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Employment Discrimination -- Building Up the Headwinds

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introduction of the equal protection compelling interest requirements in this area of the law and, accordingly, will not designate access to the civil courts generally as a fundamental right.[79] Such a course seems wise to this writer. Government is not shackled with the command to achieve the impossible goal of equality; yet the Court retains the option to eliminate unfairness in specific areas where the burden on the indigent is unreasonably heavy.

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Employment Discrimination—Building Up the Headwinds

In 1971 the United States Supreme Court held in *Griggs v. Duke Power Co.*[1] that a private employer's hiring practices violated the mandate of Title VII of the Civil Rights Act of 1964.[2] Faced with a showing of racially discriminatory impact without intent,[3] a unanimous Court[4] concluded that "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups"[5] were invalid absent proof of genuine "business necessity"[6] within the scope of the Title

[79] *But see* Note, *Free Access to the Civil Courts as a Fundamental Constitutional Right: The Waiving of Filing Fees for Indigents*, 8 NEW ENG. REV. 275, 302 (1973). This note states the novel proposition that since the Supreme Court did not specifically address the concept of access to the courts generally, the designation of that concept as a fundamental right by the lower courts remains intact.

[1] 401 U.S. 424 (1971). The Court invalidated Duke Power's requirement of a high school diploma and satisfactory aptitude test scores for employment in all non-labor force departments. The requirement was instituted, without a meaningful validation study, despite the successful performance of non-high school graduates already employed in those departments.

[2] Civil Rights Act of 1964 [hereinafter cited as Act], §§ 701-16, 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, Equal Employment Opportunity Act of 1972, 42 U.S.C.A. §§ 2000e to 2000e-15 (Supp. 1972). For pertinent portions of the Act see text accompanying note 18 *infra*. For a recent analysis of the application of Title VII to hiring practices see Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1119-51 (1971).

[3] An analysis of the doctrine of unintentional discrimination is not within the scope of this note. It is now generally accepted that intent is unnecessary for the establishment of a violation of Title VII. *See, e.g.*, Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.) petition for *cert. dismissed*, 404 U.S. 1006 (1971). However, it is clear that an employment practice must have a discriminatory impact to violate Title VII. *See, e.g.*, Rios v. Steamfitters Local 638, 326 F. Supp. 198, 202-03 (S.D.N.Y. 1971). For a detailed discussion of the ramifications of the Court's redefinition of discrimination see Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

[4] Mr. Justice Brennan did not participate.

[5] 401 U.S. at 432.

[6] *See* notes 20-33 *infra* and accompanying text.

VII Guidelines promulgated by the Equal Employment Opportunity Commission.[7] Subsequently, both commentators and the lower federal courts have been primarily concerned with the ramifications of *Griggs* in the area of job testing.[8] Recently in *Spurlock v. United Airlines, Inc.*,[9] the Court of Appeals for the Tenth Circuit was confronted with the racially discriminatory impact of certain "pre-employment" standards utilized to screen applicants *prior* to job testing. However, in discarding the rigid "business necessity" doctrine in favor of a more flexible "job-related" standard, the court presented United and other employers in analogous positions with a windfall of considerable proportions.

In May 1969, Paul Spurlock submitted an application to United Airlines for employment as a flight officer. At the time he was twenty-nine years of age, had completed two years of college, and had logged 204 hours of flight time. He thus fitted the composite flight officer qualifications previously advertised by United.[10] Nevertheless, United rejected his application because it had recently increased the educational and flight time requirements.[11] After increasing his total flight time to five hundred hours, Spurlock reapplied and was again rejected. Suit was filed under the enforcement provisions of Title VII[12] alleging that the miniscule number of black flight officers (approximately nine out of a total of 5900) established a prima facie case of racially discriminatory hiring practices.[13] Spurlock did not seek admission to United's "rigor-

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[7]Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-.14 (1972).

[8]*E.g.*, Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906 (4th Cir. 1973); Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972); Note, *Intelligence Testing: Beyond Griggs v. Duke Power Company*, 49 CHI.-KENT L. REV. 82 (1972); Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Company*, 72 COLUM. L. REV. 900 (1972).

[9]475 F.2d 216 (10th Cir. 1972).

[10]*See* Spurlock v. United Airlines, Inc., 330 F. Supp. 228, 229 (D. Colo. 1971). United's employment brochure set forth the following qualifications: a commercial pilot's license (generally requiring 165-200 hours of flight time), two years of college (which could be waived for applicants with equivalent experience and excellent qualifications) and excellent physical condition. Other factors taken into consideration included flight aptitude, learning ability and temperament. *Id.*

[11]A memorandum circulated to the personnel department in April contained the following guidelines for placing candidates into process: "(1) College degree; (2) 500 hours of flight time (minimum); Commercial license and instrument rating; (4) Age 21 through 29." *Id.* at 229.

[12]Act § 706, 42 U.S.C. § 2000e-5 (1964), *as amended*, 42 U.S.C.A. § 2000e-5 (Supp. 1972).

[13]Sparse representation of a minority group within a workforce is a commonly accepted index of discrimination. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 n.19 (1973); Chance v. Board of Examiners, 458 F.2d 1167, 1172, 1176 (2d Cir. 1972) (small percentage of black principals in New York city schools in comparison with other large metropolitan school systems); *cf.* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (all white

ous training course,"[14] but merely claimed denial of an equal opportunity to take the tests which United administered to select candidates for the course. Relying on a less sweeping interpretation of the *Griggs* opinion, the district court held that despite the prima facie discriminatory impact, United's standards clearly had a " 'manifest relationship to the employment in question.' "[15] This note will examine the implications that emanate from the failure of both the trial and appellate courts to inquire into the feasibility of less discriminatory alternatives.

Of all the recent civil rights legislation, only Title VII appears to have been directed at the economic aspects of minority group oppression.[16] To improve the employment prospects of blacks, the Act has outlawed discrimination, generally assumed to be the cause of the problem.[17] Section 703 of Title VII states: "[I]t shall be an unlawful *employment practice* for an employer—(1) to fail or refuse to hire, to discharge any individual . . . or (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race, color, religion, sex or national origin."[18] Presently, *Griggs* is the only Supreme Court case in which testing devices and educational requirements have been challenged as unfair hiring practices.[19] In proscribing practices that were superficially neutral but

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fire department in a city with a minority population of 6.4%). *But see* Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972) (blacks comprised one third of city's population, but only 12.4% of its police force). In Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), *aff'd in part, rev'd in part*, 459 F.2d 725 (1st Cir. 1972), statistics showing 3.6% black policemen in a city with a 16.3% black population were held to be "of no value in deciding which, if any, of the specific practices referred to in the complaint are discriminatory . . . ." *Id.* at 936.

[14]475 F.2d at 219.

[15]330 F. Supp. 228, 235 (D. Colo. 1971), *quoting* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[16]42 U.S.C. §§ 1981-2000h (1970); *see* Note, 84 HARV. L. REV., *supra* note 2, at 1111-13.

[17]Note, 84 HARV. L. REV., *supra* note 2, at 1113. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

[18]Act § 703(a), 42 U.S.C. § 2000e-2(a) (1970), *as amended*, 42 U.S.C.A. 2000e-2(a) (Supp. 1972) (emphasis added). The 1972 amendment added "or applicants for employment" after "his employees."

[19]There have been only three other Title VII decisions on the merits. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam), involved a challenge to a company rule against hiring women with preschool-age children—men in like circumstances carried no such disability. Love v. Pullman Co., 404 U.S. 522 (1972), upheld an administrative procedure of the Equal Employment Opportunity Commission concerning federal-state relations in the processing of Title VII cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), upheld a rejected applicant's right to sue subsequent to a finding by the EEOC of reasonable cause for the rejection. Furthermore, the Court held that refusal to hire an applicant because he had engaged in illegal activity

discriminatory in operation, the Court introduced the now familiar "business necessity" doctrine. "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[20] However, the Court's thematic approach[21] and its reluctance to define precisely the concept of "business necessity" relegated the task of delineating the scope of the doctrine to the lower federal courts.[22] The only assistance offered came in a casual remark that the interpretation of Title VII contained in the EEOC Guidelines was entitled to "great deference"[23] as an expression of congressional will.[24] Under the present Guidelines[25] the use of a "test"[26] that has an adverse impact on the hiring of minority group members constitutes a discriminatory *employment practice* unless test validation[27] demonstrates "a high degree of utility . . . [and] alternative suitable hiring . . . procedures are unavailable for use."[28] Notwithstanding the Supreme Court's endorsement of the Guidelines, attempts were made in early post-*Griggs* decisions to create other validation standards.[29] However, the Guidelines have recently

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against the company was legitimate, absent proof of discriminatory application. *Id.* at 798, 806.

[20]401 U.S. at 431.

[21]This technique, often used in opening new areas of the law, involves listing several factors which affect the Court's decision, thus allowing the lower courts to determine the proper scope of the new rule. *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). For a discussion of the thematic approach employed in *Griggs*, see Wilson, *supra* note 8, at 846.

[22]In addition to the language in the text accompanying note 20 *supra*, the Court elsewhere in its opinion used such interrelated terminology as "significantly related," "genuine business need," and "manifest relationship." 401 U.S. at 426, 431-32.

[23]*Id.* at 434.

[24]"The Commission shall have authority from time to time to issue, amend, or rescind suitable procedures and regulations to carry out the provisions of this subchapter . . . ." Act § 713, 42 U.S.C. § 2000e-12(a) (1970). However, it is commonly accepted that the guidelines do not have the force of law. *See, e.g.*, Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1190 (7th Cir. 1971), *cert. denied*, 404 U.S. 939 (1972). An extensive discussion of the increased authority given to the Commission by the Equal Employment Opportunity Act of 1972 may be found in Comment, *In America, What You Do Is What You Are: The Equal Opportunity Employment Act of 1972*, 22 CATH. U.L. REV. 455 (1973).

[25]The Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607 (1972), superseded Guidelines on Employment Testing Procedures, 35 Fed. Reg. 1233 (1970).

[26]Significantly, the Guidelines define the term "test" to include "all formal . . . techniques of assessing job suitability including . . . background requirements [and] educational or work history requirements . . . ." 29 C.F.R. § 1607.2 (1972).

[27]The minimum standards for test validation are set forth in 29 C.F.R. § 1607.5 (1972). For a recent discussion of judicial response to test validation under the EEOC Guidelines, *see* Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employees*, 41 GEO. WASH. L. REV. 505, 521-29 (1973).

[28]29 C.F.R. § 1607.3 (1972).

[29]*E.g.*, Colbert v. H-K Corp., 4 FEP Cas. 529 (N.D. Ga. 1971), *on remand from* 444 F.2d

gained general acceptance as the appropriate basis for resolving test validation inquiry.[30] Moreover, their influence has appeared elsewhere as the courts have proceeded to recognize that some reasonable and efficient employment practices, which engender widespread discriminatory repercussions, are intolerable.[31] Nonetheless, the Guidelines fail to provide an explicit definition of the "business necessity" concept. The most cogent judicial definition appears to be that which has evolved from an amalgamation of the Guidelines and several appellate court formulations:[32]

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[33]

In *Spurlock,* the court premised its decision on the existence of a heretofore unarticulated dual standard in Title VII litigation. "*Employment practices* which are inherently discriminatory may nevertheless be valid if a *business necessity* can be shown. And *pre-employment qualifications* which result in discrimination may be valid if they are shown to be *job-related.*"[34] Despite the language of Title VII,[35] the trend established by other courts[36] and forceful arguments

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1381 (5th Cir. 1971). The court suggested that under *Griggs* "validity itself is a reasonable, not an absolute requirement." *Id.* at 530.

[30]*E.g.,* United States v. Georgia Power Co., 474 F.2d 966 (5th Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973).

[31]This view has frequently been taken in cases involving seniority systems having discriminatory impacts on black employees. *See, e.g.,* United States v. Hayes Int'l. Corp., 456 F.2d 112 (5th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *noted in* 50 N.C.L. REV. 1161 (1972).

[32]One of the formulations happened to be that announced by the Tenth Circuit in Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970): "When a policy is demonstrated to have discriminatory effects, it can be justified only by a showing that it is *necessary to the safe and efficient* operation of the business." (emphasis added).

[33]Robinson v. Lorillard Corp., 444 F.2d 791, 798 (footnotes omitted). *See also* United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972) (management convenience not synonymous with business necessity).

[34]475 F.2d at 218 (emphasis added).

[35]*See* text accompanying note 18 *supra.*

[36]*See, e.g.,* cases cited notes 3 & 30 *supra.* Also, in Johnson v. Pike Corp., 332 F. Supp. 490

by commentators,[37] United's requirements were analyzed within a job-related context.[38]

The court first concluded that United's statistical evidence clearly showed that "500 hours was a reasonable minimum to require of applicants to insure their ability to pass United's training program."[39] Since minimizing the program's cost constituted a "business necessity," the standard was job-related.[40] Superimposing the "business necessity" title upon a "job-related" analysis appears only to expose and exacerbate the latter's vulnerability to careful scrutiny. Even under its own relatively primitive formulation of "business necessity," the court had required proof that the policy was "essential to the safe, efficient operation of the company's business."[41] Moreover, simple statistical analysis reveals that a lower cut-off point would be an equally reasonable alternative.[42] The court's position can be defended however, by recourse to quantitative economic values. A higher cut-off point causes a proportionate reduction in total expenditures by reducing the number of trainees necessary to produce a given number of pilots.[43] But there is a readily discernable flaw that militates against complete reliance on this argument. Rejection of the lowest trainee groups not only eliminates half of the failures, but also depletes the ranks of graduates by approximately one-third. Consequently, as more applicants from the higher categories are hired, the proportionate increase in failures from this group will partially offset the reduction achieved by elimination of the lower applicant groups.

(C.D. Cal. 1971), the court read *Griggs* to say that the only permissible factors to consider in refusing to hire an employee were those directly affecting his ability to perform his job. Thus even the job relatedness approach "leaves no room for arguments regarding inconvenience, annoyance or even expense to the employer." *Id.* at 495.

[37]*See* Wilson, *supra* note 8, at 873 (academic records held to same standards as employment tests); Note, 84 HARV. L. REV., *supra* note 2, at 1142.

[38]The court itself had previously recognized the hierarchy in standards. *See* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970).

[39]475 F.2d at 216, 218-19 & n.1.

[40]*Id.* at 219.

[41]Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970).

[42]The statistical significance of a difference between two groups can be determined using the chi-square test of significance. In this case the null hypothesis is that the success rate is the same for the two groups of trainees above and below a given cutoff point. Using both two hundred and five hundred hours of flight time as cutoff points to be tested, the null hypothesis will be rejected in both instances (at less than the .05% level) since the one percent and five percent levels are commonly used in deciding whether to reject a null hypothesis. Thus the two cut off points appear to be of equal statistical significance. *See* G.W. SNEDECOR & W. G. COCHRAN, STATISTICAL METHODS 20-29, 215-19 (6th ed. 1968).

[43]475 F.2d at 219 n.1.

With respect to the increased eduational requirement, the court noted that "possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information given in the atmosphere of a classroom training program."[44] No inquiry was made into the comparative value of the company's admission tests for revealing the desired traits. Furthermore, the degree requirement was apparently not considered dispositive since United willingly waived it for applicants who possessed extensive, high quality flight experience.[45]

In reflecting on the purposes of Title VII, the Supreme Court in *Griggs* took explicit judicial notice of the disparity between the educational levels of blacks and whites as being a consequence "directly traceable to race."[46] Nevertheless, some courts have simply assumed that the high school diploma requirement is valid.[47] As one commentator has noted:

> The reluctance of courts to tamper with such requirements is understandable, given the faith that American society has always reposed in education. But it ignores the substantial discriminatory impact which educational requirements can have, without justification, on minority group employment.[48]

Today the disparity continues; it is even greater at the college level.[49] The rate of black unemployment persists at double the rate for whites.[50] Recently, some courts, relying on these facts as well as Chief Justice Burger's admonition against "using diplomas or degrees as fixed measures of capability,"[51] have employed various formulations of the "business necessity" concept to invalidate the high school diploma requirement.[52] By circumventing the strictures of this doctrine, the Tenth Cir-

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[44]*Id.* at 219.

[45]*Id.*

[46]401 U.S. at 430. *See* the statistics used by the Court. *Id.* at 430 n.6.

[47]Broussard v. Schlumberger Well Services, 315 F. Supp. 506, 510 (S.D. Tex. 1970); Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413, 437-38 (S.D. Ohio 1968).

[48]Note, 84 HARV. L. REV., *supra* note 2, at 1143.

[49]Negroes comprise 11.2% of the total population, but only 6.0% of the total college enrollment. 11.6% of whites over age twenty-five complete four years or more of college, compared with 4.5% of Negroes. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1971 27, 108, 128 (92d ed. 1971).

[50]*See* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, MONTHLY LABOR REVIEW 104 (Aug. 1973).

[51]401 U.S. at 433.

[52]*See* United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). However, the high school diploma or its equivalent has survived rigid scrutiny as a requirement for metropolitan policemen. *See, e.g.*,

cuit easily approved United's college degree requirement, since "a person with a college degree is more able to cope with the initial training program and the unending series of refresher courses than a person without a college degree."[53] However, *Spurlock* fails to require the presentation of any empirical evidence to substantiate the proposition that a college graduate can better cope with the program than a non-graduate *of comparable intelligence.* But the court apparently saw no need for comparisons and consequently, did not even demand evidence of a significant correlation between college graduation and successful performance as a pilot, given the fact that an applicant had passed the training program.

In conclusion, the court offered an explanation for the relative lightness of United's burden of proof: the job of airline flight officer "clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great. . . ."[54] In light of the facts in the case, this crucial syllogism appears to rest on somewhat dubious logic at best. The court's description of the challenged requirements as "pre-employment" qualifications implicitly recognizes that they merely serve to determine which applicants may proceed to admissions testing.[55] As the trial court noted, the plaintiff was not demanding automatic employment because of his race, merely the opportunity to take the tests.[56] Assuming the training program was as effective as the court's use of the term "rigorous" implies, only those genuinely capable individuals would eventually become pilots. Thus the "staggering" human and economic risks cited by the court[57] appear to involve merely those losses incurred because of applicants who enter but fail to complete the training program. In light of the comparatively diminutive "human" risk involved, the court's reasoning would seem inappropriate unless United were able to demonstrate a "staggering" economic risk involved in accepting less qualified applicants into its training program.

Assuming *arguendo* the validity of the court's proposition, its con-

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Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (given two methods of adequate screening, the non-discriminatory one must be used), *cited with approval in* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973).

[53]475 F.2d at 219.

[54]*Id.*

[55]*See id.* at 218.

[56]Spurlock v. United Airlines, Inc., 330 F. Supp. 228, 235 (D. Colo. 1971).

[57]*See* 475 F.2d at 219.

clusion nevertheless remains vulnerable unless one accepts the propriety of "selective extraction" as a means of legitimizing decisions. The court appears guilty of this convenient practice upon examination of the source of its proposition.[58] The court's justification was extracted from that portion of the Guidelines concerned with minimum standards for validation of *tests*.[59] In effect, the court implicitly equated United's requirements with tests in order to rationalize the application of a lowered evaluation standard, yet it completely ignored a preceding section that enumerated additional criteria by which tests must be evaluated.[60] Had the court extended this tacit analogy to its logical dimensions, United would have been required to show that suitable alternative hiring procedures were "unavailable for its use."[61] Moreover, the court failed to articulate reasons for ignoring the Guidelines' definition of the term "test."[62]

In defense of the court's conservative interpretation of *Griggs*, it should be noted that *Spurlock* contains at least two substantial factual variants. First, *Griggs* involved an archetype of the subordination of black laborers in the South.[63] Obviously the circumstances in *Spurlock* revolve on a more sophisticated level concomitant with the advanced technology involved in United's business. Also, Duke Power had implemented its requirements without a prior meaningful study of their relationship to successful job performance.[64] United, on the other hand, at least offered statistical evidence to demonstrate "good faith"[65] in raising its requirements. These two factors perhaps prompted the trial court's reiteration of Chief Justice Burger's *caveat* that Congress did not "command that any person be hired simply because . . . he is a member of a minority group"[66] nor that "the less qualified be preferred over the

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[58]*Id.*

[59]*See* 29 C.F.R. § 1607.5 (1972). The court drew its justification statement from 29 C.F.R. § 1607.5(c)(2)(iii) (1972).

[60]*See* 29 C.F.R. § 1607.3 (1972).

[61]29 C.F.R. § 1607.3(b) (1972). *See* text accompanying note 28 *supra.*

[62]*See* note 26 *supra.*

[63]*See* 401 U.S. at 426-28.

[64]*Id.* at 431.

[65]In Handverger v. Harvill, 479 F.2d 513 (9th Cir. 1973), good faith was held to be a valid defense to an allegation of deprivation of rights under 42 U.S.C. § 1983 (1970). *But cf.* Johnson v. Pike Corp., 332 F. Supp. 490, (C.D. Cal. 1971) (good faith employment policy with discriminatory consequences interdicted by Title VII).

[66]401 U.S. at 430-31, *quoted with approval in McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

better qualified simply because of minority origins."[67]

The *Spurlock* decision qualifies as an important precedent for a sympathetic lower court response to the Burger Court's cautious approach toward enforcement of the constitutional rights of minorities.[68] Had the court seen fit to apply either a "business necessity" approach or the standards provided by the EEOC Guidelines, United's task would have been measurably greater. If the goals of Title VII are not to be abandoned, the courts must carefully consider the availability of alternatives and the specific problems they themselves present, and weigh these against the inequity of current hiring practices. If less discriminatory alternatives are feasible the courts should be extremely reluctant to condone existing discriminatory impacts. The "headwinds" against minorities have not yet dissipated; the advanced technology and elevated production standards of modern corporations should not blind the courts to the portentous consequences of permitting employers to reject qualified minority applicants merely because their white applicants are "better" qualified.

SAXBY M. CHAPLIN

Estate Tax—Administrative Expense Deductions—A Reaffirmation of the Section 2053(a) Standard

The transfer of property at death results in the levy of federal estate taxes upon the taxable estate, that is, the gross estate less allowable deductions and exemptions.[1] One of the allowable deductions from the gross estate is that of administration expenses provided for in section 2053(a) of the Internal Revenue Code of 1954.[2] Treasury Regulations

[67]401 U.S. at 436.

[68]*See, e.g.*, Palmer v. Thompson, 403 U.S. 217 (1971).

[1]INT. REV. CODE OF 1954, § 2051.

[2]INT. REV. CODE OF 1954, § 2053(a) provides:

General Rule.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

(1) for funeral expenses,
(2) for administration expenses,
(3) for claims against the estate, and
(4) for unpaid mortages on, or any indebtedness