The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies

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THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES: COMPROMISES AND CONTROVERSIES

Employment discrimination has worked severe economic hardships on minorities, locking groups into cycles of poverty and making social advancement all the more difficult.1 A major source of frustration for minorities has been the extensive use by both public and private employers of standardized, competitive employment tests.2 Proponents of standardized testing consider it an expedient measurement tool, enabling employers to process large numbers of applicants in a relatively short period of time.3 As a class, however, minorities tend to score significantly lower on standardized employment tests than nonminorities, resulting in lower selection rates for minority group members.4 Criticism has been leveled at these ostensibly neutral selection devices on the ground that patterned social and economic inequalities prevent minorities from entering the employment


2. For the purposes of this note, the term "employment test" will mean any standardized assessment instruments or procedures used for making inferences about the characteristics of people which form the basis of an employment decision. See American Psychological Association, Standards for Educational and Psychological Tests 2 (rev. ed. 1974) [hereinafter cited as 1974 APA Standards].

Almost every public employer uses a competitive, written examination as the basis for making personnel decisions. See generally O. Glenn Stahl, Public Personnel Administration 128-48 (7th ed. 1976). From 1940 to 1965 some 3,000 new tests were developed. In 1963, 84% of American companies were reported to be using tests for personnel selection, as compared with 64% in 1958. 3 A. Larson, Employment Discrimination: Race § 75.21 (1977).


selection process with resources equivalent to those of the wealthier, more educated groups.5

Historically, standardized testing aided employers in avoiding charges of discriminatory hiring practices by shrouding employment decisions with a veil of objectivity.6 Largely because the traditionally accepted definition of employment discrimination required proof of an invidious motive,7 state fair employment laws were generally ineffective in protecting minorities against arbitrary exclusion from employment opportunities.8 Since proof of discrimination turned on subtle and often elusive questions of fact, state fair employment agencies attempted to achieve voluntary compliance with state laws rather than institute troublesome administrative or judicial proceedings.9

After extended debate and intensive lobbying by innumerable special interest groups, Congress enacted Title VII of the Civil Rights Act of 196410 to serve as a comprehensive federal weapon for eliminating all as-

5. In Hobson v. Hanson, 269 F. Supp. 401, 481-85 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), Circuit Judge Skelly Wright enumerated several factors underlying the poor performance of minority children on standardized tests: (1) environmental disadvantages, specifically those relating to the development of verbal skills; (2) lack of self confidence in competing with persons from different cultural backgrounds; (3) psychological turmoil relating to one's status as a minority; and (4) apathy due to the atmosphere of low expectations fostered in urban schools. These same factors hamper the performance of adult minorities on standardized tests. See notes 185-90 and accompanying text infra. It is generally agreed, moreover, that poor minority performance is not related to genetically determined abilities. See Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 COLUM. L. REV. 691, 692-95 (1968).


9. See Blumrosen, supra note 7, at 68; M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 41-44 (1966).


It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of em-
pects of employment discrimination. Although this direct federal involvement spawned significant legal challenges to employment decisions predicated upon the use of test scores that excluded large numbers of minorities, the resulting legal dilemma became readily apparent. While the Act explicitly condemned employment discrimination, it also expressly authorized employers to use standardized tests as a basis for making employment decisions, so long as the results were not "intended or used to discriminate." Yet, because large numbers of minority applicants continued to be denied employment by ostensibly neutral tests, the need to identify discriminatory testing practices became paramount.

In 1966 the Equal Employment Opportunity Commission (EEOC) published its first set of testing guidelines, embodying EEOC's interpre-


12. See generally Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598 (1969). By the late 1960's, 15% to 20% of all complaints filed under Title VII included a charge that the use of standardized tests was discriminatory. Id. at 1637.


Notwithstanding any other provision of this subchapter, 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 or national origin.

14. The EEOC was created to investigate and attempt to conciliate claims of employment discrimination. The power to sue in federal district court, however, was originally given to the Attorney General or the complainant. 42 U.S.C. §§ 2000e-4 to 2000e-5 (1970). Moreover, an attempt to give EEOC the power to issue cease and desist orders was stricken in an early compromise bill. See Blumrosen, supra note 7, at 94-97. See also Comment, Continuing Violations in Private Suits Under Title VII of the Civil Rights Act of 1964, 32 ARK. L. REV. 381 (1978).

tation of Title VII as permitting only job-related tests. An employer was in violation of the guidelines if it could not demonstrate that its employment tests, when shown to exclude a disproportionate number of minorities, were job-related. Amended and reissued in 1970, EEOC's guidelines incorporated a concept that was to become the focus of employment testing litigation: test validity.

With the enactment of the Equal Employment Opportunity Act of 1972 (EEOA), federal, state and local governments, originally exempted from Title VII's provisions, were brought within its reach.

16. EEOC's testing guidelines were promulgated pursuant to its power to issue procedural rules. 42 U.S.C. § 2000e-12(a) (1976). EEOC was not granted the power to engage in substantive rulemaking, nor were the guidelines federal regulations within the meaning of the Administrative Procedure Act, 5 U.S.C. § 553 (1976). See Blumrosen, supra note 7, at 95 n.143, 96. See also General Elec. Co. v. Gilbert, 429 U.S. 125, 140-43 (1976).

17. The necessity of demonstrating a test's job-relatedness became a legal requirement under Title VII in Griggs v. Duke Power Co., 410 U.S. 424 (1971), in which the Court paid "great deference" to EEOC's guidelines. Id. at 434. The Court stated that: 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 . . . . More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. Id. at 431-32.


19. Test validity is a psychological concept which indicates the degree to which a test measures what it purports to measure and whether that which is measured is significant in terms of job performance. See 1974 APA STANDARDS, supra note 2, at 25-26; notes 32-43 and accompanying text infra. See generally L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING (3d ed. 1970).


21. The 1972 Act expanded Title VII's coverage to all employers engaged in industries affecting commerce employing at least 15 workers, including any governmental industries,
created the Equal Employment Opportunity Coordinating Council, composed of the federal agencies with major equal employment enforcement responsibilities, charged with the task of establishing a uniform set of testing standards and avoiding inconsistent enforcement of federal equal employment opportunity law.\textsuperscript{22} Despite numerous attempts, however, the member agencies were unable to agree on a uniform set of guidelines and the EEOC finally withdrew from participation.\textsuperscript{23} In November 1976, the Civil Service Commission and the Departments of Justice and Labor rescinded their individual guidelines and adopted the Federal Executive Agency (FEA) Guidelines \textsuperscript{24} to interpret the Title VII mandate. While most private employers were bound by the EEOC Guidelines, the FEA Guidelines governed federal contractors subject to Executive Order No. 11,246,\textsuperscript{25} the federal government as a civilian employer, certain state and local governments,\textsuperscript{26} and the Department of Justice in its prosecutorial responsibilities under federal law.\textsuperscript{27}

Following the enactment and subsequent amendment of Title VII, the multiplicity of employee selection guidelines created administrative and practical problems.\textsuperscript{28} Conflicting standards, debate over the proper role of

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\item businesses or activities. The federal government, corporations wholly owned by it, Indian tribes, some departments and agencies of the District of Columbia, and certain private membership clubs are excluded from the definition of employers 42 U.S.C. § 2000e-(b) (1976). The Civil Service Commission, however, was specifically designated to enforce Title VII against the federal government whenever it acts as a civilian employer. \textit{Id.} § 2000e-16. Enforcement power over states and localities was given to the EEOC. \textit{Id.} § 2000e-5.
\item Represented on the Council were the Departments of Labor and Justice, the Civil Service Commission, the EEOC and the Civil Rights Commission. The various sets of major pre-1972 Act guidelines are referenced at note 18 \textit{supra}.
\item \textit{See note} 18 \textit{supra}.
\item The Civil Service Commission was given additional equal employment responsibility under the Intergovernmental Personnel Act, 42 U.S.C. §§ 4701 to 4772 (1976).
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the EEOC, and varying agency and court interpretations regarding the scope of Title VII contributed to exacerbate the difficulties inherent in enforcing fair employment law. In a final effort to settle their differences and attain uniform standards, the Civil Service Commission, the Departments of Justice and Labor, and the EEOC formally adopted the Uniform Guidelines on Employee Selection Procedures on August 25, 1978. Because the Uniform Guidelines replace all prior federal employment testing pronouncements, they shall have substantial ramifications for existing fair employment law and the practice of employment testing. This note will measure these guidelines against previous agency efforts to establish testing standards and assess the degree to which they have accommodated the underlying philosophical conflict between meritocracy and equal achievement.

I. TESTING, GUIDELINES AND THE JUDICIAL RESPONSE

In the context of employment testing, a “valid” test is one that measures an applicant against those elements of the job necessary for successful job performance. Validity assessment can be viewed conceptually as a two-step process: first, indicators of job success are isolated through a job analysis and weighted according to their relative importance; second, the
test itself is evaluated to determine whether it actually measures these indicators, as well as its effectiveness in doing so.\textsuperscript{34} The American Psychological Association (APA) has identified three acceptable methods for determining test validity: criterion-related, content, and construct validation.\textsuperscript{35}

### A. Methods Of Test Validation

Criterion-related validity is investigated by comparing test scores with external variables (criteria) believed to be direct measures of the job performance in question.\textsuperscript{36} To determine whether validity exists under this method, the relationship between test success and measures of actual job performance is evaluated for statistical and practical significance.\textsuperscript{37} Although predicated upon statistical evaluation, and therefore considered to be an empirical methodology, the ultimate merit of a criterion-related validity study depends upon the appropriateness and quality of the criteria particular job. These requirements vary in complexity with the position in question. For a secretary, accurate and speedy typing may be necessary. For a systems analyst, abstract reasoning ability may be important. For a machinist, overall manual dexterity and an understanding of basic geometry may be paramount. See E. Ghiselli, \textit{Validity of Occupational Aptitude Tests} 22-23 (1966); E. McCormick \& J. Tiffin, \textit{Industrial Psychology} 47-63 (6th ed. 1974).

\textsuperscript{34} See generally, A. Anastasi, \textit{Psychological Testing} 134 (4th ed. 1976); Stahl, \textit{supra} note 2, at 131-32. Validity itself is not measured, rather, it is inferred from the data collected during the test's evaluation. 1974 APA Standards, \textit{supra} note 2, at 25.

\textsuperscript{35} 1974 APA Standards, \textit{supra} note 2, at 26. All three methods are interrelated logically and operationally. A complete study will include information about all types of validity and only rarely will a single method be of overwhelming importance by itself. \textit{Id.} See generally Anastasi, \textit{supra} note 34, at 159.

\textsuperscript{36} Criterion-related validity indicates a test's effectiveness in predicting a person's behavior in a particular situation. Anastasi, \textit{supra} note 34, at 140. Examples of simple criteria include supervisory ratings, number of units sold or produced, number of mistakes and regularity of attendance. Criteria, however, are dynamic in nature and will vary over time. See \textit{id.} at 142-46; McCormick \& Tiffin, \textit{supra} note 33, at 35-36.

There are two types of criterion-related validity: predictive and concurrent. Predictive validity indicates the extent to which an individual's future level of job performance can be predicted from a prior test score (\textit{i.e.}, how good a mechanic will John be in six months?). Concurrent validity shows the extent to which an applicant's present score will be predictive of job success as measured against those already employed (\textit{i.e.}, how good a mechanic would John be if he started now?). See 1974 APA Standards, \textit{supra} note 2, at 26.

\textsuperscript{37} The relationship between test scores and the criteria must be significant both statistically and practically in order to infer that a test is valid. Statistical significance is a mathematical demonstration of the test's accuracy in predicting successful job performance. Practical significance would indicate that, under the circumstances of the test's use, the correlation was of a statistically sufficient magnitude to be important as a measuring device. See Wilson, \textit{A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts}, 58 U. Va. L. Rev. 844, 860-61 (1972).
The content and construct methods comprise what are sometimes characterized as "rational" methods of validation because their efficacy depends largely upon the judgments of psychologists analyzing the relationship between the requisite job characteristics and the content of the test itself. Content validation evaluates the correlation between test questions or requirements and the skills or knowledge designed to be measured. Evaluating the validity of a particular test through an analysis of its content is appropriate only for tests designed to measure an individual's present skills or knowledge. Construct validation, on the other hand, attempts to determine the degree to which a test accurately measures whether an individual possesses some hypothetical trait identified as necessary for successful job performance. Validity demonstrated in this manner rests on the assumption that the presence of the construct in the individual, as evidenced by his test score, is predictive of future job performance.

B. The EEOC Guidelines

Whenever a test disqualified a disproportionate number of minorities, the EEOC's interpretive guidelines mandated that it be job-related.

38. The theory behind criterion-related validity assumes that the criteria selected will themselves possess validity. The isolation and evaluation of predictive criteria is difficult. See 1974 APA Standards, supra note 2, at 27; Ghiselli, supra note 33, at 22-23.
40. Anastasi, supra note 34, at 134-35. For example, a test which measures one's ability to type would generally be considered content valid if the position tested for was that of a secretary. Employment tests cannot be justified solely on the basis of content validity, however, unless the skills or behaviors tested for represent nearly all of the important elements of the job. 1974 APA Standards, supra note 2, at 28-29.
41. A content valid test can tell an employer only whether or not a particular applicant presently possesses certain skills or knowledge. It is not predictive in the sense that it would indicate a person's level of performance at some "future" time. See Wilson, supra note 37, at 863; 1974 APA Standards, supra note 2, at 28.
42. 1974 APA Standards, supra note 2, at 29-30. Examples of constructs include loyalty, perseverance, intelligence and mechanical comprehension.
43. See Anastasi, supra note 34, at 151-58; Wilson, supra note 37, at 863-64.
44. Since the FEA and Uniform Guidelines did not become effective until 1976 and 1978 respectively, employment testing law developed primarily from court interpretations of the EEOC Guidelines. In order to examine employment testing law from a developmental perspective, the EEOC Guidelines will be discussed first.
45. 29 C.F.R. § 1607.3 (1977). Although the Guidelines themselves do not specify any particular disqualification ratio as "disproportionate," the cases finding adverse impact generally report vast differences between the success rates for whites as compared with those for
The guidelines required that a test's validity be demonstrated by empirical evidence, generated whenever possible by the use of criterion-related validation methods. 46 The use of content or construct methods of validation was restricted to those instances in which a criterion-related validity study technically would not be feasible. 47 Yet, even if an employer had satisfied this burden, the guidelines additionally required that the employer show a lack of “suitable alternatives” with less adverse impact on minorities. 48

This requirement not only placed a heavy evidentiary burden on the employer, but was further complicated by the vagueness of the term “suitable.” 49 By placing the burden of proving the nonexistence of suitable alternatives on the employer, the EEOC guidelines opened the door to endless debate over the comparative discriminatory effect of a wide variety of tests. 50 Moreover, because the cost of validating only one test is so substantial, few employers could afford to investigate and validate numerous alternative selection devices. 51

Perhaps the most stringent requirement of the EEOC guidelines was that tests should be analyzed for differential validity. 52 This concept was based on the theory that a test may be a valid predictor of job success for one group — usually mainstream whites, but not for others — usually blacks due to the continuing effects of past segregation and cultural separatism. 53 Differential validity would not exist, however, merely because one group continually scores lower than another. Rather, a test is considered

47. Technical feasibility was defined as “having or obtaining” sufficient numbers of minorities to achieve findings of statistical and practical significance. The employer was assigned the burden of proving the absence of technical feasibility by “positive evidence.” Id. § 1607.4(b).
48. Id. § 1607.3. The EEOC also required an employer to demonstrate that its test evidenced a “high degree of utility” or practical usefulness. The APA has never established standards for measuring a test’s utility. See Seelman, supra note 23, at 12-17; Comment, supra note 6, at 1128.
50. See, e.g., Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). “[T]here 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.” Id. at 798, quoted with approval in Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 244-45 (5th Cir. 1974).
51. See Gardner, supra note 29, at 72-73; Comment, supra note 6, at 1130.
52. 29 C.F.R. §§ 1607.4(a), 1607.5(b)(5) (1977).
53. An often cited text in this area concludes that “evidence of test validity or invalidity in a given ethnic group cannot be safely assumed to apply to another ethnic group.” J. KIRKPATRICK, R. EWEN, R. BARRETT & R. KATZELL, TESTING AND FAIR EMPLOYMENT:
differentially valid when it operates to over predict or under predict the job success of a particular group. As a part of the overall validation study, the EEOC guidelines required an employer to generate and report test data for each minority group involved and then to validate the test for each group separately, whenever feasible. If differential validity was indicated, an employer was prohibited from using that test on groups for which the test was believed to be nonpredictive.

C. Judicial Response to the EEOC Guidelines

Prior to the enactment of Title VII, adverse impact was not generally considered to be prima facie evidence of employment discrimination absent an invidious motive on the part of an employer. After the Act's passage, however, federal district courts began enjoining the use of tests when a plaintiff proved that a particular test's use had deprived his group or class of employment opportunities and was not job-related. In Griggs v. Duke Power Company, the Supreme Court enunciated two principles critical to employment testing litigation. First, the Court defined employment discrimination under Title VII in terms of adverse effect rather than discriminatory intent. Secondly, the Court interpreted Title VII's testing provision to sanction only tests proven to be job-related, thereby affirming that aspect of the EEOC guidelines.

Griggs was a class action brought by black employees of the Duke Power Company, alleging that the requirements of a high school diploma or passing scores on a standardized test as a prerequisite to initial employment or promotion was discriminatory under Title VII. In reversing the

Fairness and Validity of Personnel Tests for Different Ethnic Groups 30 (1968). But see note 152 and accompanying text infra.

54. See Wilson, supra note 37, at 869.
57. See generally Seelman, supra note 23, at 47.
60. Id. at 431-32. See Blumrosen, supra note 7, at 61-63.
61. 401 U.S. at 426-28. Both the district court, 292 F. Supp. 243 (M.D.N.C. 1968), and the court of appeals, 420 F.2d 1225 (4th Cir. 1970), had rejected this argument in the absence of proof of discriminatory intent.
circuit court's ruling that a showing of intent was necessary to prove discrimination under Title VII, the Supreme Court held that any employment test which operated to disqualify a disproportionate number of minorities was unlawful unless justified by "business necessity." In rejecting Duke Power's contention that, regardless of their impact, facially neutral tests were expressly authorized by section 703(h) of the Act, the Court gave "great deference" to EEOC's interpretive guidelines permitting the use of only job-related tests whenever their use had an adverse effect on minorities. The Griggs Court, however, failed to explain the manner in which job-relatedness was to be demonstrated and to prescribe the degree of relationship necessary to justify a test's continued use, once adverse impact had been shown. The Court's endorsement of EEOC's guidelines, therefore, was limited to EEOC's interpretation of section 703(h) as requiring tests to be job-related whenever they had an adverse impact on minority groups.

After Griggs, the great majority of federal employment testing cases found tests adversely affecting minorities unlawful either because the test had not been validated at all or because the courts viewed the attempted validation as defective under the EEOC guidelines. In United States v. Jacksonville Terminal Co., for example, a district court found a promotion test to be nondiscriminatory because it was designed by professional railroad personnel and its relationship to job qualifications could be rationally inferred. On appeal, the Fifth Circuit rejected the district court's finding, stating that the "safest validation method is that which conforms with the EEOC guidelines expressing the will of Congress." Similarly, in United States v. Georgia Power Co., the Fifth Circuit determined that the EEOC guidelines were the appropriate framework for establishing validity.

62. 401 U.S. at 431. See note 17 supra.
63. See note 13 supra.
64. 401 U.S. at 434.
65. Id. at 433 n.9. Under Griggs, once the plaintiff demonstrates that the test adversely affects minorities, the employer must show that its tests are job-related. Id. at 431-32. See notes 160-78 and accompanying text infra.
66. The Griggs Court did not reach these questions presumably because the tests at issue were adopted simply to "improve the overall quality of the workforce" and no attempt had been made to validate them. See 401 U.S. at 428, 431.
67. See Johnson, supra note 49, at 1248. But see Bernhardt, supra note 3, at 901, 912.
70. 316 F. Supp. at 583. See 451 F.2d at 455.
71. Id. at 456 (quoting Griggs v. Duke Power Co., 401 U.S. at 434).
72. 474 F.2d 906 (5th Cir. 1973). See generally Comment, The Georgia Power Case:
"absent a showing that some cogent reason exists for noncompliance." 73 Moreover, in *Pettway v. American Cast Iron Pipe Co.* 74 the same court subsequently mandated validation in accordance with the EEOC guidelines.

In its first opportunity to rule on the technical aspects of validation, the Supreme Court, in *Albemarle Paper Co. v. Moody*, 75 followed the lower courts and required strict compliance with the EEOC guidelines. *Albemarle* involved a class action by black employees seeking, in part, to enjoin the use of two pre-employment general ability tests on the ground that they were not job-related. 76 The Court initially reaffirmed its holding in *Griggs* that Title VII prohibits the use of any employment test having an adverse effect on minorities unless the employer could show that the test has a "manifest relationship" to the employment in question. 77 Agreeing with the circuit court, 78 the majority then found Albemarle's attempt to validate its tests insufficient in several respects. First, the employer had failed to conduct an adequate job analysis in the development of performance criteria. 79 Second, while the validation study focused on high-level job groups, the results were used to validate tests for entry-level positions without showing an absence of significant differences among job groups. 80 Finally, Albemarle's study was criticized because it failed to validate differentially the tests for minorities. 81

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73. 474 F.2d at 913.
74. 494 F.2d 211, 221 (5th Cir. 1974). Both the Sixth and Eighth Circuits also endorsed a strict compliance rule. See EEOC v. Detroit Edison Co., 515 F.2d 301, 317 (6th Cir. 1975), vacated on other grounds, 431 U.S. 951 (1977); Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir.), vacated on other grounds, 423 U.S. 809 (1975).
75. 422 U.S. 405 (1975).
76. *Id.* at 408-11. The other major issue in the case involved the appropriate standards for awarding back pay.
78. 474 F.2d 134 (4th Cir. 1973), vacated on other grounds, 422 U.S. 405 (1975).
79. 422 U.S. at 431-33. Job performance criteria were determined by vague and subjective supervisory ratings. *Id.* See EEOC, 29 C.F.R. §§ 1607.5(b)(3) & 1607.5(b)(4) (1977).
81. 422 U.S. at 435. *See* EEOC, 29 C.F.R. §§ 1607.4(a), 1607.5(b)(5) (1977). Judicial precedent for requiring differential validation was initially established in United States v. Jacksonville Terminal Co., 451 F.2d 418, 456 (5th Cir. 1971). Subsequently, in United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), although acknowledging the possible unreliability of differential validity studies, the Fifth Circuit chose to mandate strict compliance. *Id.* at 914. The Eighth Circuit in Rogers v. International Paper Co., 510 F.2d 1340, 1350 (8th Cir.), vacated on other grounds, 423 U.S. 809 (1975), followed Georgia Power in striking down validation efforts where differential validity studies had not been undertaken. Although EEOC's requirement of differential validation had become accepted by the courts, it had come under increasing attack by the psychological profession. *See* note 152 and accompanying text *infra.*
In *Albemarle*, however, the Court apparently repudiated the EEOC's requirement that the employer demonstrate the absence of less discriminatory alternatives.\(^8\) It placed the burden of proving the existence of these alternatives on the plaintiff, regarding them as "evidence that the employer was using his test merely as a pretext for discrimination."\(^8\) Despite this, the Court's opinion was generally interpreted to mean that tests which have not been validated according to the technical aspects of the EEOC Guidelines would not be considered job-related within the meaning of *Griggs*,\(^8\) and thus would be discriminatory under Title VII.\(^8\)

Following *Griggs*, the trend towards strict compliance with the EEOC Guidelines spread to non-Title VII cases. In *Douglas v. Hampton*,\(^8\) an action brought under the fifth amendment\(^8\) and section 16 of the Civil Rights Act of 1870,\(^8\) the United States Court of Appeals for the District of Columbia Circuit ruled that the federal government's efforts to validate the Federal Service Entrance Exam by the construct method were inadequate, partly because the government had not shown that criterion-related validity studies were infeasible. In so holding, the court relied on the Supreme Court's general approval of the EEOC Guidelines in *Griggs* and the Fifth Circuit's decision in *Georgia Power*.\(^8\) The Second Circuit came to a similar conclusion in *Kirkland v. New York State Department of Correctional Services*,\(^9\) another non-Title VII case. Relying on the Supreme

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82. The Court stated the following: "If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similar undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" 422 U.S. at 425. See EEOC, 29 C.F.R. § 1607.3 (1977).
83. 422 U.S. at 425. Thus, the mere existence of alternatives would not necessarily lead to the conclusion that an employer's use of a validated test which adversely affects minorities is discriminatory. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-05 (1973).
84. See note 17 supra.
85. See, e.g., Johnson, supra note 49, at 1256. In separate opinions both Chief Justice Burger and Justice Blackmun criticized the majority for its apparent treatment of the EEOC Guidelines as mandatory. See 422 U.S. at 449-53 (Burger, C.J., concurring and dissenting); Id. at 447-49 (Blackmun, J. concurring in the judgment).
86. 512 F.2d 976 (D.C. Cir. 1975). Black college graduates, hired as temporary employees, sought to enjoin the Civil Service Commission from firing anyone who failed the Federal Service Entrance Examination.
87. U.S. Const. amend. V, which provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."
89. 512 F.2d 976 (D.C. Cir. 1975). Noting Congress' extension of Title VII to public employers in 1972, 42 U.S.C. §§ 2000e-5, 2000e-16 (1976), and the application of Title VII standards by other courts to non-Title VII cases, the court applied EEOC's Guidelines even though the case had been brought on equal protection grounds. 512 F.2d at 980-81.
90. 520 F.2d 420 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976). Blacks and Hispanics
Court's strong endorsement of the EEOC Guidelines in *Albemarle*, the court adopted the EEOC's position of accepting content or construct validity only when criterion-related validity studies were not feasible. The First and Fourth Circuits reached a similar result.

In *Washington v. Davis*, however, the Supreme Court refused to follow the decisions of most lower courts to apply the EEOC Guidelines to non-Title VII cases. *Davis* arose when black applicants for jobs as police officers in the District of Columbia were rejected because they failed a test purporting to measure verbal and reading skills. The plaintiffs brought suit under the fifth amendment and section 16 of the Civil Rights Act of 1870, charging that the tests were unrelated to successful job performance and disqualified a disproportionate number of black applicants.

In reinstating the district court's grant of summary judgment for the District of Columbia, the Supreme Court first held that a plaintiff must show discriminatory intent to carry its burden of proof when asserting a violation of the Constitution. On the statutory issue, the Court found the test to be rationally related to a legitimate government objective: that police

sued under 42 U.S.C. §§ 1981 and 1983 (1976) to enjoin the use of a promotion exam for state correctional officers in which a significantly higher percentage of whites received a passing score.

91. *See* notes 75-85 and accompanying text supra.

92. 520 F.2d at 426. The decision in *Kirkland* effectively overruled the policy position adopted in *Vulcan Soc'y*, Inc. v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973). In *Vulcan*, a non-Title VII case, the court stated that “[T]he Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statistics.” *Id.* at 394.


94. 426 U.S. 229 (1976). At the time the suit was brought Title VII was not applicable to the District of Columbia. *Id.* at 238 n.10.

95. U.S. CONST. amend. V.


officers have a certain level of communicative skills. Instead of paying "great deference" to the EEOC Guidelines, the majority essentially ignored the requirement that tests be predictive of actual job success. In contrast, the Court viewed a positive correlation between test scores and training school performance as sufficient to "validate" the exam and sustain the legality of its administration. In Davis, the majority not only refused to extend Title VII standards to situations not directly covered by the Act, but also evidenced a willingness to accept methods of demonstrating job-relatedness which did not meet the EEOC's strict empirical requirements. In light of the Griggs and Albemarle mandate that tests be predictive or significantly correlated with actual job success, Davis' subjective construction of "job-relatedness" materially altered prior interpretations of the concept making the depth of the inquiry dependent upon the legal basis of the claim.

D. The FEA Guidelines

Although short-lived themselves, the issuance of the comparatively lenient Federal Executive Agency (FEA) Guidelines in 1976 had a major impact upon the eventual development of uniform employment testing standards. First, their adoption marked a fundamental change in the position among the federal agencies with major equal employment opportunity responsibilities. Whereas the Departments of Justice and Labor had originally supported EEOC's demands for empirical stringency, the adopt-

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100. Id. at 250-51 & n.17.
103. 426 U.S. at 250-51 & n.17.
105. See notes 17 and 75-85 and accompanying text supra.
106. See 426 U.S. at 250-51. The Davis majority neither analyzed the job skills in question nor the standards by which they were measured. See id. at 266-67 (Brennan, J., dissenting).
107. According to the Davis majority, judicial inquiry into job-relatedness under Title VII "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." Id. at 247. See Comment, Washington v. Davis: Reassessing the Bars to Employment Discrimination, 43 BROOKLYN L. REV. 747, 763-72 (1977) (Davis either diluted the requirement of job-relatedness for all purposes or created a double standard).
tion of the FEA Guidelines indicated their acceptance of the Civil Service Commission's flexible approach. 109 Secondly, the promulgation of the FEA Guidelines created awkward situations under which certain employers were subject to two different sets of federal testing standards. 110 Both these factors, combined with EEOC's inability to effectively manage its caseload, 111 fostered agency cooperation in the development of the Uniform Guidelines.

II. The Uniform Guidelines on Employee Selection Procedures

The Uniform Guidelines on Employee Selection Procedures supersede both the EEOC and FEA guidelines. 112 As such, they constitute the official policy statement of the federal government on employment testing. While they depart significantly from the EEOC version, the Uniform Guidelines restate some of the flexibility available to employers under the FEA guidelines in terms of both test validation and operational use. In addition, they clarify much of the ambiguity characterizing previous guidelines, thereby providing more precise benchmarks for all test users.

A. Validation Strategies and Technical Standards

1. Criterion-Related Validation

Both the Uniform and FEA Guidelines incorporated the most current test validation strategies recognized by the American Psychological Associ-

ation. Unlike the EEOC Guidelines, which mandated criterion-related validation unless the employer could demonstrate technical infeasibility, both the Uniform and FEA Guidelines removed this burden from the employer. Content and construct validation are permitted so long as the employer complies with the guidelines’ procedures.

In comparison to the EEOC’s somewhat skeletal treatment of this area, the Uniform Guidelines provide employers with specific procedures, thereby facilitating their compliance. The technical standards for conducting criterion-related validity studies are essentially the same for both the Uniform and FEA Guidelines and require the employer to provide evidence of the test’s utility as well as validity when there is adverse impact. More importantly, the Uniform Guidelines mandate that both utility and validity evidence be furnished to support the use of


For its technical requirements the EEOC Guidelines were guided by standards promulgated by the APA in 1966, wherein a preference for criterion-related validation was expressed. Both the Uniform and FEA Guidelines relied on the 1974 APA Standards which, rather than preferring one method over another, recognized all three methods so long as feasible and appropriate. See generally Hunt, Civil Service Testing and Affirmative Action: A Psychologist’s Perspective, 44 U. Cin. L. Rev. 690 (1975).


117. The American Psychological Association has stated the following: “We are of the opinion that the Technical Standards of the Guidelines continue development toward a professionally sound approach to the use of the employment selection procedures. We commend the drafters of these Guidelines for the important contribution that they have made.” American Psychological Association, Committee on Psychological Tests and Assessment, Statement on the Uniform Guidelines on Employee Selection Procedures (February 17, 1978).


119. The APA has never established standards for measuring “utility.” However, examples of utility considerations might include lower costs, higher production and decreased absenteeism. See note 48 supra. See generally L. Cronbach & G. Gleser, Psychological Tests & Personnel Decisions 3-4, 121-32 (2d ed. 1965).

scores for either ranking or cutoff purposes.121

2. Content Validation

Before content studies may be undertaken, the Uniform Guidelines require the employer to conduct a job analysis to determine important work behaviors, assess their relative importance, and select for actual measurement only those critical or important behaviors encompassing most of the job's requirements.122 Under the Uniform Guidelines, an employer can demonstrate content validity in one of two ways: it may show that the instrument's content is representative of, and in fact measures, work behaviors necessary for successful job performances, or it may show that the test measures skills, knowledge or abilities used in and necessary for the performance of important work behaviors.123 Before scores from a content validated test can be used to rank applicants, the employer must show, through a job analysis, that a higher score is likely to result in better job performance and that the test in fact differentiates among levels of job performance.124 As with criterion-related validation, the Uniform Guidelines require an employer using content validated tests for either ranking or cutoff purposes to provide evidence of utility.125 By emphasizing the critical importance of a well-reasoned job analysis, the Uniform Guidelines recognize that important job elements cannot be ascertained through

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121. Interview with Prof. Alfred Blumrosen, Rutgers University, in Washington, D.C. (October 18, 1978).

122. Section 14(C)(2), 43 Fed. Reg. 38,302 (1978)(to be codified in 29 C.F.R. § 1607.14(C)(2)). Work behavior is defined as "an activity performed to achieve the objectives of the job," be it mental or physical. While skills, knowledge or abilities may be used in work behaviors, they are not work behaviors in themselves. Id. § 16(Y), 43 Fed. Reg. 38,308 (1978)(to be codified in 29 C.F.R. § 1607.16(Y)).

123. Section 14(C)(2), 43 Fed. Reg. 38,302 (1978)(to be codified in 29 C.F.R. § 1607.14(C)(2)). Work behavior is defined as "an activity performed to achieve the objectives of the job," be it mental or physical. While skills, knowledge or abilities may be used in work behaviors, they are not work behaviors in themselves. Id. § 16(Y), 43 Fed. Reg. 38,308 (1978)(to be codified in 29 C.F.R. § 1607.16(Y)).


125. Id. §§ 5(G) to 5(H), 43 Fed. Reg. 38,298 (1978)(to be codified in 29 C.F.R. §§ 1607.5(G) to 1607.5(H)). When a test adversely affects minorities, the guidelines indicate that more evidence is required to support a decision to use scores for ranking than cutoff purposes, but warn that the cutoff score must be set at a reasonable level. Id.
a vague or subjective methodology.\footnote{126}

When compared with the FEA approach to content validation, the Uniform Guidelines are more specific and precise.\footnote{127} Rather than demanding that important work behaviors be isolated through a detailed job analysis, the FEA Guidelines merely instructed the employer to ascertain a performance domain\footnote{128} through either a job analysis, an examination of work activities, or the combined judgment of persons familiar with the job.\footnote{129} The employer could then establish content validity upon showing that the desirable skills, knowledge or abilities were both tested for and measured by the instrument and that they were substantially the same as those needed for successful job performance.\footnote{130} The FEA Guidelines permitted ranking if higher scores leading to better job performance could "be expected," and if the performance domain included aspects differentiating among levels of performance.\footnote{131}

3. Construct Validation

The Uniform Guidelines also impose stricter standards than the FEA Guidelines for the use and validation of tests through construct validity studies.\footnote{132} Although both sets of guidelines call for a job analysis to determine those constructs indicative of job performance, the Uniform Guidelines further require that each construct be separately named and distinguished from the other constructs involved.\footnote{133} The FEA Guidelines permitted the operational use of a construct validated test if some empirical evidence existed relating performance on the test to performance on the job, preferably generated from a criterion-related validity study.\footnote{134} More importantly, the Uniform Guidelines go a step further by requiring that the test be related to the construct and that the construct be related to the

\footnote{126. See note 33 supra. Aside from its value in preparing for validity studies, it has been suggested that job analysis will enable employers to identify "high value" jobs into which minorities can be placed for remedial purposes and aid in the defense of a discrimination charge. Bates & Vail, Job Evaluation and Equal Employment Opportunity: A Tool for Compliance — A Weapon for Defense, 1 EMP. REL. L.J. 535 (1976).

127. The EEOC guidelines did not enumerate standards for content validation.

128. A performance domain could include general work activities and duties, as well as important work behaviors and essential skills or knowledge. 41 C.F.R. § 60-3.13(c)(1) (1977).

129. Id.

130. Id. § 60-3.12(c)(4).

131. Id. § 60-3.12(c)(2).

132. The EEOC guidelines did not enumerate standards for construct validation.


134. 41 C.F.R. § 60-3.12(d)(3) (1977).}
performance of important work behaviors.¹³⁵

4. Transportability and Interim Use

The EEOC Guidelines placed a difficult burden on an employer attempting to demonstrate the job-relatedness of a particular test by generalizing from a prior validity study. In this situation, the employer was first required to show that it was infeasible to validate its own tests. Additionally, it was necessary to demonstrate job compatibility and the absence of major contextual variables.¹³⁶ As a matter of policy, both the Uniform and FEA Guidelines encourage all test users to cooperate in developing validity evidence.¹³⁷ Nevertheless, the FEA Guidelines permitted an employer to use another test's validity study if the weight of the evidence showed the procedures to be valid, and the jobs in question were, through a job analysis, shown to be substantially the same.¹³⁸ In contrast, the Uniform Guidelines permit generalization of validity evidence only if the prior study has in fact complied with the technical aspects of the Uniform Guidelines and a job analysis indicates that the major work behaviors at issue are substantially the same.¹³⁹

All three sets of guidelines permit an employer to use, on an interim basis, a test which presently is not validated completely, as long as the employer can demonstrate substantial evidence of validity and complete validation studies are in progress.¹⁴⁰ The Uniform and FEA Guidelines recognize, however, that there may be circumstances under which none of the enumerated validation techniques would apply.¹⁴¹ In these situations,

¹³⁸. 41 C.F.R. § 60-3.6(b) (1977).
¹³⁹. Sections 7(A), 7(B)(1) to 7B(2), 43 Fed. Reg. 38,299 (1978)(to be codified in 29 C.F.R. §§ 1607.7(A), 1607.7(B)(1) to 1607.7(B)(2)). In addition, the Uniform guidelines specifically limit the transportability or generalization of construct validated tests based on less than complete criterion studies to only those situations in which an employer can demonstrate comparability of jobs, constructs and employees. Id. § 14(D)(4), 43 Fed. Reg. 38,303 (1978)(to be codified in 29 C.F.R. § 1607.14(D)(4)). For a complete discussion of the transportability of validity evidence, see ANASTASI, supra note 34, at 149-51. Both the Uniform and FEA guidelines call for fairness studies when using another's validity evidence. See notes 149-59 and accompanying text infra.
employers are advised to use procedures that are as job-related as possible, either undertaking modification so as to eliminate any adverse impact or otherwise justifying their continued use.\textsuperscript{142}

\textbf{B. Investigation of Alternatives}

In contrast to the EEOC's requirement, neither the FEA nor the Uniform Guidelines obligate the employer to prove the nonexistence of suitable alternatives, when its test adversely affects minority employment opportunities.\textsuperscript{143} The investigation of alternatives, however, continues to play a significant role in justifying the use of a test having adverse impact.\textsuperscript{144} The FEA Guidelines indicated than when a validity study became necessary, the employer should make reasonable efforts to investigate for alternative tests with less adverse impact.\textsuperscript{145} Under the Uniform Guidelines, however, the search for alternative tests, appropriate methods of administration and score use have been mandated as part of the original validity study.\textsuperscript{146} The importance of this extension is highlighted by the decision in \textit{Allen v. City of Mobile},\textsuperscript{147} the first case to apply the Uniform Guidelines. In \textit{Allen}, the United States District Court for the Southern District of Alabama found a content validation effort legally insufficient because the employer did not investigate the required alternatives as part of the validity study.\textsuperscript{148}

\textbf{C. A Test for "Fairness" Replaces Differential Validity}

The concept of differential validity is highly controversial in employment testing.\textsuperscript{149} The EEOC Guidelines required employers to undertake

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\textsuperscript{142} Uniform Guidelines, \S\S 6(B)(1) to 6B(2), 43 Fed. Reg. 38,299 (1978)(to be codified in 29 C.F.R. \S\S 1607.6(B)(1) to 1607.6(B)(2)); FEA Guidelines, 41 C.F.R. \S\S 60-3.3(b)(1) to 60-3.3(b)(2) (1977).

\textsuperscript{143} \textit{See} EEOC Guidelines, 29 C.F.R. \S 1607.3 (1977); notes 48-51 & 82-83 and accompanying text \textit{supra}.


\textsuperscript{145} 41 C.F.R. \S 60-3.3(c) (1977).

\textsuperscript{146} Sections 3(B), 5(G) to 5(H), 43 Fed. Reg. 38,297-98 (1978)(to be codified at 29 C.F.R. \S\S 1607.3(B), 1607.5(A) to 1607.5(H)). The employer is not, however, under a duty to continually search for alternatives. \textit{Id}.


\textsuperscript{148} \textit{Id}. at 222-23.

\textsuperscript{149} \textit{See} MCCORMICK & TIFFIN, \textit{supra} note 33, at 131-34; SCHMIDT, BERNER & HUNTER,
differential validity investigations as part of any validation effort. The employer's failure to conduct such studies was cited by several courts as one reason for finding a test's use unlawful. Standards for measuring differential validity, however, have never been established by the American Psychological Association. Moreover, studies completed after the publication of the EEOC Guidelines criticized both the statistical accuracy of earlier studies purporting to find differential validity and the general theory itself.

Under the Uniform Guidelines, differential validity studies are no longer a prerequisite to lawful test use. Standardized tests, however, measure a sample of behavior, and, insofar as culture affects behavior, its influence will be manifested in the test's results. Accordingly, although not strictly incorporating the concept of differential validity, the Uniform Guidelines recognize the concept of "test fairness." Employers must keep records of a test's effect on minority groups and conduct fairness studies when technically feasible. The greater the adverse impact on

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Racial Differences in Validity of Employment Tests: Reality or Illusion?, 58 J. APPLIED PSYCH. 5 (1973); notes 52-56 and accompanying text supra.

150. See notes 52-56 and accompanying text supra. Technical feasibility existed when a minority group constituted an identifiable factor in the relevant labor market and a sufficient number were tested to achieve findings of statistical and practical significance. 29 C.F.R. §§ 1607.4(b), 1607.5(b)(5) (1977).

151. See note 81 supra.


153. See ANASTASI, supra note 34, at 343-49.

154. The Uniform Guidelines define test unfairness as follows:

When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.


minority groups, the greater the need to investigate for possible unfairness. Although the Uniform Guidelines do not provide employers with any standards for measuring test fairness, they do require that if "unfairness is found," the employer must either replace the test or modify it so as to eliminate the bias. Because either of these alternatives poses significant costs, the probable practical consequences would be to lower the cut-off score or to discontinue the use of test scores for ranking purposes.

D. Determining Adverse Impact

A final consideration involves the kind of showing needed to demonstrate adverse impact. The EEOC Guidelines required the validation of any individual test shown to "adversely affect" job opportunities of persons protected by Title VII. "Adverse effect," however, was not defined. The Albemarle Court had ruled it was incumbent on the complaining party to make a prima facie showing of adverse impact but did not establish the quantum to be demonstrated before the employer would be required to validate. Because most tests will adversely affect some group, employers literally could have been required to validate all tests. Furthermore, the EEOC Guidelines did not specify whether adverse impact was to be measured by a test's comparative pass-fail rates, the ultimate to achieve statistical significance, effectively exempting small employers. Employers are not required to hire or promote persons merely to conduct fairness studies. Section 14(B)(8)(e)(i), 43 Fed. Reg. 38,302 (1978)(to be codified in 29 C.F.R. § 1607.14(B)(8)(e)(i)). The guidelines further note that where the range of scores for any one minority group is small as compared with those for other groups, misleading evidence of unfairness may result. Id. § 14(B)(8)(c)(to be codified in 29 C.F.R. § 1607.14(B)(8)(c)). See 1974 APA Standards, supra note 2, at 43-44.

158. Id. § 14(B)(8)(d), 43 Fed. Reg. 38,301 (1978)(to be codified in 29 C.F.R. § 1607.14(B)(8)(d)). Accord, FEA Guidelines, 41 C.F.R. § 60-3.12(b)(7)(iv) (1977). Where a fairness study is indicated, but is technically infeasible, an employer may use any test which is otherwise valid unless the technical infeasibility is the result of the employer's discriminatory practices. This result must be demonstrated by facts other than past failure to validate in accordance with the guidelines. Section 14(B)(8)(f), 43 Fed. Reg. 38,302 (1978)(to be codified in 29 C.F.R. § 1607.14(B)(8)(f)). Accord, FEA Guidelines, 41 C.F.R. § 60-3.12(b)(7)(vi) (1977).
159. See Uniform Guidelines, §§ 5(A) to 5(H), 43 Fed. Reg. 38,298 (1978)(to be codified in 29 C.F.R. §§ 1607.5(A) to 1607.5(H)).
160. 29 C.F.R. § 1607.3 (1977).
161. 422 U.S. at 425. See Larson, supra note 2 at §§ 74.50 to 74.52.
mate hiring rates, or some combination of both.\textsuperscript{163}

In contrast, the Uniform Guidelines shift the basis for measuring adverse impact to the total selection process — the "bottom line" — of which a particular test may be but a single component.\textsuperscript{164} Employers generally will be required to validate individual components of their selection process only if the "bottom line" indicates adverse impact — that is, when the hiring rate for minorities is disproportionately lower than the rate for non-minorities.\textsuperscript{165} Where no such overall impact is shown, however, the federal government's enforcement agencies, "in the usual circumstances," will not expect an employer to validate each component separately.\textsuperscript{166}

The Uniform Guidelines adopt a "four-fifths rule" as the primary indicator of the presence or absence of adverse impact. Under this formula, a selection rate for any minority group falling below eighty percent of that of the group with the highest selection rate generally will be considered evidence of adverse impact.\textsuperscript{167} The Guidelines note, however, that the four-fifths rule is to be viewed as a practical rule of thumb, not a legal definition, and that greater or lesser differences also may evidence adverse im-

\textsuperscript{163} Cf. Albemarle, 422 U.S. at 425 (adverse impact is shown when the test selects applicants for hire in racial pattern significantly different from pool of applicants). See generally Lopatka, \textit{A 1977 Primer on the Federal Regulation of Employment Discrimination}, 1977 U. I.L.L. L.F. 69, 76-82.


\textsuperscript{165} Id.

\textsuperscript{166} Id. The guidelines note, however, two situations in which an employer will be required to demonstrate job-relatedness regardless of the bottom line. The first situation is where the selection procedure is a significant factor in perpetuating the effects of past discrimination. \textit{Id} For example, where an employer requires a high school diploma as a precondition for promotion or transfer. See, \textit{e.g}., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976). The second situation is where the weight of authority has held that a particular selection procedure is not job-related under certain circumstances. Section 4(C), 43 Fed. Reg. 38,297 (to be codified in 29 C.F.R. § 1607.4(C)). See, \textit{e.g}., Dothard v. Rawlinson, 433 U.S. 321 (1977)(height and weight requirements for prison guard); Green v. Missouri Pac. R. Co., 523 F.2d 1290 (8th Cir. 1975), \textit{modified}, 549 F.2d 1158 (8th Cir. 1977)(lack of arrest record may not be required as a condition of employment); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), \textit{aff'd}, 472 F.2d 631 (9th Cir. 1972)(lack of arrest record may be required as a condition of employment). Moreover, the bottom line concept is not offered as a legal interpretation of Title VII; rather, it is a rule of prosecutorial and administrative discretion. Uniform Guidelines, Supplementary Information, Part III, 43 Fed. Reg. 38,291 (1978).

\textsuperscript{167} Uniform Guidelines, § 4(D), 43 Fed. Reg. 38,297 (1978) (to be codified in 29 C.F.R. § 1607.4(D)). Accord, FEA Guidelines, 41 C.F.R. § 60-3.4(b) (1977). For example, assume an employer had 120 applicants for a job, 80 white and 40 black. Sixty applicants were hired, 48 white and 12 black. The selection rate for whites is 48/60, or 60%, while the selection rate for blacks is 12/40, or 30%. Because whites have the highest rate of 60%, the impact ratio for blacks is computed as follows: .30/.60 = .50 or 50%. Since the selection rate for blacks is less than 80% of the white selection rate, adverse impact is indicated.
Moreover, in considering whether to initiate compliance efforts, both the employer's affirmative action programs and its overall equal employment opportunity posture will be taken into account. The Uniform Guidelines' adoption of the bottom line concept and the four-fifths rule could increase a plaintiff's burden of establishing a prima facie case of discrimination. Under the EEOC Guidelines, a plaintiff usually met its burden of demonstrating adverse impact by introducing statistical evidence of a significant differential between minority and nonminority pass-fail rates. Courts generally did not require proof of disparity in actual hiring rates before requiring the employer to demonstrate job-relatedness. To present a prima facie case under the "bottom line" concept plaintiffs now usually must show that the employer's total selection process, rather than a single test, adversely affects minorities. Only then will the employer be forced to put forth proof of job-relatedness. Since adverse impact is defined in terms of disproportionate hiring rates rather than simply test performance, employers hiring a

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168. Uniform Guidelines, Supplementary Information, Part II, 43 Fed. Reg. 38,291 (1978). Presumably an employer's location, recruitment practices or reputation would influence its applicant flow, requiring a departure from the general rule. See generally Newman, Discrimination in Recruitment: An Empirical Analysis, 32 Indus. & Lab. Rel. Rev. 15 (1978)(while recruitment practices do not differ greatly across geographical regions, they are moderated by company size; larger companies with government contracts being more prone to give preference to minorities).


173. See notes 164-66 and accompanying text supra.

sufficient number of applicants from a particular minority group should be able to use nonvalid tests with relative impunity.\textsuperscript{175}

Under the four-fifths rule, a determination of adverse impact is highly dependent upon the employer's minority applicant flow because the impact is computed by comparing each group's selection ratio,\textsuperscript{176} rather than by comparing the test scores of minorities with non-minorities, or their respective numbers in the employer's workforce.\textsuperscript{177} In essence, the agencies adopting the Uniform Guidelines have shifted their attention away from individual instances of discrimination toward securing group-based relief from large-scale offenders.\textsuperscript{178}

III. MERITOCRACY V. EQUAL ACHIEVEMENT

In several respects, the Uniform Guidelines undoubtedly will advance fair employment law. Their most obvious benefit is that federal agencies with equal employment opportunity enforcement responsibilities finally will be guided by a uniform, mutually agreed upon set of standards. This will eliminate dual standards of enforcement and should reduce inter-agency antagonism.\textsuperscript{179} Additionally, since the Uniform Guidelines largely conform to rulemaking procedures outlined in the Administrative Proce-

\textsuperscript{175} Cf. EEOC v. Navajo Refining Co., 47 U.S.L.W. 2598 (10th Cir., March 13, 1979) (although educational requirements and aptitude tests eliminate from pool of applicants a greater number of Spanish surnamed Americans (SSA's) than Anglos, employer not required to validate selection procedures because the percentage of SSA's actually hired exceeded both the percentage of SSA's who applied and the percentage of SSA's in the relevant labor market). It has been argued, however, that where test performance is the sole or primary factor in an employment decision the bottom line concept will have little effect. Moreover, given the Uniform Guidelines' extensive data reporting requirements, §§ 4(A) to 4(B), 4(D), 15(A) to 15(H), 43 Fed. Reg. 38,297-98, 38,303-307 (1978)(to be codified in 29 C.F.R. §§ 1607.4(A) to 1607.4(B), 1607.4(D), 1607.15(A) to 1607.15(H)), statistical data previously unavailable to most plaintiffs will now be readily accessible through discovery. Interview with David Rose, Esq., Department of Justice, in Washington, D.C. (Jan. 30, 1979).


\textsuperscript{177} Cf Van Bowen & Riggins, A Technical Look at the Eighty Percent Rule as Applied to Employee Selection Procedures, 12 U. RICH. L. REV. 647, 650-53 (1978)(four-fifths rule not statistically valid because it does not apply consistently to all employers: more stringent for those who make fewer selections and harsher on those who select from labor pools containing a higher proportion of minorities). See also Hay, Making Statistics Work for the Employer in Employment Discrimination Cases, 3 EMP. REL. L.J. 374, 378-79 (1978)(defendant's ability to focus court's attention on recent hiring rate rather than current workforce composition will decrease the number of cases in which plaintiffs can establish prima facie case).


\textsuperscript{179} See notes 28-29 and accompanying text supra.
dure Act\textsuperscript{180} and represent a synthesis of agency judgments based on years of expert work, they likely will receive even greater judicial deference than those guidelines promulgated by the EEOC.\textsuperscript{181} In any event, the Uniform Guidelines should be applied more consistently by the courts. From the employers' perspective, the Uniform Guidelines present more reasonable standards than those of the EEOC and, arguably, they will inspire the future development and use of a greater number of standardized selection procedures.\textsuperscript{182}

Nonetheless, by emphasizing standards for test validity and largely ignoring test fairness, the Uniform Guidelines do little to ameliorate the underlying tension between traditional merit principles and an equal achievement philosophy.\textsuperscript{183} EEOC's retreat from its earlier position of requiring differential validity studies is understandable. The concept simply had not achieved sufficient recognition in professional circles to warrant its

\textsuperscript{180} 5 U.S.C. § 553 (1976). In contrast to the EEOC Guidelines which were never submitted for public comment, see Seelman, supra note 23, at 4, and were still accorded "great deference" by courts in Title VII cases, see notes 59-85 and accompanying text supra, the adoption of the Uniform Guidelines was preceded by public notice, receipt of written comments, and a public meeting at which testimony was taken from representatives of private industry, state and local governments, labor organizations, civil rights groups and professional psychologists. See Notice of Proposed Rulemaking, 42 Fed. Reg. 65,542 (1977); Notice of Issues of Particular Interest for Public Hearing and Meeting, 43 Fed. Reg. 11,812 (1978); Uniform Guidelines, Supplementary Information, Part VIII, 43 Fed. Reg. 38,292-93 (1978).

\textsuperscript{181} Factors underlying both the substance and the promulgation of the Uniform Guidelines suggest that prior Supreme Court hesitations about according great weight to interpretive agency guidelines have been adequately allayed. First, the fact of public notice and comment, see note 180 supra, should alleviate doubts expressed by Chief Justice Burger and Justice Blackmun in their \textit{Albemarle} opinions. See \textit{422 U.S.} at 449 (Blackmun, J., concurring in the judgment); \textit{id.} at 452 (Burger, C.J., concurring in part and dissenting in part). Second, although the \textit{Davis} majority ignored the EEOC's Guidelines pertaining to job-relatedness, the Court did note that a higher degree of judicial scrutiny would be appropriate under Title VII. See \textit{426 U.S.} at 247. Third, the Uniform Guidelines are not subject to the same flaws as EEOC's pregnancy guidelines. See General Elec. Co. v. Gilbert \textit{429 U.S.} 125 (1976). Under the test of Skidmore v. Swift & Co., 323 U.S. 134 (1944), adopted in \textit{Gilbert}, \textit{429 U.S.} at 141-42, the Uniform Guidelines are a model of thoroughness and are generally consistent with both prior agency requirements for test validation and the views enunciated in \textit{Griggs} and \textit{Albemarle}. Moreover, in \textit{Gilbert}, the EEOC's interpretation was in conflict with that of the Wage and Hour Administrator of the Department of Labor. In contrast, the Uniform Guidelines have been agreed upon by all federal agencies with major equal employment responsibilities. Finally, unlike the citizenship discrimination guidelines at issue in \textit{Espinoza} v. Farah Mfg. Co., \textit{414 U.S.} 86 (1973), the Uniform Guidelines do not add a new category of discrimination to Title VII.

\textsuperscript{182} A 1975 study conducted by Prentice-Hall indicated that companies were lessening their reliance on standardized tests because of actual or anticipated problems with the EEOC Guidelines. See \textit{Larson}, supra note 2, at § 75.22.

\textsuperscript{183} See note 31 supra.
inclusion. The failure to insist on a meaningful demonstration of test fairness, however, illustrates that the federal government presently is unwilling to subordinate meritocratic principles in order to achieve remedial goals.

Validation of selection procedures in accordance with the Uniform Guidelines cannot ensure equality in employment opportunity for most members of minority groups. Employment tests measure applicants for jobs designed by mainstream groups and therefore reflect the culture in which they were developed. As such, they tend to favor those individuals from the culture in which they were developed. Test questions may require the possession or use of certain skills or knowledge common to mainstream groups but not to minorities due to lack of educational or prior employment experience. Because the testing situation itself may be a rarity for minorities, it may be inherently unsettling. Such a reality favors mainstream groups which have been subjected to batteries of standardized and competitive tests throughout their lives. In essence, the Uniform Guidelines do not squarely address the issue of whether validity studies can enlighten anyone about the actual fairness or unfairness of a cross-cultural test. The question remains whether merit-based systems of employee selection are so inherently biased against those groups which have been the victims of educational and cultural deprivations as to make

184. See note 152 and accompanying text supra.
185. See CRONBACH, supra note 19, at 247.
186. See ANASTASI, supra note 34, at 345. Cultural differences become cultural handicaps when an individual attempts to perform within another culture. Id. at 346. Moreover, an individual’s group membership affects his style of conduct in a given situation. See L. CRONBACH, EDUCATIONAL PSYCHOLOGY 320-26 (3d ed. 1977).
187. See Wilson, supra note 37, at 871-72. Many employment tests measure abilities generally learned in school. Due to overcrowding and low-level funding, minorities who have attended inner city schools are at a significant educational disadvantage. See Northcross, The Limits on Employment Testing, 50 J. URBAN LAW 349, 352-53 (1973) and sources cited therein. Moreover, employment tests are indicators of such cumulative environmental effects. See, e.g., A. ANASTASI, COMMON FALLACIES ABOUT HEREDITY, ENVIRONMENT & HUMAN BEHAVIOR 9 (AMERICAN COLLEGE TESTING PROGRAM RESEARCH REPORT No. 58 (1973)).
188. See generally 1974 APA STANDARDS, supra note 2, at 43-44; ANASTASI, supra note 34, at 58-59.
189. See Peterson & Novick, An Evaluation of Some Models for Culture-Fair Selection, 13 J. EDUC. MEASUREMENT 3, 28 (1976)(the ideas of culture-fairness and group parity have spawned incoherent theoretical models that can sanction the very discrimination they seek to remedy); Darlington, A Defense of “Rational” Personnel Selection, and Two New Models, 13 J. EDUC. MEASUREMENT 43, 44 (1976)(rational approach holds that employers should use culture as part of their selection criteria: a purposeful decision to hire a certain number of minorities).
any perceived gains through the use of truly "valid" tests illusory. The dilemma has been concisely phrased by Professor Derrick Bell:

"[I]f the country was really committed to eradicate the social and economic burdens born by the victims of employment discrimination, it would have fashioned a far more efficacious means of accomplishing this result. . . . [r]eliance on. . . complex and uncertain [administrative and judicial] process[es] will [not] close the wide gap in income standards and unemployment rates. . . ."191

The Uniform Guidelines apparently support this proposition, that fair employment laws are but a “limited corrective strategy and the major societal interest in efficiency is the major limitation.”192 Their adoption, coupled with EEOC’s acquiescence in them, suggests that the present statutory framework has been stretched to its limit.193 Consistent with this suggestion are indications by the Supreme Court that it will not feel bound to uphold agency interpretations of Title VII that enlarge the scope of the Act.194 Without a clear mandate from Congress, both the federal agencies and the courts will be unwilling to advance the cause of equal employment opportunity much further.

IV. Conclusion

The articulated goal of standardized testing is to enable employers to make hiring decisions on the basis of merit, thereby reducing reliance on subjective criteria unrelated to job qualifications. Unfortunately, merit-based employment tests, although phrased in racially neutral terms, effectively exclude a disproportionate number of minorities from employment opportunities. Under Title VII’s mandate, various federal agencies attempted to eliminate this adverse racial effect by adopting testing guide-

193. Compare Comment, supra note 6, at 116 (Congress attempted to aid minorities within the constraints of color blindness and noninterference with legitimate business concerns) with Blumrosen, supra note 7, at 99 (Congress did not actually consider the legal definition of discrimination, leaving it to the discretion of the courts).
lines that required employers to demonstrate a test's job-relatedness through validity studies. The multiplicity of different sets of guidelines, however, precluded the establishment of a uniform national testing policy.

A synthesis of agency viewpoints culminated in the promulgation of the Uniform Guidelines which provide more precise test validation procedures than any of the earlier sets. The Uniform Guidelines are significant because they recognize content and construct studies as appropriate methodologies, require employers to justify their use of test scores for ranking and cutoff purposes, and demand that alternatives with less racial impact be investigated as a part of any validation effort.

Test validity, however, yet may become a secondary concern in the quest for equal opportunity in employment. Rooted in the Griggs doctrine of job-relatedness, validity is essentially a meritocratic principle. While a valid test does distinguish among individual performance levels on a selected set of items, it also assumes that all applicants have a similar experiential base. In essence, investigations of validity do not reveal whether the use of a test is fair for those groups who have not had an "equal exposure" to mainstream culture. By formulating refined standards for test validity but largely ignoring the issue of test fairness, the Uniform Guidelines fall short of adequately alleviating the tension between meritocracy and an equal achievement philosophy.

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