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ABSTRACT

Until recently, because of the shortage of instructors, junior colleges set few employment restrictions. Standard qualifications were mastery of subject matter, ability to communicate it, interest in students, and understanding of the college philosophy. As eligible applicants increase, so do questions about employment and certification requirements. Hiring practices have to date shown little concern for teaching proficiency (e.g., causing learning according to defined outcomes), but have generally depended on degrees, etc. This paper questions whether the procedure is non-discriminatory, whether the requirements beyond state credentialing relate directly to job performance. It discusses the possible impact on teacher certification and employment of Griggs vs Duke Power Company. Although this is an industrial case, subsequent judgments may alter traditional patterns in other areas by bringing an historical pattern in line with prevailing social realities or even beginning a new tradition. The court is unlikely to find credentialing, for instance, inherently discriminatory; the question seems clearly limited to requirements that tend to preserve existing patterns of discrimination or that do not clearly measure the applicant's ability to do the job. (If the courts consider credentials to be only licenses [with no elements of contract], they are outside the scope of Griggs.) Since the basic issue is discrimination in employment, any public agency must therefore justify its hiring practices by showing a rational connection between the requirements and the actual demands of the job. (HH)

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ARE YOUR EMPLOYMENT PRACTICES LEGAL?

A black instructor applies for a position at your college. He meets minimum state certification requirements but, after interviewing him, the dean and department chairman decide not to employ him. Subsequently a white instructor is appointed to the position, whereupon the black candidate brings suit challenging the procedure that led to his being refused employment. Could you defend your college's employment practices? More to the point, could you show how information gained in a personal interview relates to teaching proficiency?

The present hiring practices of community colleges are not easy to discern. Until recently, junior colleges could not afford to set many employment restrictions because of the shortage of candidates. A 1969 review of documents on teacher recruitment and selection found they focused on the problems of finding *experienced* teachers, evaluating the kinds of experience, and discussing who should select faculty (ED 032 864).

The general requirements for instructors are more obvious. An AAJC publication in 1966 noted that anyone interested in junior college teaching should have: (1) mastery of subject matter, with practical as well as theoretical preparation; (2) ability to communicate the subject matter; (3) interest in the student; and (4) an understanding of the community college, its purposes, and history (ED 032 886). These broad recommendations, however, are qualified in each district and are becoming more specific as the supply of generally suitable personnel increases. For example, Los Angeles junior college districts gather a wide variety of information on candidates before their names can even be placed on the eligible list. These data include: completed application forms, transcripts of all college and university records, verification of California Community College credentials, letters of reference, evidence of good health, Graduate Record Examination scores or other test scores (optional), an interview with administrative and/or faculty recruiters, and evidence of related teaching experience and employment. Points are assigned for each qualification and any candidate whose total score exceeds a certain number is considered eligible (about 50 per cent of all applicants in 1969-1970). The candidate then visits the campus for an interview with departmental faculty and administrators, who make the final selection (ED 046 382).

As the number of eligible candidates increases, so does the questioning about employment and certification requirements. One writer rejected the idea of raising the requirements to the Ph.D. level, but defined a competent junior college teacher as one who had a "master's degree, or a master's plus 15 to 18 semester hours" (ED 038 121, p. 3). He presented no evidence, however, that the number of courses taken in the subject matter area related to the quality of teaching. A study of secondary school teachers, after examining several other studies, concluded that teachers are most effective and satisfied when working with children whose socio-economic background is similar to their own (ED 040 123). Other sources recommended that evidence of previous effective teaching, as demonstrated by causing learning on the basis of defined outcomes, be adopted as a condition of employment (ED 035 416; ED 031 222; Cohen and Brawer, 1972). But a search of the literature revealed no reports of adoption of these recommendations as conditions of employment for junior college faculty. Hiring practices have been adopted for reasons other than their proven relation to teaching proficiency and have been continued, even expanded, without reference to their results.

Could an individual community college district show that its pattern of employing instructors is non-discriminatory?—that its own requirements above and beyond state credential requirements relate directly to job performance?

GRIGGS VS. DUKE POWER COMPANY

This issue of the *Review* examines the potential impact of a recent Supreme Court decision on state teacher certification and local school district employment practices. In the case of *Griggs vs. Duke Power Company* (1), the opinion written by Chief Justice Burger for a unanimous court held that the requirement of either a high school diploma or success in a standardized general education test as a prior condition to employment is prohibited by the Civil Rights Act of 1964, Title VII (1), where the employer cannot establish that either standard significantly relates to competence in the job at issue; (2) where such standards have the effect of disqualifying a significantly higher proportion of blacks than whites (that is, if the effect is discriminatory even where there is no intention to discriminate); and (3) where formerly the jobs were limited to whites under a prior policy of discrimination practiced by the employer. The significant portions of the 1964 Civil Rights Act, Title VII state:

> Sec. 703 (a) It shall be unlawful employment practice for an employer, (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer... to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin . . .

American jurisprudence depends a great deal on precedent as an ordering factor; that is, a judge will tend to look to the customary patterns of judicial findings within the court's history to aid him in deciding the case at hand. This is a consequence of the strong Common Law tradition in the system and stands in marked contrast to the situation existing in Civil Law jurisdictions, where the influence of prior decisions plays little part.

Frequently judgments are handed down that alter the traditional patterns. They perform two functions within the legal system: (1) by overruling a line of specific opinion within that court's history, they act to bring the main body of the law on the point at issue in line with trends (often already apparent in the opinions of judges in the lower courts or in other jurisdictions) reflecting prevailing social realities; (2) where the court is presented with a novel situation, they begin a new tradition. Thus the law is provided with a means by which it can slowly evolve. *Griggs* fulfills the second function.

The facts on which the Supreme Court based its decision in *Griggs* were as follows: The Duke Power Company operated a power generating station at Draper, North Carolina, called the Dan River Steam Station. The plant was organized into five departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. At the time the legal action was begun, the company had 95 employees at the station of whom 14 were black. All the blacks were employed in the Labor Department, where they were paid less than the lowest-paying job in any other department.

In 1955 a policy was instituted at the plant requiring a high school education as a condition for employment in any department except Labor and for transfer to any "inside" department. However, whites without a high school diploma who were hired prior to the institution of this requirement and who continued to do a satisfactory job, could achieve promotion. The 1960 census statistics revealed that, although 34 per cent of whites had completed high school in North Carolina, the percentage for blacks was only 12.

Prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the company openly discriminated on the basis of race in its employment and transfer policy at the Dan River operation. All this had ceased, however, by the time *Griggs* was instituted. After July 2, 1965, the company further required new employees to score satisfactorily on two professionally prepared aptitude tests to qualify for placement in any department except Labor. In September 1965, black or white employees who lacked high school diplomas were permitted to qualify for transfer from Labor and Coal Handling departments into the more desired positions by passing the *Wonderlic Personnel Test* and the *Bennett Mechanical Aptitude Test*. Neither test was designed to rate the performance of the prospective employee for a particular job or category of jobs. Fifty-eight per cent of the whites received passing marks on the tests while only 6 per cent of the blacks did so.

On the basis of these facts, the court found that, although the practices of the company were on their face neutral and not performed with any intention to discriminate on the basis of race, they operated to "freeze" the *status quo* of its prior discriminatory employment practices. This effect, Justice Burger maintained, was prohibited by the Civil Rights Act.

When required to interpret a statute that, on its face, is ambiguous or silent on its application to the facts presented, a court may resort to one or more of several strategies available for this purpose. The Civil Rights Act of 1964 does not specifically demand job-relevance for a pre-employment testing program that has the effect of discrimination. Yet the question presented to the court was whether, despite the absence of specific wording in the Act, such a requirement would be a proper interpretation. Chief Justice Burger chose to resolve the issue by determining the intention of the legislature in passing section (h) of the Act. To do this, he reviewed the extended Senate debate on that section and found that the intention of the legislature was that professionally developed ability tests be job-related wherever they fall under control of the Act.

IMPLICATIONS

Reports of landmark rulings by the Court in cases such as *Griggs* frequently prompt interpretations of their possible effects — effects that go far beyond those indicated by a strict reading of the Court's opinion. Imminent fundamental alterations in the operations of some segment of society are predicted. For example, Ivan Illich, a persistent and insightful critic of established education has hinted that *Griggs* may even signal the beginning of the end of institutionalized schooling:

> This case may set us on the road to legal recognition that schooling requirements, in and of themselves, constitute a discrimination which hampers social advancement and so violates public policy. We are told that the offer of "equal opportunity" subject to irrelevant educational standards (that the classes protected by the statute are less likely to meet) can be compared to the fabled offer of milk to the stork and the fox (Illich, 1971).

There is no reason to go quite that far in assessing the probable consequences of the decision, for nowhere does the court suggest that such non-job-related requirements are inherently discriminatory and prohibited by any statute or law. Although it may appear to some that such a holding is only a slight extension of the reasoning of the opinion, the law literature is loaded with speculation forecasting an impending attack on one established citadel or another that never quite arrives.

The decision seems clearly limited to the prohibition of "diploma or testing" requirements as a condition to employment where they tend to operate to the disadvantage of certain identified classes by preserving pre-existing patterns of discrimination and where it can be demonstrated that they do not measure the prospective employee's ability to perform the job in question (2). Nothing in the decision would, for example, prohibit an employer from maintaining such requirements for whites and waiving them for the class discriminated against until the pre-existing discrimination patterns had altered and racial balance had been established. Then the procedure could be reinstated for all employees without fear of judicial interference. In fact, where there is no evidence that the requiremnt operates or has operated to disqualify the protected group at a higher rate than whites, it is permitted (3). It was not the intention of the legislature to hamper business discretion except in such extremely limited circumstances as those presented in *Griggs*.

What, then, is the effect of *Griggs* on state certification requirements and on local school district employment practices?

The courts have considered credentials to be licenses, much like hunting licenses or building permits. They have found in them none of the elements of a contract protected by the Fourteenth Amendment to the Constitution. They merely confer a personal privilege on the applicant — in this case, the right to teach in the schools if he is able thereafter to secure employment. The state legislature, in the proper exercise of its discretion, may provide for a general system of licenses or certificates for a person qualified to teach in the public schools and may likewise provide for revocation of such licenses at its pleasure. Once the authorities have discovered that the applicant possesses the qualifications required by the legislation, the power to exercise discretion is exhausted and performance of the ministerial act of issuing the certificate becomes mandatory and may be compelled by the appropriate procedure.

So far we have discussed only the issuance of a license to teach and not the employment of teachers. Obviously the licensing of teachers itself lies outside of the scope of the reasoning in *Griggs*. The fundamental issue was discrimination in employment. Thus a court action against the certification agency, designed to prohibit the issuing of credentials

on the basis of the *Griggs* reasoning, would be as if *Griggs* were originally brought against the school system in an effort to force it to issue the diplomas or abolish the granting of them because, although the plaintiffs were otherwise qualified for the positions, they could not get them without possessing that particular scrap of paper. However interesting such an approach might be, it certainly was not the one taken by the parties in *Griggs*.

Therefore, there appears little hope that the practice of issuing teaching credentials as it now exists will be prohibited through any direct attack in the courts, any more than the practice of issuing diplomas by schools will be prohibited by a direct attack – despite the fundamental unfairness possibly inherent in both procedures. More than likely, where the requirements limit the protected class from entering the profession on an equal basis with the previously favored class, the Court will recognize the license attributes of the credential and order the certifying agency to issue the certificate in such a way as to assure that any pre-existing discrimination patterns in teaching faculties are not perpetuated. In a 1967 decision, for example, later affirmed by the Supreme Court, the superintendent of schools in Alabama was ordered to apply certification requirements without discrimination by race and also to apply them or grant provisional certificates in a manner that will not tend to perpetuate faculty segregation or avoid faculty integration (4).

Suppose, however, a circumstance arises where a school district refuses to hire a member of one or another minority group (who is an otherwise qualified teacher) or even to transfer him from the position of teacher's aide to teacher on the sole grounds that the applicant lacks credentials. Also assume that there is evidence of *de facto* segregation in the teaching faculty of the school, resulting from prior policies of the school board discriminating against the group; and finally, that the credential requirement appears to limit full participation by any group in the profession. These conditions may be sufficient to make out a situation like that in *Griggs*. If that rationale applies, the school district would be compelled to demonstrate the connection between the requirements and the subsequent proficiency displayed by the teacher or would risk being ordered to abolish them. However, *Griggs* itself is not controlling. It purports only to interpret the Civil Rights Act of 1964. The Act specifically excludes a state or political subdivision of a state as an employer affected by its provisions. It is the Fourteenth Amendment to the Constitution that applies to state activities that may discriminate by race or color. The courts have consistently resorted to the Amendment whenever they reviewed state employment practices on this basis (5). There is no reason, then, to doubt that a result similar to *Griggs* would obtain in an action brought against a state or a state agency on similar facts.

The equal protection clause of the Fourteenth Amendment makes unlawful a distinction on the grounds of race or color in awarding state employment. Also, where the hiring practice of a public agency, even without conscious intent, has the effect of producing a *de facto* pattern of racial discrimination, such discriminatory effect renders the method of selection sufficiently suspect to make out a *prima facie* case of unconstitutionality. (The courts have not yet decided that the effect renders the method of selection actually constitutionally defective.) Under such circumstances, the public agency has the burden of justifying the use of such hiring practices by showing some rational connection between the requirement and the actual demands of the job to be performed. One's capability may be shown merely by producing evidence of prior employment as a teacher on a level with the same qualifications and skills generally demonstrated by white teachers.

Therefore, although *Griggs* pertained to employment practices in the private sector that tended to perpetuate pre-existing discrimination patterns, there seems no reason to expect a result much different from that in an action based on facts similar to those presented in our example, begun against a local school board. Should such a case actually be commenced and the defendant fail to demonstrate a reasonable connection between the requirement and the job of teaching, the requirement would be prohibited for that district. Teacher requirements would then, in effect, be set on a district-by-district or even school-by-school basis. The state might then find itself under intense pressure from both the public and (perhaps) the courts either to waive the requirements for all or to find a method that reasonably measures the person for the job.

In summary, the *Griggs* opinion confirms a tradition that prohibits employment procedures that discriminate against a protected class by prolonging a pre-existing pattern of discrimination. It is not a ruling that non-job-related conditions for employment are inherently discriminatory and prohibited. Thus state credentials and job requirements that are a precondition to employment within a school system may not be directly attacked on the basis of the *Griggs* rationale. However, in a school district where a particular racial group fails to achieve positions as teachers in some reasonable relationship to their numbers, solely because they have been unable to obtain credentials and where the applicants from that group are otherwise qualified (assuming all other pertinent facts also to exist), then a *Griggs* fact pattern exists.

Should the employment practices or the credential requirements prove not to be a fair test of an applicant's qualifications for and performance on the job, then the Fourteenth Amendment to the Constitution may compel the requirements to be set aside and the applicant hired. Thus, community college districts may well soon be challenged to show how their own employment procedures and requirements relate to job performance. Do grades made in college relate positively to skill in teaching? Do letters of recommendation from previous employers or from graduate school professors predict teaching proficiency? The educational researchers, who have been asking these questions for years, have reached only negative conclusions or, at best, non-significant relationships. Now these same questions are due to be raised by other groups. It is not too early to begin to seek justification for the requirements. Better still, it is not too early to abandon them in favor of a rational method that can be shown to relate to effective teaching.

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NOTES

1. Willie S. Griggs, et al., Petitioners v. Duke Power Company, United States Law Week, Wash., D.C., (39): LW, 4317-4321, 71.03.09

2. See also, Hicks v. Crown Zellerbach Corp. (DC La. 1970) 319 F. Supp. 314, where the imposition by an employer of new testing requirements was held unlawful under 200e (2) where its impact was primarily to the disadvantage of formerly segregated blacks wishing to improve their job status.

3. Rios v. Enterprise Assn. Steamfitters Loc. U. No. 638 of U. A., 326 F. Supp. 198, (DC NY 1971) where plaintiff was denied a preliminary injunction restraining the union from denying him membership because it was not shown that the test, which he was required to take and failed, operated to disqualify Negroes at a higher rate than whites.

4. Lee v. Macon County Board of Education (1967 DC Ala.) 267 F. Supp. 468, affd, Wallace v. United States, 389 US 218 19 L. Ed 2d 422, 88 S. Ct. 415.

5. Kerr v. Enoch Pratt Free Library (CA Md.) 149 F2d 212, cert. denied, 326 US 721; Reynolds v. Board of Public Instruction (CA Fla.) 108 F. 2d 759, cert. den. 326 US 740; and many others.
See also Youngblood v. Board of Public Instruction of Bay County Fla. (CA Fla. 1969) 419 F2nd 1211, in which it was held that in no case must teachers and others who work directly with children at a school be assigned so that the racial composition of the staff indicated that the school was intended for black or white students.

6. See US v. Local No. 86 Intern. Assn. of Bridge, Structural, Ornamental and Reinforcing Iron Workers (DC Wash. 1970) 315 F. Supp. 1202, where prior employment as a journeyman was *prima facie* evidence of journeyman's capability.

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"Mr. Chief Justice Burger and the Disestablishment of Schooling," by Ivan Illich. Centro Intercultural de Documentacion, Doc. A/E 71/310, Cuernavaca, Mexico.

ANNOUNCING TWO NEW CLEARINGHOUSE BOOKS

We should like to call our readers' attention to two new books prepared by the Clearinghouse staff.

The first, *The Constant Variable: New Perspectives on the Community College*, will be published this month by Jossey-Bass of San Francisco. The principal authors are Arthur M. Cohen (Director of the Clearinghouse), Florence B. Brawer, and John Lombardi, assisted by John R. Boggs, Edgar A. Quimby, and Young Park. The foreword is by Raymond E. Schultz.

This analytical review is addressed to junior college administrators and researchers, examining the literature on students, faculty, instruction, curriculum, institutional research, and vocational education. It questions the prevailing wisdom of the field, making recommendations for new directions in curriculum development, organizational patterns, and the study of students. Over 400 documents are cited.

The second book in the Clearinghouse series is *Confronting Identity: The Community College Instructor*, by Arthur M. Cohen and Florence B. Brawer. With a foreword by Nevitt Sanford, this one will be published in January 1972 by Prentice-Hall. Written for the community college faculty member in practice or in training, it discusses the issues pertinent to the definition of the instructor's personal identity and how this affects his professional as well as personal development.

Both books may be ordered now from the publishers.

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