOC's "4/5ths rule." The requirement was to hire strong candidates, while still comply with federal demands for increased minority representation. In the wake of *Griggs*, as many civil rights cases were filed and ruled against employers, a sentiment grew that facially neutral employment tests were too susceptible to yielding hiring improprieties.[137] As employers considered other proactive measures, the phrase "affirmative action" ostensibly appeared to take shape in a manner antithetical to the apparent objectives of the lawmakers who shaped the language of 703(h).[138] Consequently, as articulated herein, it appeared that some companies sought refuge from Title VII violations by implementing hard racial quotas.[139]

So quotas became a common measure for all companies as they attempted to comply with the Title VII statutes and its "4/5ths" hiring requirement, in light of it appearing that the objective of Title VII was to incorporate a critical mass of minorities into the workforce.[140] Testing results for many minority candidates, who were eventually hired, were in some cases considerably lower than many other non-minority candidates. These hiring practices, coupled with case law that was ostensibly hostile to employers, begin to destabilize the effect 703(h), as the provision that originally intended to provide minorities with parity in the testing evaluative process slowly began to produce an unintended competitive advantage.[141]

G. Race-Norming

A common method of employer adherence to federal testing regulations in the early 1980s was through the normalization of test scores

136. *See id.* at 37.
137. H.R. Rep. No. 102-40 (II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 649, at 695.
138. *See generally* LAPENSON, *supra* note 36, at 10-11.
139. *See e.g.*, *id.* at 10-12.
140. *See id.* at 10-13.
141. *See generally id.* at 10-13.

based on an applicant's race, called "race-norming."[142] This process was prominently applied to the scoring results of the government's General Aptitude Test Battery ("GATB"), a job-skills test developed by the Department of Labor in 1981.[143] The GATB was created to measure certain abilities such as "numerical, verbal, and spatial relationship skills."[144] This test was also designed to measure an examinee's "general aptitude."[145] One's general aptitude (g) score was essentially a cerebral barometer measuring things such as general problem-solving skills and overall mental agility.[146]

The Department of Labor worked very closely with state employment services to match job seekers with both private sector and government jobs.[147] When employers contacted the department requesting a prospective employee's GATB testing results, they typically only received a race-normed GATB score.[148] This was a raw scored converted into a percentile score based on the particular applicant's performance in relation to others of the same ethnicity, and not the overall test-taking pool in its entirety.[149] Thus, hypothetically suppose that if a black applicant receives a GATB score of 66 (which, in this example, is the 89th percentile of black test-takers), and a white test-taker scores a 77 (which, say, places them in an 82nd percentile of whites), then the black's higher percentile score – the only score the employer sees – positions them to receive the job offer. This hypothetical was a common occurrence with the GATB score-adjusting procedures.[150]

The Labor Department's officials contended that this score-adjustment procedure was necessary because "unadjusted test results did not accurately predict job performance."[151] Also, additional supporters of race-norming purported that this method was necessary to adjust the inherent bias against minorities contained in the GATB.[152] But, the principle reason for race-norming, of course, is the evasion of Title VII litigation.

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142. H.R. Rep. No. 102-40 (II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 649, at 749-50.

143. *See id.*

144. Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1205. (1991).

145. *Id.*

146. *Id.*

147. Timothy Noah, *Job Tests Scored on Racial Curve Stir Controversy*, WALL ST. J., Apr. 26, 1991, at B4.

148. *See* H.R. Rep. No. 102-40 (II), at 750.

149. *See id.*

150. *See id.*

151. Noah, *supra* note 147, at B4.

152. *See id.*

"Whites on the whole perform above Hispanics, Hispanics above Blacks, Asians above all three groups," remarked Robert Litman, a deputy director of the Labor Department's U.S. Employment Service.[153] If employers hired solely on the basis of raw GATB scores, said Mr. Litman, "we would be discriminating significantly" along ethnic lines.[154] Also, many large private companies felt that race-norming was the only way to meet affirmative-action goals while still utilizing relevant evaluative tests for hiring purposes.[155]

It was perceived that such race-norming test results were less biased, and as a result, companies in the 1980s utilized them to decrease likelihood of successful disparate-impact contentions.[156] But many detractors argued that it was deceptive, especially since some employers were unaware of the great disparity in the GATB raw score to percentile scoring conversions, since the raw score was in fact never disclosed.[157] Employers were often oblivious to the fact that a black candidate's percentile of 90% did not represent a raw score comparable to a white candidate with the same percentile score.[158]

Throughout the 80s, the use of race-norming was highly prevalent, but seldom talked about. There was something inherently secretive about this score-adjustment practice, perhaps demonstrating the guilty conscience of some of its partakers. Also, it was said that companies were reluctant to discuss their race-norming policies in fear of attracting reverse discrimination suits from non-minorities.[159] As a result of this covert behavior, officials at the Labor Department would only offer "sketchy details" in those days about how businesses fared using race-norming, suggesting such things as a lack of adequate statistical data, "or a need to protect the confidentiality of the companies to which they referred job applicants."[160]

But eventually the race-norming matter came to light. When the esoteric practice started to receive widespread attention, it also caught the attention of the legislative branch of the U.S. Government. Disappointed in how employment test score regulation had started to deviate from the original purposes of 703(h), there was a movement for reform to provide

153. *Id.*
154. *Id.*
155. *See id.*
156. *Id.*
157. *See id.*
158. *Id.*
159. *See id.*
160. *Id.*

clarity on the matter.[161] So, by 1990, Congress sought to make amendments to the Civil Rights Act of 1964.[162]

III. THE CIVIL RIGHTS ACT OF 1991

A. 703(l)

In 1990, after Congress' continued dissatisfaction with the interpretations of some provisions in the 1964 Civil Rights Act, including the 703(h) test score provision, House Democrats of the George H. W. Bush Administration filed a bill which would endeavor to amend some of the disputed provisions.[163] Among the new sections proposed as an amendment was section 703(l), a new employment test score provision that would supplant 703(h).[164]

Before the bill that would eventually become the 1991 Civil Rights Act passed, it endured a rather protracted legislative process.[165] It took several attempts, over a one-year time span.[166] The Senate's first bill, S. 2104 (The Civil Rights Act of 1990), did not pass in the House of Representatives because it would "have the effect of forcing employers to hire by the numbers in order to avoid costly and protected litigation."[167] Then, at the first House meeting for the 102nd Congress session in 1991, the House Democrats filed H.R. 1 (The Civil Rights Act of 1991).[168] The Bush Administration felt that H.R. 1 was identical to that of the previously vetoed bill, so they introduced their own version of the Civil Rights Act of 1991 (S. 611) in March 1991.[169] Finally, the Senate responded to Bush's proposed bill with yet another bill, showing a lack of confidence in S. 611.[170] Senator Danforth then unveiled the Senate's version of the Civil Rights Act of 1991 (S. 1745), the third consecutive different bill proposed on the matter.[171]

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161. *See* H.R. Rep. No. 102-40 (II), at 750-51.

162. *See id.*

163. *See id.*

164. *See id.* at 709-10.

165. *See id.* at 737-38.

166. *See id.*

167. *See id.* at 738-39, 749.

168. Caryn Leslie Lilling, *The Civil Rights Act of 1991: An Examination of the Storm Preceding the Compromise of America's Civil Rights*, 9 HOFSTRA LAB. & EMP. L. J. 215, 218 (1991).

169. *See id.*

170. *See id.* at 219.

171. *See id.*

Bush informed Danforth that S. 1745 would be acceptable, so long as the bill did not contain "quotas" similar to the previous bill.[172] Thus, anything that could be construed as advocating "quotas" were not included in S. 1745, and the bill became Public Law 102-166 in late 1991.[173]

In addition to the actual passage of the bill, the rationale of 703(l) may be delineated by noting some of the pertinent discussions in the House Report regarding P.L. 102-166 in 1991. The dialogue occurring during the committee hearings addressed several concerns, such as the general validity of employment tests, as well as the need for an omission of the very controversial racial "quotas" in the hiring process.[174] In the House Report, it was emphasized that the usage of tests by employers was permissible so long as they are valid, objective, and justified for business necessity.[175] An example provided was an employer using the test as a measure of aptitude: a means of measuring an individual's potential ability to perform the job description for the position.[176]

Public law 102-166, eventually signed and approved by the President, came to be an amendment to Title VII 27 years after its original title was established. The amendments were called The Civil Rights Act of 1991, and the new testing provision, 703(l), read:

> 42 U.S.C. 2000e-2(l) of Title VII:
>
> It shall be unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.[177]

Also, another hot topic that garnered considerable discussion in the House Report was whether it is ever necessary to alter the results of valid, objective tests, yet still remain in compliance with the equal employment opportunity requirement of Title VII (i.e., score-adjusting). It was decided that this practice should be permanently banned, as such altering tended to frustrate the original legislative intent of Title VII.[178] At a committee hearing, Congressman Hyde opined that the law needed to be clarified so that it would be unmistaken that there is a prohibition against changing test

172. *See id.*

173. *See id.* at 256.

174. *See* H.R. Rep. No. 102-40(II), at 750-51 (1991).

175. *See id.* at 749.

176. *Id.*

177. 42 U.S.C. 2000e-2(l) (1991) *invalidated by* Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008) when applied in the context of religion and the ministerial exception.

178. *See* H.R. Rep. No. 102-40 (II), at 749.

scores on employment aptitude tests based on an individual's race or ethnicity.[179]

Hyde proposed an amendment that made it a violation of Title VII "for any employer, employment agency or state employment service to alter or adjust the scores on tests used in evaluation of current or prospective employees, where those scoring changes are based solely on an individual's race, color, religion, sex or national origin."[180] The current revised version of 703(l) looks remarkably similar to this Hyde amendment. The current version of Title VII's *Prohibition of Discriminatory Use of Test Scores*, now amended in section 704 in the Civil Rights Act of 1991 (42 U.S.C. 2000e-2(l)) is as follows:

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.[181]

Indeed, it appears that the defeated Hyde amendment still subsists, as central rudiments of both former President Bush and Congressman Hyde's arguments against quota usage have seemed to shape the language of 703(l). In 703(l) committee hearings, Hyde directly attacked the practice of race-norming (also referred to as "within group norming") because he said that it violated the spirit of the original Equal Employment Opportunity Act.[182] This rampant use of race-norming in the 1980s was said to concomitantly patronize Blacks and Hispanics, while discriminating against Jewish and Asians – something in which Title VII was to safeguard against.[183] Thus, the race norming system was labeled as a "quota system," something that Congress was resolute in eliminating with the new Title VII amendments.[184]

So, with quota usage and race-norming passé, employers – still concerned about maintaining a certain level of diversity in the hiring process – were posed with the quandary of implementing an alternative method to overcome the new Title VII statutory language. Because each race subgroup did not consistently score at the same level on these tests, some affirmative action would still be necessary to sustain the EEOC's "4/5ths" hiring requirement. Even the labor officials who normalized

179. *See id.*

180. *Id.*

181. 42 U.S.C. 2000e-2(l) (1991) *invalidated by* Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008) when applied in the context of religion and the ministerial exception.

182. H.R. Rep. No. 102-40(II), at 749-50.

183. *Id.* at 751.

184. *Id.* at 750-51.

GATB test results stated that without such score adjusting, there would be *significant* discrimination against certain minority groups in score reporting to the participating employers.[185] Hence, employers realized that if evaluative tests were to be continually used during the hiring and promotional process—and of course they were—it was prudent for the implementation of an alternative method that could circumvent the wording of the newly implemented 703(l) to achieve the requisite diversity.

B. Contemporary Litigation

In the present day, a new popular method of classifying test scores has emerged: it is termed "race banding."[186] "Race banding" is essentially the banding (i.e., grouping) of a batch of scores that fall within a certain range.[187] Employers who use it believe that any difference in scoring within the band is statistically insignificant, as some factors – such as margin of error and scoring variance on multiple tries – are inherent in any test.[188] This test score manipulation is the preeminent method for justifying the hire of a minority applicant with a lower score, because of the notion that any score at the bottom of the band is considered similar to a score at the top of the band.[189] So, this method can be quite effective in instances where the test score is the decisive factor for hiring or promotion.

But in instances where other factors are taken into consideration, courts typically apply a strict scrutiny analysis to determine if the employer's action taken is "narrowly tailored" to achieve a "compelling state interest": diversity.[190] As demonstrated below, the answer appears to be invariably "yes," as the courts in the current era tend to reward employers that take reasonable measures to balance the Title VII "no quota" compliance with salubrious public policy furtherance of ethnic and racial inclusiveness.[191] The public sector has, at times, been rather resolute in principally emphasizing test score results in its hiring process, thus plaintiffs bringing suit in public sector cases often focus on challenging the legality of band

185. *See,s e.g.*, Justin McCrary, *The Effect of Court-Ordered Hiring Quotas on the Composition and Quality of Police*, 97 AM. ECON. REV. 318, 345-46 (2007).

186. *See* JOHN F. BUCKLEY IV & MICHAEL R. LINDSAY, DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 3:79 (2nd ed. 2013).

187. *Id.* n.2.

188. Officers for Justice v. Civil Service Comm'n of S.F., 979 F.2d 721, 723 (9th Cir. 1992).

189. *Id.* at 723-24.

190. Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

191. *See generally* FAYE J. CROSBY, AFFIRMATIVE ACTION IS DEAD: LONG LIVE AFFIRMATIVE ACTION 83 (2004).

scoring.[192] On the contrary, the plaintiffs in private sector claims frequently encounter courts applying a strict scrutiny analysis, since the test score is typically just a component of the conflict there.[193]

In addition, it appears that contemporary courts are *very* reluctant to rule against the employer.[194] This is presumably a combination of various factors, such as perhaps modern employers' ability to more readily evade clear-cut Title VII facial violations. Also, present employers as a whole exhibit a more sympathetic appearance towards minority inclusion.[195] As a result, unlike prior decades, there has been relatively minimal success for plaintiffs alleging Title VII 703(l) violations since 1991.[196] All of this, perhaps, could signal that the modern judiciary is fairly content with the manner in which employers are currently utilizing testing in its evaluative practices.

1. Public Sector

First, it should be noted that the overwhelming majority of litigation with regards to Title VII's 703(l) lands in the public sector, not private. Usually, the focal point of litigation centers around a plaintiff contesting the test score usage of either firefighter or police officer examinations.[197] The fact that the public sector is a magnet for litigation is undoubtedly based on its frequent reliance on candidate test scoring as a determinant for many hiring and promotion practices.[198] Similar to the leading public institution of the University of Michigan, which literally added points to minority applicants in its undergraduate admission process, the public sector's selection process has at times appeared somewhat rigid and impersonal.[199] Yet still, "racial banding" seems to assist public sector employers adequately achieve their many hiring objectives.

The very first case decided after the enactment of the CRA of 1991 addressing the matter of employment testing was *Officers For Justice*.[200]

192. *See generally* DANIEL A. BIDDLE, HIRING THE MOST QUALIFIED FIREFIGHTERS WHILE AVOIDING (AND DEFENDING) LAWSUITS 18-19 (2010), *available at* http://fpsi.com/pdfs/Hiring-the-Most-Qualified-Firefighters-While-Avoiding-and-Defending-Lawsuits.pdf.

193. *See, e.g.*, Hawkins v. Home Depot USA, Inc., 294 F. Supp. 2d 1119 (N.D. Cal. 2003); Williams v. Ford Motor Co., 187 F.3d 533 (6th Cir. 1999).

194. *See, e.g.*, *Hawkins*, 294 F. Supp. 2d 1119; *Williams*, 187 F.3d 533.

195. *See, e.g.*, *Hawkins*, 294 F. Supp. 2d 1119; *Williams*, 187 F.3d 533.

196. *See, e.g.*, Hayden v. County of Nassau, 180 F.3d 42 (2nd Cir. 1999).

197. *See generally* BIDDLE, *supra* note 192.

198. *See generally id.* at 18.

199. *See generally* Gratz v. Bollinger, 539 U.S. 244, 270 (2003).

200. *See* Officers For Justice v. The Civil Service Comm'n of S.F., 979 F.2d 721,724 (9th Cir. 1992).

This was a 9th Circuit case where the San Francisco police officer's union challenged the city's procedures in grouping the officer testing results on a "band": a certain range the city felt was "substantially equivalent for purpose of knowledge, skills, and abilities measured by the examination."[201] The city further substantiated this band by saying that there existed a margin of error inherent in scoring any exam, and that minor differences in test scores do not reliably predict differences in job performance.[202] The 9th Circuit Court stated that despite this procedure being contrary to a more strict ranking approach, the uniform guidelines do not forbid such an alternative selection procedure unless it is proven invalid.[203]

Also, the 9th Circuit Court used a strict scrutiny analysis to uphold the band scoring as well.[204] It was held that public sector employers can use race as a factor in selecting between qualified applicants pursuant to a "narrowly tailored" affirmative action plan designed to remedy past discrimination, so long as there is a "strong basis" in the evidence that remedial action is necessary.[205] Here, a "strong basis" was found in the fact that there historically lacked adequate representation of minorities in the police force tantamount to the minority population in the surrounding community.[206] So, the banding was and is considered to be a way to circumvent the strict language of the 703(l).[207]

Also, similar to *Officers For Justice*, the 7th Circuit upheld another city's practice of banding test scores in *Chicago Firefighters Local 2*.[208] There, several white police officers claimed to have been passed over for a promotion illegally after being surpassed by minority candidates who had scored lower on the promotional exam.[209] The city replied that despite the promoted candidates' scores being slightly lower, all scores in question still located on the same band, thus any variance was statistically insignificant.[210] The court ruled in favor of the city, determining that this "narrowly tailored" racial band was the equivalent to a school converting a number grade into a letter grade.[211]

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201. *Id.* at 722-23.
202. *See id.* at 724.
203. *Id.* at 728.
204. *Id.* at 726.
205. *Id.*
206. *Id.*
207. *Id.* at 726-27.
208. *See* Chicago Firefighters Local 2 v. City of Chicago, 249 F.3d 649, 649-58 (7th Cir. 2001).
209. *Id.* at 652-53.
210. *Id.* at 658.
211. *Id.* at 656.

That court analogized that placing all grades of 80-89 on a band called "B" indeed helps the person scoring "80" and hurts the person scoring "89"; yet due to the variance in each test-taker performance, this is the fairest way to judge their general range of abilities.[212] After all, the court opined, it is likely that *not* using such a general model of scoring may in itself be misleading, considering the many different factors which may have played into the scoring result (e.g., slightly varied questioning on different test versions, test-taker suffering from any sort of sickness or distraction, etc.).[213]

And one of the most recent cases deciding an alleged test score misuse by a public sector employer is the 2003 1st Circuit case of *Cotter v. City of Boston*.[214] There, suit was brought by ten white officers claiming to have been injured by the police department, who promoted three black officers scoring on exactly the same band over the plaintiffs.[215] The city defended the promotion of the blacks based on its need to remain in compliance with Title VII's "4/5ths" rule, which required the department to promote blacks at a minimum 80% rate of the most promoted group, the white group.[216] The plaintiffs, perhaps employing a legal stratagem in view of the perceived futility of a 703(l) testing claims (which plaintiffs had yet to succeed on in that jurisdiction), brought a 14th Amendment equal protection contention.[217]

The court reminded that for equal protection claims, it is not required that every citizen is treated identically, rather, there needs to be adequate explanation for treating groups differently.[218] Accordingly, the city felt it could show that its conduct of promoting only blacks from the scoring band was narrowly tailored to further a compelling governmental interest.[219] The city's commissioner testified that the "compelling interest" for his decision to hire only the blacks from the "scoring band" included remedying past discrimination, avoiding lawsuits, and the operational needs of the department.[220] In regard to the city's desire to remedy past discrimination, the court concurred that such action was a slow and gradual process, and it

212. *Id.*
213. *See id.*
214. *See generally* Cotter v. City of Boston, 323 F.3d 160 (1st Cir. 2003).
215. *Id.* at 163.
216. *Id.* at 164-65.
217. *Id.* at 163.
218. *Id.* at 168.
219. *See id.* at 170.
220. *Id.* at 168.

could take years to successfully integrate an organization that had been segregated for a century in time span.[221]

Cotter also introduced a test which set out guidelines for what was deemed "narrowly tailored":

> [The extent to which] (i) The beneficiaries of the order are specially advantaged; (ii) the legitimate expectancies of others are frustrated or encumbered; (iii) the order interferes with other valid state or local policies; and (iv) the order contains (or fails to contain) built-in mechanisms which will, if time and events warrant, shrink its scope and limit its duration.[222]

In *Cotter*, the beneficiaries were not considered "specially advantaged" because only the required number of black officers bringing the department within EEOC "4/5ths" compliance were chosen; plus, considering that all the candidates were on the same band, the plaintiffs could not claim that they were in fact "passed over," as no one from a lower band was selected over them (thus no legitimate expectancies should have been frustrated).[223] No valid policies were disturbed, and the city had no quotas or long-term affirmative action guidelines established, hence an inference that such practices were limited in scope and duration.[224]

Thus, *Cotter* delineated a "narrowly tailored" test, a refined standard which provides a checklist for employers to conscientiously monitor.[225] Intriguingly, present-day courts appear more rigid in their technique of analyzing cases, providing consistency with multi-prong tests in place for case analysis. As for the private sector lawsuits, though the litigation there is fairly infrequent, it is clear that there also appears to be more structure in recent cases with regards to how judges generally derive their decisions.[226] And, also comparable to public sector litigation, the inherent advantage seems to go to the employers, as plaintiffs tend to find little success against private companies as well.[227]

2. Private Sector

A casual observer to some of the post-1991 private sector discriminatory test claims would probably feel that plaintiffs tend to make much ado about nothing, as they appear to not have a very good

221. *Id.* at 169.
222. *Id.* at 171.
223. *Id.*
224. *Id.* at 172.
225. *See id.* at 171.
226. *See id.* at 164-74.
227. *See id.*

understanding of how Title VII 703(l) litigation could actually succeed. Generally speaking, very little merit has been uncovered in their contentions. Surely, there *is* such a thing as an actionable modern day 703(l) claim, but plaintiffs just need to understand that there are certain elements which must be satisfied, that is, in order for the suit not to appear spurious.

In the 1999 6th Circuit case of *Williams v. Ford Motor Co.*, the court upheld the use of an employment test, declaring it valid and proper.[228] In *Williams*, the plaintiffs contested the legality of a Ford Motor Company pre-employment test which measured an applicant's reading comprehension, arithmetic knowledge, parts assembly ability, visual speed and accuracy, and manual dexterity.[229] The plaintiffs, seven blacks, purported that blacks failed or scored low on the test in disproportionately high numbers, thus creating Title VII and disparate impact violations.[230]

The defendant, Ford, presented evidence of a study conducted on over 100 employees which measured the relationship between test performance and job performance, with the results of the study empirically showing that the test performance was a strong predictor of success on the job.[231] Also, the defendant presented evidence showing that it had hired blacks at a rate higher than the percentage represented in the local labor pool.[232] Moreover, Ford claimed that even if disparate impact could be shown, and it could not, it *still* cannot be liable because its pre-employment test was proven valid and job-related, and there is no equally valid test that would have less of a disparate impact.[233] Consequently, the employer felt that summary judgment should be entered due to various factors: a relationship between test performance and job performance, similar percentage of persons in the local labor pool, and the test being valid and job-related.[234]

The court therefore ruled in *Williams* that because the defendant's burden was met, summary judgment would be entered in the favor of Ford Motor Company.[235] The court also obtained some of its reasoning from the standards set forth in the EEOC Uniform Guidelines, which stated that an

228. *See generally* Williams v. Ford Motor Co., 187 F.3d 533 (6th Cir. 1999).
229. *Id.* at 536.
230. *Id.* at 541.
231. *Id.* at 545-46.
232. *Id.* at 548.
233. *Id.* at 541.
234. *See id.* at 540-41, 543.
235. *Id.* at 547.

employer may validate a test – through content, construct, or criterion-related studies.[236]

In *Hawkins v. Home Depot U.S.A.*, there was a Title VII claim from a black employee who was fired upon failing a departmental reassignment test after his prior position held was eliminated.[237] The plaintiff asserted that he was discriminated against because he was black, and also questioned whether he had actually failed the test, as he was not able to obtain a copy of it from the employer.[238] The employer moved for summary judgment, stating that the plaintiff's burden of proof was not established for remedy.[239]

The court held that the plaintiff failed to show by the preponderance of the evidence that he had qualified for the newly created position, which required the passing of a sales-associate exam, due to the new responsibility of customer contact (a duty that the plaintiff previously did not have).[240] After all, it was the plaintiff's obligation to furnish affirmative evidence that he in fact passed the test, or that his test results were in some way altered because of his race.[241]

With regards to the plaintiff's race discrimination claim, the court reasoned that there was a failure to demonstrate that similarly situated employees of other races were treated more favorably with regards to the testing requirements.[242] Furthermore, even if the court could assume, for the sake of argument, that a prima facie case of race discrimination had been established, the plaintiff's Title VII claim would have failed nonetheless.[243] If a prima facie case was established, the burden then shifted to the employer to produce legitimate, nondiscriminatory reasons for its actions.[244] Here, the plaintiff did not qualify for the reassignment position because he did not demonstrate that he passed the test.[245] Thus, legitimate, nondiscriminatory reasons for the plaintiff's termination were established.[246]

One cannot help but wonder why the plaintiffs have lacked much Title VII testing success in the newest case law. Perhaps modern employers really are in compliance, or possibly plaintiffs in general tend to bring more

236. *Id.* at 539 (citing 29 C.F.R. §1607.5).
237. Hawkins v. Home Depot U.S.A., 294 F. Supp. 2d 1119, 1121 (N.D. Cal. 2003).
238. *Id.* at 1122.
239. *See id.* at 1123.
240. *Id.* at 1122.
241. *Id.*
242. *Id.*
243. *Id.* at 1123.
244. *Id.*
245. *Id.* at 1122.
246. *Id.* at 1123.

frivolous claims. Possibly even, courts are more reluctant to "stir the waters" with regards to new striking case law developments on the matter, instead just looking to fine-tune another variation of a disparate impact analysis that tips in the employer's favor. While this remains an intriguing mystery, certainly, in an era of microscopic media attention and severe competition amongst companies, the typical employer has produced a more public-friendly countenance, in consideration that any sort of controversy with regards to racial discrimination could easily result in substantial losses in business opportunities.

So, Title VII testing provisions do not tend to spend as much time being interpreted in court systems as they once were. Maybe enough litigation has occurred over the past 5 decades for employers to have a lucid understanding of the purposes and methods of taking an affirmative action to continue to integrate the workplace. And undoubtedly the seeds are being planted – and have been for some time – to allow a day where the provisions of Title VII are obsolete; because as stated in *Cotter*, the process of repairing long-standing discriminatory practices are *slow and gradual*.[247]

IV. CONCLUSION

It appears that Title VII's testing provision has undergone considerable changes over the years. In its initial drafting during with the Civil Rights Act of 1964, the tone in the language of 703(h) appeared quite *proactive*, emphasizing that minorities should be granted certain protective rights in the employment testing process. The word selection used in 703(h), such as "provided that" or "is not designed, intended or used to discriminate,"[248] illustrates congressional aim in ensuring that minorities receive certain liberties perhaps not previously available.

This proactive stance by Congress was a sign of the times, in light of the fact that 1964 was an era in which blacks suffered a very public and severe struggle to overcome many laws and practices of exclusion in the United States. Case law, such as *Griggs*, typified the deprivation endured by some blacks striving for advancement in the workforce, with an unjustified employment exam serving as a line of defense for some companies unwilling to recognize on-going internal discriminatory practices. As a result, Congress intervened to assist the deprived, eliminating such exclusionary practices and providing better access for some to historically segregated positions in the workforce.

247. *See* Cotter v. City of Boston, 323 F.3d 160, 169 (1st Cir. 2003).

248. Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971).

Alternatively, in implementing 703(l), Congress seemed instead more *reactive*, receding some of the employment testing benefits that minorities had accrued over the years. Perhaps, 703(l) was produced solely to hedge against 703(h), and its judicial friendly interpretations that many believed were forcing employers to hire a certain number of minorities regardless of qualifications. If so, then simply stated, 703(h) warned employers to be more cognizant of minority inclusion in their hiring, while 703(l) warned employers that too much of an advantage was being given to minorities in their hiring. All of this implies that 703(l) was a signal that Congress perceived that the quest for equality in hiring had gradually escalated from a disadvantage, to an advantage for minorities between 1964 and 1991. As a result, with 703(l) limiting 703(h), perhaps the proper stance today for an employment test is a common ground between the two statutes, such as following the balancing act of the employer's need (most qualified candidates) with society's need (hiring in proportion to the labor pool).

However, without extrapolation, the literal language of 703(l) provides no guidance *per se* on the entitlements of minority test takers, but instead only reduces them. After all, 703(l) is actually silent on what rights minorities may possess in the employment testing process, as it simply mentions what is unlawful conduct. This makes the incorporation of 703(l) in "The Civil Rights Act" rather paradoxical considering the provisions exist to *grant* minorities rights. With that said, perhaps it was necessary to revise Title VII's testing provision if in fact the overall quality of the workplace was in danger of being compromised by standards different for minorities than others, for it is possible to be excessive in the assistance of protected groups to a state of counter productivity. But still, a first time reader of 703(l) may be rather perplexed over how such a restrictive statute became included in a set of provisions that supposedly invokes rights for minorities.

Whenever, if ever, Title VII testing revisions occur, Congress may be better suited in drafting a new provision to supplant 703(l) that is actually clear in its intent, purpose, as well as limitations, so the statute can be more coherent to an unattached observer. This could entail drafting a considerably more elaborate statute, with pertinent inclusions from both 703(h) and 703(l), in addition to incorporating new, germane language. Because the current statute, 703(l), is nothing more than a codicil for 703(h), as both statutes seemingly contain elements equally important to an effective enforcement of a Title VII testing violation. Yet, with litigation on employment testing subsiding, such a revision may not appear likely or necessary.