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401 U.S. 424 (1971)
Supreme Court of the United States

GRIGGS et al.
v.
DUKE POWER CO.

No. 124

Argued December 14, 1970.
Decided March 8, 1971.

Justices Angela ONWUACHI-WILLIG and David SIMSON delivered the opinion of the Court.[1]

This case presents the first opportunity for this Court to interpret the provisions of Title VII of the 1964 Civil Rights Act in the context of race discrimination. As the Act grew out of, and was meant to help resolve, a period of massive contestation over the possibility, and terms, of racial progress in the United States – a contestation that continues – our task is of the utmost importance. In this case, a group of black employees argues that the practice of their employer, respondent Duke Power Company ("Duke" or "the company"), to require a high school education or satisfactory scores on two standardized general ability tests as a prerequisite for transfer and promotion discriminates against them on the basis of race in violation of Title VII. The Court of Appeals held that those plaintiffs who were hired after the high school requirement was put in place[2] were not entitled to relief because, in implementing and using the high school and testing requirements, Duke had

[1] Chief Justice Burger delivered the original opinion of the Court.

[2] Respondent did not appeal the Court of Appeals' separate holding that six of the Company's black employees who did not have a high school education, but had been hired before the education and testing requirements at issue were implemented, were entitled to relief because under Title VII "relief may be granted to remedy present and continuing effects of past discrimination." Griggs v. Duke Power Co., 420 F.2d 1225, 1230 (4th Cir. 1970). These plaintiffs had been discriminatorily hired into Duke's lowest level jobs and had subsequently been locked into those jobs by the education requirement, which did not limit white employees without a high school education who had already been hired into higher level jobs. We have no reason to disturb this finding and agree with the Court of Appeals that it is "apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Id.* (citing Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968)). In this opinion, references to "plaintiffs" relate only to the four named plaintiffs whose claims are before us.

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a "genuine business purpose" and "no intention to discriminate against Negro employees," *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1232 (4th Cir. 1970).[3] The Court also held that, where employment practices such as Duke's education and test requirements are not designed, intended, or used to discriminate on the basis of race and have a genuine business purpose, they "do [...] not have to be job-related in order to be valid" under Title VII. *Id.* at 1235 & n. 8.

This appeal requires us to determine (1) whether the Court of Appeals properly applied the concept of "discriminatory intent" when finding that Duke acted without such intent in implementing or using its requirements; (2) whether a showing of discriminatory intent is necessary to prove a violation of Title VII; and (3) if a showing of intent is not necessary, under what circumstances employment practices adopted or used without discriminatory intent are unlawful under Title VII. We hold the following:

1. The Court of Appeals (and the district court[4]) evaluated the question of Duke's discriminatory intent under an improperly restrictive legal standard. Therefore, its determination that Duke acted without discriminatory intent must be set aside.[5] Based on its overly narrow legal conception of discriminatory intent, the Court of Appeals failed to fully evaluate important evidence and contextual considerations pointing toward the possibility that the company acted with such intent when implementing and using the education and testing requirements. We clarify the proper intent standard,[6] provide guidance on how various aspects of the record should be considered in relation to this standard, and remand to the lower court to re-evaluate the question of intent.

[3] Although the high school requirement was adopted by the company in 1955 and the testing requirement was not adopted until 1965 (after the plaintiffs were hired), the Court of Appeals held that "the testing requirement [was] being applied to white and Negro employees alike as an approximate equivalent to a high school education" and that, because there was no discriminatory intent in the implementation and use of either requirement, both were equally valid under Title VII. *Id.* at 1235–36.

[4] The district court provided less explanation than the Court of Appeals for its conclusion that the education and testing requirements were implemented and used without discriminatory intent, but appears to have relied on some of the same considerations – namely, Duke had a legitimate business motive and applied its requirements in the same way to its black and white employees. *See* Griggs v. Duke Power Co., 292 F. Supp. 243, 248 (M.D.N.C. 1968) (finding that the high school requirement was "intended to eventually upgrade the quality of [Duke's] entire work force" and that "[a]t least since July 2, 1965, the requirement has been fairly and equally administered"); *id.* at 249 (determining that the test requirements were "not in violation of the Act for the same reasons" as the education requirement). Because the Court of Appeals relied on those same considerations as well as additional ones, as described in detail in Part II *infra*, we evaluate the lower courts' holdings regarding discriminatory intent on the basis of the Court of Appeals' reasoning. Our conclusion that determinations were reached based on an incorrect discriminatory intent standard also applies to the district court's identical finding.

[5] *See* U.S. v. Singer Mfg. Co., 374 U.S. 174, 194 n. 9 (1963) ("Insofar as [a factual] conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law.").

[6] Although no constitutional issue is directly raised in this case, our analysis of discriminatory intent could apply just as well in cases that allege race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

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2 Although proving discriminatory intent in the adoption or use of an employment practice is one way to demonstrate a violation of the statute, Title VII does not require a showing of discriminatory intent before an employment practice can be found unlawful. This holding is clear from both the language and context of the statute, as well as Title VII's purposes to equalize employment opportunity and promote hiring on the basis of qualifications in an economy deeply affected by structural race discrimination.
3 Irrespective of an employer's intent in adopting or using a particular employment practice, such a practice is discriminatory and unlawful under Title VII when (1) the practice disproportionately and negatively affects the employment opportunities of a statutorily protected group; and (2) the employer cannot demonstrate that the practice is either (a) designed to ensure that employment opportunities are distributed strictly on the basis of job qualifications; or (b) designed to affirmatively eliminate or reduce existing inequality in employment opportunities on the basis of a protected characteristic.

We therefore reverse the judgment of the Court of Appeals and remand for further consideration in light of our analysis below.

I

This case arises out of Respondent Duke Power Company's employment practices at its Dan River Station in Draper, North Carolina. Duke's workforce at this power-generating facility consists of 95 employees. A large majority of those workers are white, but the facility also employs fourteen black workers. Duke's workforce at the Dan River Station is broadly divided into five departments: operations, maintenance, laboratory and test, coal handling, and labor.[7] Employees in departments other than coal handling and labor generally work inside the plant. Thus, these departments, which contain the more desirable and well-paid jobs, are sometimes referred to as the "inside" departments. Jobs in the labor department are the least desirable and lowest paid. Indeed, the highest-paid job in the labor department pays a lower wage than the lowest-paid job in any of the other departments.

Additionally, there are lines of progression for different kinds of jobs within each department. Promotions are usually made on the basis of seniority when vacancies occur. Employees also have the option of transferring from one department to another, but if they choose to do so, they will usually have to start at the entry level of the relevant line of progression in the new department.

Until very recently, all of Duke's black workers at the Dan River Station had been relegated to the labor department. For the longest time, the relegation of black workers to the labor department was the outcome of explicit race discrimination by the company. Confirming the district court's finding on this point as "fully

[7] The positions of watchman, clerk, and storekeeper are in a miscellaneous category.

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supported by the evidence," the Court of Appeals noted "that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Negroes were relegated to the labor department and deprived of access to other departments by reason of racial discrimination practiced by the company." *Griggs*, 420 F.2d at 1230. This internal segregation and limiting of black workers to the most undesirable and lowest-paid positions was not broken until August 1966, when a black laborer with almost thirteen years of seniority was promoted to a "learner" position in the coal handling department.

It appears that the company ended its practice of explicit race discrimination around the time that the Civil Rights Act of 1964 became effective. From that point forward, the transfer and promotion opportunities for black workers were determined by various facially race-neutral requirements that Duke had instituted at different points in time to regulate transfers and promotions in general. The first such requirement was put in place in 1955, when Duke began to require a high school education or its equivalent for all new hires except those in the labor department and for transfers by incumbent employees from either the labor department, the one department to which black workers had previously been relegated, to all other departments, or from coal handling to the inside departments.[8]

Furthermore, on July 2, 1965, the date that Title VII became effective, the company implemented an additional requirement for new hires. From that day forward, the day that Title VII made formal discrimination in the workplace illegal, Duke began to require that new hires in any department except for the labor department have both a high school degree *and* satisfactory scores on two employment aptitude tests – the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test.[9]

Within a couple of months, Duke also amended its requirements for cross-department transfers. Although the company had initially kept its transfer and promotion requirements unchanged, in early September of 1965, and at the instigation of white employees in the coal handling department who did not have a high school diploma but who wanted to escape that department, Duke altered its promotion and transfer policies to allow incumbent employees from both the coal handling and the labor departments to become eligible for transfer or promotion to a department containing higher classified jobs if they achieved satisfactory scores on the Wonderlic and Bennett tests. In other words, after these policy changes, access to the more desirable jobs required at a minimum, either a high school degree or

[8] According to Duke, this requirement was ostensibly put in place because business operations were becoming more complex, and the company wanted to ensure that its employees were generally capable of advancing within the company and its lines of progression. The company, however, took no action in investigating whether such changes furthered such goals, and the fact that white employees who had not completed high school or taken the tests continued to perform satisfactorily and achieved promotions within their departments belied the company's explanation.

[9] The required score on these tests was set to be roughly the average (median) score for high school graduates. In other words, the test requirement was more stringent than the high school requirement because it excluded approximately half of all high school graduates.

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satisfactory scores on the Wonderlic and Bennett tests. When Title VII became effective, only three of the fourteen black employees had a high school degree. Additionally, in North Carolina, the Census from 1960 revealed that only 12 percent of black men possessed a high school diploma compared to 34 percent of white men.[10]

Thirteen of the fourteen black employees subsequently filed suit to challenge the company's transfer and promotion policies as racially discriminatory in violation of Title VII of the Civil Rights Act of 1964.[11] The district court denied relief to all of them. It held that Title VII was meant to apply prospectively only and thus did not reach Duke's pre-Act explicit discrimination. The court further found that Title VII did not outlaw practices that were not themselves discriminatory even if they perpetuated the consequences of past discrimination. The court determined that the high school requirement was not discriminatory because it "was made applicable to a departmental work force without any intention or design to discriminate against Negro employees" and had been "fairly and equally administered" since the effective date of Title VII. 292 F. Supp. at 248. The testing requirement was valid "for the same reasons" and because the tests were "professionally developed" in accordance with section 703(h) of the Act. *Id.* at 249–50.[12]

The Court of Appeals reversed in part, holding that Title VII *does* provide a remedy for present and continuing effects of past discrimination. Thus, the court held the high school and testing requirements invalid as to those six black workers who had been discriminatorily relegated to undesirable jobs in the labor department *before* the requirements were put in place and who had been locked into those jobs by the new requirements while similarly qualified white workers who had previously been hired into better jobs here not subsequently made subject to those requirements.[13] However, the Court of Appeals affirmed the denial of relief to the four black workers without a high school education who had been

[10] U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Characteristics of the Population, pt. 35, Table 47.

[11] The operative provision of Title VII, section 703(a), states as follows: "Sec. 703. (a) It shall be an unlawful employment practice for an employer – (1) 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 employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, 42 U.S.C. § 2000e-2(a).

[12] Section 703(h) of the Act states in relevant part: "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 78 Stat. 257, 42 U.S.C. § 2000e-2(h).

[13] The Court of Appeals also found moot the cases of two of the black employees with a high school degree who were promoted subsequent to the filing of the case, as well as of one black employee who had acquired a high school equivalency education and was thus eligible for advancement.

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hired *after* the implementation of the high school requirement. The court ruled that the high school requirement was valid under Title VII because it had been implemented with a genuine business purpose (to facilitate the company's internal promotion system) and "with no intention to discriminate against Negro employees who might be hired after [its] adoption." 420 F.2d at 1232.[14] The court then determined that the four black workers could not "have been discriminated against" because the transfer and promotional opportunities of the four black employees were thus limited by a valid requirement. *Id.* at 1235. The court ruled that the testing requirement was similarly valid because it had been "applied to white and Negro employees alike as an approximate equivalent to a high school education" and the tests had been professionally developed in accordance with section 703(h) of the Act. *Id.* The court also ruled that employment tests "do[] not have to be job-related in order to be valid" under Title VII. *Id.*

Judge Sobeloff dissented from the majority in the Court of Appeals decision. In his view, employment practices are discriminatory under the Act, irrespective of the employer's intent, if they are "fair in form but discriminatory in substance" – that is, when they "favor whites but do not serve business needs" because they have not been shown to be job-related. *Id.* at 1239 (Sobeloff, J., concurring in part and dissenting in part). Because there was "no serious question that Duke Power's criteria are not job-related," *id.* at 1244, Judge Sobeloff would have invalidated Duke's requirements. In addition, Judge Sobeloff would have held that because Duke's practices predominantly disfavored blacks by applying only to transfers from the outside departments to the inside departments in the context of a "history of overt bias [that] caused the departments to become [heavily racially] imbalanced," they operated as an "'illegal freeze-out' of blacks from the inside departments." *Id.* at 1247–48.

We granted certiorari.

II

Both lower courts were correct in assuming that Title VII prohibits employers from implementing or using employment practices with the intention to discriminate on the basis of race.[15] However, the district court and the Court of Appeals inappropriately applied an overly restrictive definition of discriminatory intent when they

[14] The court based its conclusion regarding the absence of discriminatory intent on various aspects of the record which we discuss in detail in Part II, *supra*.

[15] This is not because Title VII's operative provisions explicitly mention the word "intent" – they do not. *See also infra* Part III. It is because acting with discriminatory intent is one way in which an employer can engage in the kind of behavior that is prohibited by the statute. For there to be a violation, an employer must "discriminate against any individual" "because of such individual's race," 42 U.S.C. § 2000e-2 (a)(1); or make certain decisions that "tend to deprive any individual of employment opportunities" "because of such individual's race." 42 U.S.C. § 2000e-2(a)(2). An employer's decision-making, in other words, has to result in one of the harms listed by the statute (failure to be hired, limited employment opportunity, etc.), and a negatively affected individual's race has to be a cause of that harm – meaning a "substantial factor in bringing about the harm." Restatement (Second) of Torts

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found that Duke had implemented and used the education and testing requirements without intent to discriminate against black employees.

An employer acts with unlawful "discriminatory intent" when its decision to implement or use an employment practice is influenced, at least in part, by the desire, knowledge, or expectation that the practice will disadvantage one or more of its employees or applicants in their employment opportunities based on their race. In other words, discriminatory intent exists when an employer either desires or is substantially certain that an employment practice will limit the employment opportunities of one or more of its employees or applicants as a function of their race and goes ahead with the practice.[16]

The Court of Appeals applied a more restrictive definition when it concluded that it was "compelled" to find that discriminatory intent was absent in this case, 420 F.2d at 1232, by a combination of facts in the record: (1) that Duke's policy of promoting

§ 431(a) (1965). When an employer adopts or uses an employment practice with discriminatory intent under the standard we describe below, it is clear that race was such a substantial factor because race will have been a direct influence on the employer's decision-making. As we discuss in detail in Part III *infra*, however, there are many employment practices that create the relevant race-based harm even in the absence of discriminatory intent. Thus, a showing of discriminatory intent is one way, but by no means the only way, to prove a violation of the statute.

[16] This definition of discriminatory intent can be derived from both sections 703(a)(1) and (a)(2) of the Act and generally accepted principles of civil law. Sections 703(a)(1) and (a)(2) make clear that Title VII is concerned with decisions that disadvantage employees or applicants by limiting their employment opportunities on the basis of race. Section 703(a)(1) prohibits failure to hire, termination, and any other "discriminat[ion] against any individual with respect to his … terms, conditions, or privileges of employment, because of such individual's race … ." Similarly, Section 703(a)(2) prohibits employers from "limit[ing] … employees in any way which would deprive [them] of employment opportunities or otherwise adversely affect [their] status as an employee" on the basis of race. General principles of intent in civil law hold that, at a minimum, intent is present when an "actor desires to cause consequences of his act, or … believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts § 8A (1965). In addition, actors are generally presumed to have intended the natural and foreseeable consequences of their actions. *See, e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 511 (1940) (providing that "intent as a prerequisite to liability" for conspiracy in restraint of interstate commerce under the Sherman Act means "no more than that the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits *or that such restraint is the natural and probable consequences [sic] of the conspiracy*") (emphasis added). It should be clear that this definition of discriminatory intent is not met when an employer engages in the kind of "affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin" that the Equal Employment Opportunity Commission, the agency charged with enforcing Title VII, has recently called for. Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, 12336 § 1607.14 (1970). Where an employer implements an employment practice designed to equalize employment opportunity (for example, a special training program designed to help black workers gain the skills necessary for further employment that were provided to white workers through access to superior schooling or prior discrimination in training), such a practice is properly considered remedial, not discriminatory. Such practices contribute to the successful pursuit of Title VII's goal of equal employment opportunity rather than obstructing it. *See* Local 189 v. United States, 416 F.2d 980, 995 (5th Cir. 1969) ("Title VII's imposition of an affirmative duty on employers to undo past discrimination permits compensatory action for those who have suffered from prior discrimination" such as "compensatory training and help."); *see also infra* note 68.

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from within gave the company an "obvious business motive" for tightening hiring and transfer requirements to ensure that employees would be capable of moving up in the company, *id.*; (2) that Duke had instituted the education requirement in 1955, before any antidiscrimination law seemed inevitable, which made it "highly improbable that the company seized upon such a requirement merely for the purpose of continuing discrimination," *id.* at 1232 & n. 3; (3) that Duke had stopped its explicit racial segregation and discrimination when Title VII became effective, which "tend[ed] to demonstrate the company's good faith," *id.* at 1233 & n. 4; (4) that Duke's expert believed that a high school education would provide relevant training and ability for higher skilled jobs,[17] *id.* at 1233; (5) that the educational requirement also adversely affected some white employees, which made it "unreasonable to charge the company with prospective discrimination by instituting an educational requirement which was to be applied prospectively to white, as well as Negro, employees," *id.* at 1233 & n. 5; (6) that Duke financially supported employees in obtaining a high school education or its equivalent, making it "illogical to conclude that Duke established the educational requirement for purposes of discrimination when it was willing to pay for the education of incumbent Negro employees who could thus become eligible for advancement," *id.* at 1233 & n. 6; and (7) that the tests were used as an "approximate equivalent to a high school education" and thus also not discriminatory, *id.* at 1235–36.

This reasoning suggests that the Court of Appeals applied an understanding of discriminatory intent under which (1) discriminatory intent is present only when discrimination is the sole objective or influence behind an employer's action;[18] (2) discriminatory intent is largely independent of context and historical circumstances;[19] (3) discriminatory intent is an all-or-nothing sentiment that underlies only practices that categorically distinguish all members of one racial group from all members of another;[20] and (4) discriminatory intent consists of bad faith and malice.[21]

[17] Petitioners dispute this reading of the testimony of Duke's expert. It is not necessary for us to resolve this dispute, though it should be considered on remand.

[18] This is shown by the fact that the Court of Appeals thought that an "obvious business motive" for the company's actions tended to negate a finding of discriminatory intent.

[19] This is shown by the fact that the Court of Appeals thought that if the educational requirement was adopted or used without discriminatory intent at one point in time and in one context – in 1955, when Title VII was not yet on the horizon – it could be assumed that there was also no discriminatory intent when the requirement was used and modified at a different time and in a different context – in 1965, after the passage of the 1964 Civil Rights Act.

[20] According to the Court of Appeals, discriminatory intent tended to be negated by the fact that the educational requirement also affected some white workers negatively and by the fact that the company was willing to pay educational expenses for both white and black employees.

[21] According to the Court of Appeals, because the company had discontinued its prior explicitly discriminatory practices, it had demonstrated its good faith. Therefore, it was unlikely that Duke acted with discriminatory intent in adopting or using its facially race-neutral practices.

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We hold that the Court of Appeals' narrow definition of discriminatory intent is improper under Title VII in each of these respects. The definition proceeds from an oversimplified concept of discrimination and is inconsistent with the language and purposes of the statute. Approving this definition would inappropriately hamstring effective enforcement of Title VII in the future. Title VII calls for a more expansive understanding of discriminatory intent. Only with such an expansive understanding can enforcement of Title VII be expected to effect the statutory goals of achieving equality of employment opportunities, removing barriers that have operated in the past to favor an identifiable group of white employees over other employees, and "promot[ing] hiring on the basis of job qualifications, rather than on the basis of race," 110 Cong. Rec. 7247 (memorandum of Sen. Case). Thus, the Court of Appeals' conclusion that there was no discriminatory intent in Duke's decision-making must be re-evaluated on remand based on the correct standard. The following considerations must be taken into account in this analysis, as well as by courts in Title VII cases moving forward.[22]

A

First, a finding of discriminatory intent does not require discrimination to be the sole influence behind an employer's decision-making. Therefore, the existence of an "obvious business motive" for a particular decision or practice does not negate, or necessarily even diminish, the possibility that the practice was implemented or used with discriminatory intent. Rather, discriminatory intent and legitimate business motives can co-exist and together influence an employer's practices.

Human decisions in any context – and certainly in a context as complex as employment-related decision-making – are rarely, if ever, made with a single objective or for a singular reason. Different considerations may be more or less influential, but they generally do not crowd out all other considerations.[23] The intention to discriminate based on race is no different in this regard. If the intent to discriminate based on race is present, it may simply be one of several considerations underlying any given decision, though often it can be very influential. Given this multiply determined nature of employment decisions, it is perfectly consistent for there to be an "obvious business motive" for a particular decision or practice, 420 F.2d at 1232 n. 2, *as well as* discriminatory intent. For example, an employer may have a choice between various alternative employment practices, each of which could fulfill the same "obvious business

[22] Because the question of discriminatory intent is often highly contextual and fact-intensive, we provide greater detail in our discussion below to provide guidance for lower courts in evaluating discriminatory intent in future cases.

[23] Congress was aware of how multiple considerations could be operating simultaneously in any one case when it considered and passed Title VII. As Senator Case memorably stated in debate, "[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." 110 Cong. Rec. 13,837 (statement of Sen. Case).

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motive."[24] If the employer knows or expects that one alternative would benefit white workers to a greater extent than black workers and chooses that alternative desiring to accomplish such racial discrimination or knowing that it is substantially certain to result, the employer would have acted with discriminatory intent and violated Title VII *even if* it was *also* intending to fulfill its business motive. The presence of the "obvious business motive" itself, in other words, does not rule out the presence of illegal discriminatory intent.[25]

If we were to interpret discriminatory intent as the Court of Appeals did and hold that the existence of "obvious business motives" tends to negate the presence of intent, we would in effect require plaintiffs to show that they were discriminated against *solely* because of their race. Such a definition would leave many victims of intentional race discrimination without relief by allowing employers to hide discriminatory practices under the cover of the business purposes that almost always underlie employers' decisions – discriminatory and nondiscriminatory alike. Congress' goal of ensuring equality of employment opportunity could be evaded at ease and with the imprimatur of the federal courts by simple invocation of business motives. Title VII ought not to be interpreted to generate such an outcome.[26] Title VII requires only a showing that discriminatory intent influenced the decision to adopt or use a particular employment practice – *i.e.*, that the employer desired or was substantially certain that the practice would limit the employment opportunities of one or more of its employees as a function of their race and went ahead with the practice – whether or not there were also legitimate business motives underlying the decision.

[24] In the case at hand, for example, Duke could have required either a high school degree, or high scores on a general intelligence test, or prior strong work performance, or high scores on a test specific to its business as a condition for employment or promotion. Each requirement would have been consistent with the motive to ensure a qualified workforce that can be promoted internally.

[25] Accordingly, the fact that Duke's testing expert "concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skilled classifications," 420 F.2d at 1233, does not carry as much weight in rejecting the possibility of discriminatory intent as the Court of Appeals appears to have given it. Even if this was in fact the expert's conclusion (which petitioners strongly dispute), it would only show that Duke had some basis for concluding that the high school requirement was one method of pursuing its business motive. It does not answer the question whether in choosing to use this method the company *also* acted with discriminatory intent – for example, by selecting this method over other available alternatives knowing that this choice would largely preserve the company's existing racial hierarchy.

[26] Indeed, that Congress wanted to *avoid* precisely this outcome is suggested by Congress' rejection of an amendment proposed by Senator McClellan. Shortly before the passage of the Act, Senator McClellan proposed an amendment that would specify that the statute required discrimination "solely" because of protected status, but his amendment was decisively rejected by vote of Congress. *See* 110 Cong. Rec. 13,837–38. As the opponents of the amendment noted, such a restrictive conceptualization of prohibited discrimination would "render Title VII totally nugatory," "place upon persons attempting to prove a violation [of the statute], no matter how clear the violation was, an obstacle so great as to make the title completely worthless," 110 Cong. Rec. 13,837 (statement of Sen. Case), and "negate the entire purpose of what we are trying to do," 110 Cong. Rec. 13,837 (statement of Sen. Magnuson).

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B

Second, whether discriminatory intent played such a role in a particular case is a complex question that lower courts must evaluate with careful attention to the context of each relevant decision.[27] When engaging in this contextual analysis, courts must be mindful of the long history of prejudice, stereotyping, bias, and discrimination against racial minorities that has undoubtedly and deeply shaped most people's attitudes, assumptions, and decision-making with regard to race. Racial discrimination has been a persistent and widespread problem that has asserted itself in innumerable different forms and contexts throughout America's history – as many of this Court's cases show.[28] Given this historical breadth and persistence of racial discrimination, courts should not assume that the fact that discriminatory intent may not have affected an employer's decision-making at one point in time and in one particular context means that it did not later influence related decisions made in a different context.

The Court of Appeals did not sufficiently take into account the entirety of the relevant context when it found that the high school requirement was valid because it was initially adopted in 1955 without discriminatory intent and for a legitimate business purpose, *see Griggs*, 402 F.2d at 1232; and that the testing requirement was valid because it was introduced and used as an essentially equivalent substitute for the high school degree, and was not scored or administered in a discriminatory way. *See id.* at 1233, 1235–36. In both respects, the Court of Appeals failed to consider important context that points to the possibility that discriminatory intent influenced Duke's decision-making.

With respect to the high school requirement, the Court of Appeals appears to have assumed that, because the initial decision to implement an education requirement in 1955 may have been made without discriminatory intent,[29] this

[27] Because discriminatory intent can manifest itself in such varied forms and is highly context-specific, we decline to provide a definitive or exhaustive list of factors or circumstances to be considered in evaluating whether discriminatory intent influenced a particular decision. However, at a minimum, factors such as the impact of the challenged decision on different racial groups, the foreseeability of such impact, the historical context of a particular decision and the broader racial dynamics in which it occurred, the timing of a decision, and any differences in the relevant practice when the rights of dominant versus subordinated groups are at issue, will be relevant when present. Further, because actors are generally presumed to have intended the natural and foreseeable consequences of their actions, both the likely and the actual consequences of a particular employment practice will be highly relevant in determining whether the practice was adopted or used with discriminatory intent. *See supra* note 16.

[28] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (striking down anti-miscegenation laws as unconstitutional "measures designed to maintain White Supremacy"); Louisiana v. United States, 380 U.S. 145 (1965) (invalidating racially discriminatory literacy requirement for voting); Brown v. Board of Education, 347 U.S. 483 (1954) (*Brown* I) (invalidating racial segregation in public education); Buchanan v. Warley, 245 U.S. 60 (1917) (invalidating racially discriminatory residential segregation ordinance); Strauder v. State of West Virginia, 100 U.S. 303 (1879) (invalidating race-based exclusion from jury service).

[29] Because it is not necessary for our decision, we do not take a position on whether the company's initial choice to implement the high school requirement in 1955 was made with discriminatory intent, but

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lack of intent transferred to all subsequent decisions to continue to apply the requirement regardless of changes in context. But the context of the company's use of the requirement changed significantly when Title VII was passed and became applicable to private employers such as Duke in 1965. At that point, the company could no longer explicitly segregate its workforce and limit black workers, based on their race and regardless of their educational background, to low-skill, low-wage labor department jobs as it had done in the past.[30] Now operating under a less permissive legal regime, Duke had to reconsider, and did reconsider,[31] the practices by which it hired and promoted employees, including the educational requirement. Should the requirement be continued or modified now that Title VII was applicable and prohibited explicit segregation? Who should the requirement apply to going forward? Duke's decisions in this regard were separate from, and not determined by, the decision in 1955 to implement the high school requirement in the first instance. They could be made with discriminatory intent even if the initial decision to implement the educational requirement had not been. If they *were* made with discriminatory intent, black employees negatively affected by such decisions would be entitled to relief.[32] The Court of Appeals majority improperly overlooked this possibility. This oversight is particularly curious given that the Court of Appeals noted that one consideration in determining whether an education or testing requirement is "designed or used to further the practice of racial discrimination" is "the time of the adoption of the requirements." *Griggs*, 420 F.2d at 1235 n. 8.[33]

we note the significance of the year 1955 – which is the year that *Brown v. Board of Education II*, 349 U.S. 294 (1955) (*Brown* II) was issued in response to massive defiance of our holding in *Brown* I.

[30] As the Court of Appeals noted, the conclusion "that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Negroes were relegated to the Labor Department and deprived of access to other departments by reason of racial discrimination practiced by the company . . . is fully supported by the evidence." *Griggs*, 420 F.2d at 1230.

[31] That the company did reconsider its employment practices upon Title VII becoming effective is clear. The company changed its hiring requirements the very day that Title VII became effective, and its transfer requirements a few months thereafter.

[32] For this reason, it was erroneous for the Court of Appeals to conclude that the plaintiffs who were hired after 1955 and did not have a high school education were not entitled to relief because they had "accepted a position in the Labor Department with [their] eyes wide open" and "could not be said [to] have been discriminated against" because they could not meet the education requirement then already in place. *Id.* at 1235. If the high school requirement was used after the effective date of Title VII with the intent to discriminate against such workers and to limit their advancement in this new context, such action would have been unlawful under Title VII regardless of the situation before Title VII became effective. Surely, these workers did not forfeit a right to fair and equal consideration for promotions and transfers *after* Title VII was passed merely by accepting a position at an earlier time when explicit segregation governed their promotional opportunities and their race, rather than the high school requirement, limited their options for advancement.

[33] By contrast, in his dissent Judge Sobeloff considered the impact of the change in context when he noted: "It may be accepted as true that Duke Power did not develop its transfer procedures in order to evade Title VII, since in 1955 this enactment could not be foreseen. However, by continuing to utilize them at the present time, it is now evading the Act." *Id.* at 1246 (Sobeloff, J., concurring in part and dissenting in part).

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On remand, the Court of Appeals must evaluate all relevant context that speaks to the question of intent. For example, Duke had apparently never considered the educational requirement a necessary prerequisite for *all* transfers or promotions. The requirement never applied to intradepartmental promotions, and it also did not apply to transfers between the inside departments. The requirement limited transfers only for all of the company's black employees in the labor department, and for some of its white employees in the coal handling department. In other words, during the time that it practiced explicit racial segregation, Duke had created a large, all-white "exempted inside group" that could transfer and be promoted to high-paying jobs without restrictions. *Id.* at 1246 (Sobeloff, J., concurring in part and dissenting in part). At the same time, Duke's explicit limiting of black workers to the labor department, regardless of their educational background, had disincentivized black workers with a high school education from ever taking a job at Duke, and black employees without a high school education from pursuing such an education. Indeed, only three of the company's fourteen black workers had a high school education when Title VII became effective. Thus, it would have been clear to Duke that if the company decided to keep in place its high school requirement as is, few black workers would be eligible for interdepartmental transfers upward in the company hierarchy – even if Duke no longer explicitly limited such transfers by race. The high school requirement, in other words, could be expected to act as a facially race-neutral barrier that would preserve a largely segregated and racially stratified workplace that favored white workers. This fact may have influenced the company's decision to continue to use the requirement. If it did, then Duke would have acted with illegal discriminatory intent.[34]

That Duke may have acted with discriminatory intent is further suggested by the fact that the company did create one exception to the high school requirement for transfers after Title VII became effective: it allowed sufficiently high scores on two aptitude tests to substitute for a high school degree. Both the timing of Duke's introduction of those tests, and the specific tests that it chose, suggest that the company's decision-making may have been influenced by the expectation that the

[34] While Duke's practices with respect to new hires are not directly at issue in this case, they are an important context for its transfer and promotion practices. Duke's hiring practices involved the same requirements and tests, and decisions relating to hiring criteria were made close in time to, and in the same environment as, those relating to transfers and promotions. In this regard, the fact that the company exempted only new hires for the formerly explicitly all-black labor department (the department with the lowest-paying jobs) from the high school and testing requirements can be read as another indicator that these criteria were used with discriminatory intent. Given the notorious disparities in high school graduation rates between whites and blacks, the company may well have expected that under these hiring requirements, black workers as a group would continue to be disproportionately hired into lower-paying labor department jobs, while white workers as a group would predictably and disproportionately be hired into the company's higher-paying jobs. Once in their jobs, black workers would then struggle or be unable to transfer because of the same education and testing requirements, while many white workers would face fewer limitations on upward mobility – similar to what had been the case when the company explicitly segregated its workforce.

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new test requirement would disproportionately advantage white workers. In other words, the timing of the tests exception and the choice of the tests themselves suggest that Duke's transfer requirements were introduced with discriminatory intent.

With regard to timing, the tests were first introduced (albeit in the hiring context not at issue here[35]) on the very day that Title VII became effective and outlawed the company's prior explicit racial segregation. This timing suggests that the company was resistant to changing its prior discriminatory practices until the very last possible moment and chose the tests, in conjunction with the high school requirement, as its preferred replacement for those prior practices.[36] Further, Duke decided to extend the testing requirement to transfers and promotions only when the sole group of white employees that was negatively affected by the high school requirement – those who worked in the coal handling department, wanted to escape from it, but did not meet the high school requirement – requested an additional path to transfer and promotion.[37]

In response to those requests, the company chose to implement not just any alternative, but two tests that could be expected to disproportionately advantage white workers: the Wonderlic and Bennett tests. These two general aptitude tests had been in use and popular with employers for decades. Thus, it would have been comparatively easy for Duke to predict what the likely pattern of results on those tests would be: as on broad aptitude tests generally, blacks could be expected to fare significantly worse on average than whites.[38] Indeed, in one case, the EEOC found

[35] As highlighted in *supra* in note 34, although we are not making a judgment about the legality of the company's hiring practices, we believe that the company's hiring practices are relevant context for the related transfer and promotion practices.

[36] As Justice Marshall suggested in oral argument, when implementing the testing requirement just as Title VII became effective, the company was not "writing on a clean slate" given its past explicit discrimination against black workers.

[37] The Court of Appeals seems to have interpreted the fact that the company provided this exception for both the white employees in coal handling and the black employees in the labor department as a sign of the company's good faith. *Griggs*, 420 F.2d at 1229, 1233. However, because Title VII was already in force at the time this exception was created, it would have been difficult for the company to justify offering the exception only to the all-white coal handling department, but not to the all-black labor department, even absent good faith.

[38] Such results patterns have been noted by at least one court; the Equal Employment Opportunity Commission; and academics. *See, e.g.*, Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314, 318 (1970) (employer used both Wonderlic and Bennett tests and 37.3 percent of white test-takers as compared to 9.8 percent of black takers passed the Wonderlic test and 64.9 percent of white test-takers but only 15.4 percent of black takers passed the Bennett test); *see also* Decision of EEOC, CCH Empl. Prac. Guide, 17,304.53 (Dec. 2, 1966); Decision of EEOC 70–552, CCH Empl. Prac. Guide, 6139 (Feb. 19, 1970) ("It is now well settled that the use of the Wonderlic, Bennett, and certain other pre-employment tests results in rejection of a disproportionate number of Negro job applicants."). *Cf.* George Cooper & Richard B. Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1639 (1969) (noting "overwhelming evidence that, on the average, black people and other disadvantaged groups perform substantially less well than whites on generalized 'intelligence' or 'aptitude' tests"); *see id.* at 1642–43 (explaining that Wonderlic and Bennett tests used by Duke were among most challenged tests post-Title VII and date back to around 1940); *see id.* at 1641–42 (noting that scoring discrepancies are

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that 58 percent of white people, as compared to 6 percent of black people, passed a battery of tests that included the two adopted by Duke.[39]

Furthermore, the fact that the tests were not proven to be job-related also suggests that Duke may have acted with discriminatory intent. Even though the selected tests were likely to disproportionately disadvantage Duke's black workers in their transfer and promotion opportunities (just like the high school requirement), Duke did not determine before deciding to use the tests whether they had some countervailing merit – for example, because they measured the likelihood of future successful job performance. As the Court of Appeals noted, Duke put the tests in place "without making formal studies as to the relationship or bearing such requirements would have upon its employees' ability to perform their duties." *Griggs*, 420 F.2d at 1231.[40]

Thus, once the full context of Duke's decision-making is taken into account, one way to read the facts is as follows. When Title VII became effective and outlawed Duke's explicit racial segregation, the company (1) intentionally continued to use the high school requirement as a substitute, knowing that the requirement would continue to lock most of its black workers into the low-level jobs to which Duke had previously limited them on the basis of race; and (2) used the testing requirement as a complementary mechanism to preserve the company's racial hierarchy by providing an opportunity for advancement to workers without a high school degree that could be expected to disproportionately favor white workers, despite the fact that the tests themselves were a questionable predictor of job performance. If these considerations influenced Duke's decision-making about its transfer and promotion practices, Duke acted with discriminatory intent.[41]

"particularly evident in the South" and giving examples of disparities in results on Wonderlic and Bennett tests significantly favoring whites); *id.* at 1644 (summarizing study showing that scores on Wonderlic test as used in large southern aluminum plant "had no relation whatsoever to job performance").

[39] Decision of EEOC, CCH Empl. Prac. Guide, 17,304.53 (Dec. 2, 1966). *See also* Decision of EEOC 70–552, CCH Empl. Prac. Guide, 6139 (Feb. 19, 1970).

[40] The importance of such studies in ensuring that tests provide value to employers without discriminating against employees is suggested by a recent comprehensive review of employment-related testing. *See* Cooper & Sobol, *supra* note 38, at 1643 ("Hundreds of careful studies by industrial psychologists investigating the 'validity' of standardized tests [like the Wonderlic and Bennett tests] have shown that test scores commonly bear little or no relationship to job performance."); *id.* at 1647 ("[I]t cannot be assumed in any particular case that a test is making a useful prediction without comprehensive supporting evidence based on a study of the employer's own jobs and the population he tests.").

[41] Once again, Duke's hiring practices provide relevant context. Duke exempted only hires for the formerly all-black labor department from the testing requirement. This decision suggests that the company may not have wanted the new requirements to exclude blacks from the pool of available workers for its lowest level jobs – jobs for which Duke had previously already considered blacks, and only blacks, suitable.

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C

Third, courts should not assume that only employment decisions that categorically advantage or disadvantage *all* members of a particular racial group are likely to have been influenced by discriminatory intent. While such decisions often most clearly indicate the presence of discriminatory intent, such intent can also surface in more nuanced ways. Courts must not limit their conceptualization of discriminatory intent to an all-or-nothing form.

The Court of Appeals inappropriately applied an all-or-nothing understanding of discriminatory intent in this case. It found that it was "unreasonable" to charge Duke with discriminatory intent in using the high school requirement because the requirement, when adopted in 1955, "was to be applied prospectively to white, as well as Negro, employees" and "adversely affected the advancement and transfer" of not just black workers in the labor department, but of white workers in coal handling as well. 420 F.2d at 1233 & n. 4. With respect to the tests, the Court of Appeals similarly reasoned that "since the testing requirement is being applied to white and Negro employees alike as an approximate equivalent to a high school education for advancement purposes, neither is it racially discriminatory." 420 F.2d at 1235–36. In other words, the Court of Appeals seemed willing to find discriminatory intent only if Duke's employment practices either explicitly discriminated based on race; or, to the extent that they were facially neutral, if they did not negatively affect any white workers in practice. Such a reading is an inappropriately narrow understanding of discriminatory intent. Under the Court of Appeals' approach, a sophisticated employer would only need to be willing to "sacrifice" the interests of its least favored group of white employees to purchase a judicial stamp of approval for practices intended to disproportionately advantage its other, more favored white employees and limit the employment opportunities of its black employees. Validating such an approach would clearly be inconsistent with "the very purpose of title VII [which] is to promote hiring on the basis of job qualifications, rather than on the basis of race," 110 Cong. Rec. 7247 (memorandum of Sen. Case). If an employer's decision to adopt or use a particular employment practice was influenced by the fact that the practice was likely to prevent or delay equality of employment opportunity on the basis of race,[42] then it was adopted with the kind of discriminatory intent that violates Title VII even if some members of the dominant group do not benefit from the practice.

This more nuanced understanding of discriminatory intent is critical to the long-term viability of Title VII as an effective tool for ensuring equal employment opportunity. Because the statute has clearly outlawed explicit race-based workplace segregation, discriminatory employers are likely to resort to what they might

[42] As noted above, *supra* note 16, this standard will be met not just where the employer affirmatively desires to allocate employment opportunities unequally on the basis of race, but also where the employer is substantially certain that unequal employment opportunity based on race will result from adopting or using a particular practice and goes ahead with the practice.

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consider the "next best thing": preserving workforce racial hierarchy through employment practices that, while applicable to all employees in facially the same way, predictably and disproportionately advantage white workers and disadvantage racial minorities. Such employers, in other words, might engage in race discrimination via proxies for race. Because no proxy is perfect,[43] such employers may accept disadvantages for some white employees, and allow greater opportunities for some minority employees, as the price for preserving workplace racial hierarchy overall and appearing to comply with Title VII's mandate to provide equal employment opportunity.[44]

Whether a facially neutral practice that disadvantages some white workers was nevertheless intended to discriminate based on race must again be analyzed with attention to context. In this case, for example, Duke may well have adopted the high school requirement in 1955 without intending it to serve as a proxy for race that would limit the employment opportunities of its black employees. After all, at that time Duke could, and did, limit those opportunities through explicit race discrimination. The high school requirement may have indeed started out as a vague attempt to upgrade Duke's workforce – an attempt that at the time negatively affected only the lowest levels of white employees. But, as noted *supra* in Part II.B., the context changed once Title VII became effective and Duke could no longer explicitly discriminate based on race. The crucial question on remand will be whether Duke *then* decided to use the education requirement at least in part as a facially neutral proxy for race that would keep in place most of the workplace racial hierarchy that Duke had previously created through explicit discrimination.

That this racial hierarchy was important to both the company and its white workers – and that the high school and testing requirements were used as mechanisms for maintaining it after Title VII became effective – is suggested by the following facts. First, white workers in coal handling, who had been negatively affected by the high school requirement for a decade, only complained about, and asked for alternatives to, the requirement after the effective date of Title VII. That is, they demanded changes to transfer and promotion rules only when their race-based status in the company hierarchy could no longer be guaranteed by explicit discrimination. Only then did it become real that the few black employees with a high school education might intrude into white workers' previously racially exclusive prerogative to better-paying jobs. Only then did white workers petition for an

[43] Indeed, a "perfect" proxy will raise greater suspicions of discriminatory intent and thus may be avoided by sophisticated employers.

[44] It is important to understand, as we also clarify in Part II.D *infra*, that employers' preferences for racial hierarchy in their workforces need not stem from conscious animus or dislike of racial minority workers. Employers may pursue such a hierarchy based on subconscious stereotypes about race or because it seems "normal" based on pre-Title VII practices. Even such employers act with discriminatory intent, however, if they implement or use employment practices desiring to create or perpetuate a racial workplace hierarchy, or if they are substantially certain that such a hierarchy will result and proceed anyway.

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alternative to the high school requirement to "escape" the coal handling department. 420 F.2d at 1229. Second, the company quickly responded to these complaints, but it did not do so by waiving the high school requirement for everyone, which would have made transfers and promotions depend on job-related merit and would have allowed high-performing black employees to jump lower-performing white employees in the company hierarchy. Instead, as discussed in more detail *supra* in Part II.B., Duke chose a substitute – the Wonderlic and Bennett tests – that would predictably and disproportionately disadvantage black employees and advantage white employees.[45]

If the company's decision to adopt its post-Title VII multi-factor transfer and promotion requirements was influenced by the fact that the requirements would predictably provide disproportionately greater opportunities for advancement to white employees – with or without a high school education – and disproportionately lesser opportunities to black employees – with or without a high school education – then the company acted with illegal discriminatory intent. This would be so regardless of the fact that the requirements were "to be applied prospectively to white, as well as Negro, employees," 420 F.2d at 1233 n. 5, and could be expected to "adversely affect . . . the advancement and transfer" of some white employees in coal handling, *id.* at 1233.[46]

D

Lastly, courts must not limit their definition of discriminatory intent to bad faith, ill will, or malice toward a disadvantaged group. The Court of Appeals appears to have limited its understanding of discriminatory intent in this way when it rejected an intent finding in part because Duke had stopped its explicitly discriminatory practices and had thus demonstrated "the company's good faith." 420 F.2d at 1233 & n. 4. In other words, under the Court of Appeals' reasoning, it could be assumed that the company was no longer acting with discriminatory intent once it stopped affirmatively and explicitly limiting the employment opportunities of its black employees

[45] As discussed in more detail *infra* in Part II.D., if the company chose to keep the high school requirement and add the testing substitute as mechanisms to preserve the racial hierarchy of its workforce, it does not matter whether the company did so out of ill will or malice toward its black employees or because it wanted to keep its (more numerous) white employees content.

[46] A similar analysis would apply to the company's willingness to subsidize high school tuition for both white and black employees. The Court of Appeals reasoned that it would be "illogical" to find discriminatory intent when the company was willing to subsidize the costs of education for both black and white workers, and thus allow each group to become eligible for advancement. *Id.* at 1233 n. 6. This conclusion would be supported if the company made the refund program available to all employees on truly equal terms. It would not be supported if the company put in place the program but then erected roadblocks for black employees trying to take advantage of it. It would also not be supported if the company was only willing to provide the program because it knew that it was unlikely to be taken advantage of by black workers because high school education courses were less available to black employees in North Carolina.

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based on their race. That the Court of Appeals conceived of discriminatory intent in this narrow way is further suggested by the court's reasoning that discriminatory intent was negated by the fact that some white workers were also negatively affected by the company's promotion and transfer requirements. According to the court, such a result would be unlikely if the company was acting mainly to effectuate its dislike of black employees.

However, the concept of discriminatory intent is not so narrow. Although it includes acts and decisions grounded in ill will toward a disadvantaged racial group, it also encompasses acts and decisions grounded in favoritism toward the dominant racial group, as well as reliance on race-based stereotypes in distributing employment opportunities.[47]

In this case, for example, the company may have implemented its transfer and promotion requirements in part to appease white employees who feared losing their race-based superior status in the company hierarchy by increasing their transfer and promotion opportunities relative to Duke's black employees. After all, in combination, the requirements were likely to disproportionately block the advancement of black employees and disproportionately permit the advancement of white employees. *See supra* Part II.B. If Duke proceeded with its requirements for this reason, it would have acted with illegal discriminatory intent even if the company harbored no negative feelings toward its black employees and acted as it did only to keep up the morale of its white employees. Similarly, Duke would have acted with discriminatory intent if it stereotyped black workers as unintelligent and implemented the education and testing requirements in part because it thought that they would keep most black workers in the low-level positions for which the company considered them "qualified" or "suited."[48]

[47] Racial favoritism and stereotyping may be driven by conscious or unconscious sentiments. The intent standard laid out in this opinion can account for either source because it focuses on the employer's actions and decisions in their full context and in light of their likely effects. The standard looks at the natural and foreseeable consequences of employment practices and is met when an employer is substantially certain that a practice will limit the employment opportunities of one or more of its employees or applicants as a function of their race and goes ahead with the practice. Whether any racial favoritism or stereotyping underlying decisions that meet the standard is conscious or unconscious is immaterial.

[48] Demeaning and faulty stereotypes about black people in the United States as unintelligent have a very long history in our nation. Although subscribing to this stereotype may be connected to ill will or animus toward blacks, it does not require such ill will or animus. Such stereotypical thinking could also result from repeated exposure to the stereotype through various media and lack of sufficient exposure to information refuting the stereotype. It could also result from the misguided thought that depressed educational and job outcomes of blacks are a reflection of lower intelligence rather than of widespread and structural race discrimination. Title VII outlaws decisions based on such racial stereotypes regardless of whether stereotyping is the result of ill will or of unthinking or uncritical adoption of stereotypes circulating in society at large. *Cf.* Norris v. Alabama, 294 U.S. 587, 599 (1935) ("In Neal v. Delaware, decided over fifty years ago, this Court observed that it was a 'violent presumption,' in which the state court had there indulged, that the uniform exclusion of negroes from juries, during a period of many years, was solely because, in the judgment of the officers, charged

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As noted above, the critical consideration is whether an employer's decision to implement or use a particular employment practice was influenced by the fact that the practice was likely to create or continue unequal employment opportunities as a function of race. If the answer is yes, the employer's decision is unlawful under Title VII regardless of whether the employer harbored ill will or discriminated explicitly against the disadvantaged racial group.

E

In sum, we hold that the Court of Appeals applied an overly restrictive understanding of discriminatory intent. This inappropriate conception of intent led the Court of Appeals to ignore a number of facts and interpretations of the record which point to the possibility that in continuing to use the educational requirement after Title VII became effective, and adding the testing requirement after requests by white employees in the coal handling department, Duke was influenced by discriminatory intent and thus violated Title VII. Whether the company in fact acted with discriminatory intent in violation of Title VII must be revisited in light of the considerations described above.

III

The Court of Appeals appears to have assumed that a finding of intentional discrimination is necessary for a violation of Title VII.[49] We clarify, and hold, that a showing of discriminatory intent is not required for a violation of Title VII. Title VII also outlaws certain employment practices that have a discriminatory impact on a protected group, even if those practices are implemented or used without discriminatory intent. As a result, even if the lower court finds, after re-evaluating all of the evidence in light of the correct intent standard, that Duke did not act with discriminatory intent in implementing or using the high school or testing requirements, its analysis will not be complete. It also has to evaluate whether the requirements violate the statute because they disproportionately limit or exclude black employees from transfer and promotion opportunities without sufficient justification. We first set out the basis for our holding that discriminatory intent need not be shown under Title VII and then set out the standard to be applied on remand.

with the selection of grand and petit jurors, fairly exercised, 'the black race in Delaware were utterly disqualified by want of intelligence, experience, or moral integrity, to sit on juries.' Such a presumption at the present time would be no less violent with respect to the exclusion of the negroes of Morgan county. And, upon the proof contained in the record now before us, a conclusion that their continuous and total exclusion from juries was because there were none possessing the requisite qualifications, cannot be sustained.").

[49] More precisely, the Court of Appeals proceeded from the assumption that an employment practice is valid under Title VII where there is a "genuine business purpose" for the practice and the practice is not implemented or used with intent to discriminate based on race. 420 F.2d at 1232, 1235 n. 8.

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A

The language and purposes of Title VII, as well as the context of its passage, make clear that a showing of discriminatory intent is not necessary for a violation of the statute.

As noted above,[50] Congress did not include an intent requirement in the language of the operative provisions of Title VII. Instead, Congress focused exclusively on the type of decision made,[51] the harm created, and the factors that bring about the harm. Thus, for example, Section 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees" (type of decision), "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" (employment-related harm), "because of such individual's race" (race as causal factor in bringing about the harm). Where an employer's decision-making does not just "tend to" but is *intended* to limit employment opportunities on the basis of race, these requirements are clearly met. But so long as an employer's statutorily covered decision-making results in statutorily prohibited harm and an individual's race is a substantial factor (i.e., a cause) in bringing about this harm, the result is unlawful under Title VII regardless of what the employer intended. Congress set out to ensure that employers provide employment opportunity equally as a function of race,[52] not just that they act with good or neutral intentions. We must be careful to interpret Title VII's provisions in light of this end, especially where the statutory language is clear. Artificially reading an intent requirement into the statute would not do so.

That Title VII is not confined to employment decisions made with discriminatory intent also follows from the broader context in which the statute was passed and the structural nature of race discrimination that it intended to address. Congress passed the 1964 Civil Rights Act, including Title VII, at a time of intense struggle over how to address this country's long and broad history of race discrimination against racial minorities. Deep conflicts had emerged over the implementation of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954),[53] its broader principle of racial integration

[50] *See supra* note 15.

[51] Section 703(a)(1) is concerned with types of employment decisions that generally apply to individual employees. Section 703(a)(2) is concerned with types of decisions that generally apply to larger groups of employees.

[52] Indeed, the heading introducing Title VII in the 1964 Civil Rights Act reads "Equal Employment Opportunity" and the federal agency charged with enforcing Title VII was named "Equal Employment Opportunity Commission."

[53] Ten years after our decision in *Brown*, and in the same year that the 1964 Civil Rights Act was passed, for example, delay in the implementation of *Brown* caused by "resistance at the state and county level, by legislation, and by lawsuits" continued. Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 229 (1964). Thus, we invalidated a school district's decision to close public schools and operate private schools with state and county assistance in their place because it was clear that this strategy had been implemented "for one reason, and one reason only: to ensure, through measures

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on equal terms,[54] and the demands of the broader civil rights movement for equal access to public accommodations, voting rights, and employment opportunities. All of these conflicts made painfully obvious that race discrimination was a structural phenomenon that influenced almost all aspects of people's lives.[55] It influenced where different people could live,[56] where they could go to school and the quality of education they received,[57] whether they could use various types of facilities and accommodations,[58] and whether they could get a job and the type of job they could get,[59] to name just a few. As a general

taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school." *Id.* at 231.

[54] *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, 54 (1958) (mem.) (per curiam), aff'g 252 F. Supp. 2d 122 (5th Cir. 1958) (invalidating racial segregation in public park and golf course); Gayle v. Browder, 352 U.S. 903, 903 (1956) (mem.) (per curiam), aff'g 142 F. Supp. 707 (M.D. Ala. 1956) (intrastate buses); Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955) (mem.) (per curiam), vacating and remanding 223 F.2d 93 (5th Cir. 1955) (municipal golf courses); Mayor and City Council of Baltimore City v. Dawson, 350 U.S. 877, 877 (1955) (mem.) (per curiam), aff'g 220 F.2d 386 (4th Cir. 1955) (public beaches and bathhouses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971, 971 (I954) (mem.) (per curiam), vacating and remanding 202 F.2d 275 (6th Cir. 1953) (municipal recreational and entertainment facilities).

[55] This same point was recently made in clear terms by the Report of the National Advisory Commission on Civil Disorders: "Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans. What white Americans have never fully understood – but what the Negro can never forget – is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it." NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 1 (1968) ("KERNER COMMISSION REPORT"). The commission noted that the factors leading to the racial unrest that it was investigating "were complex and interacting," but that "the most fundamental" factor was "the racial attitude and behavior of white Americans toward black Americans." *Id.* at 5. As one example of the interrelated causes of despair among black Americans, the Commission listed "[p]ervasive discrimination in employment, education, and housing, which have resulted in the continuing exclusion of great numbers of Negroes from the benefits of economic progress." *Id.*

[56] *See, e.g.*, *supra* note 55.

[57] Just two years ago, for example, we invalidated Gaston County's use of the literacy test for voter registration contained in North Carolina's constitution and statutes because the test, coupled with the long-standing inferior schooling provided to black residents in racially segregated schools, effectively deprived black residents of the right to vote on account of race. Gaston County v. United States, 395 U.S. 285 (1969). Based on "considerable evidence" that "black children [had been] compelled to endure a segregated and inferior education," *id.* at 295, we concluded that we could not "escape the sad truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens," and that therefore "'[i]mpartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form." *Id.* at 296–97.

[58] *See, e.g.*, *supra* note 54.

[59] The facts of this case provide a clear example of how race discrimination has limited black workers' access to desirable jobs. Duke's black employees were racially segregated into the lowest-level and worst-paid jobs in the labor department deep into the 1960s. *See supra* Part I. For access to jobs generally, *see, e.g.*, Alfred W. Blumrosen, *The Duty of Fair Recruitment under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 465, 471 (1968) (noting that "Negro unemployment rates have been at least double those of whites in nearly every significant category for most of the last quarter-century" and that "[t]he Southern pattern of discrimination involves restricting Negroes and other minorities to

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rule, where race was a factor in the distribution of opportunities and burdens, the outcome was inevitably one-sided: preference was given to the interests of white Americans, while the interests of racial minorities were subordinated.[60] Thus, it was clear to Congress when it considered Title VII that racial minorities were exposed to many interrelated and cumulative race-based disadvantages that depressed their life chances in general, and their employment opportunities in particular.[61] To interrupt this state of affairs, broad and decisive intervention was necessary that went beyond outlawing overtly prejudiced behavior. In response to this challenge, Congress passed a broad statute in the 1964 Civil Rights Act, and broad and comprehensive equal employment opportunity provisions in Title VII.

Thus, when Congress chose to outlaw all employment practices which "tend to deprive" individuals of employment opportunities because of their race, 42 U.S.C. § 2000e-2 (a)(2), we must assume that Congress did so because it understood that equal employment opportunity for members of all racial groups was possible only if all barriers to it – intentional and unintentional, individual and structural – were addressed. When Title VII is read in its broader context, it becomes clear that Congress set out to create a statutory framework that would ensure that employers only use practices that provide employment opportunity equally to all racial groups. Only such a framework, if enforced conscientiously, could be expected, over time, to accomplish "the very purpose of title VII [which] is to promote hiring on the basis of job qualifications, rather than on the basis of race," 110 Cong. Rec. 7247

certain menial or low paying jobs and reserving the better jobs for whites" while "[t]he basic discriminatory pattern outside the South has consisted of not recruiting or hiring Negroes at all").

[60] In all of the examples cited *supra*, the discrimination at issue was against racial minorities. Such discrimination has been practiced by private and state actors alike. Just four years ago, this Court struck down Virginia's anti-miscegenation laws, which we noted could be described only "as measures designed to maintain White Supremacy." Loving v. Virginia, 388 U.S. 1, 11 (1967).

[61] Professors Cooper and Sobol recently succinctly summarized this point: "Our national history of racial segregation, discrimination and separatism has produced rigid and far-reaching racial patterns in housing, education, culture and employment status. A black worker in the United States today is likely, because of his race, to live in a different section of the city from that occupied by whites; to have gone to schools inferior to those attended by most whites; to have received less, or at least different, cultural stimulation than whites; and to have been excluded, for overtly racial reasons, from many employment opportunities. Any employment decisions that are affected by these patterns are likely to have an adverse impact on job opportunities for blacks." Cooper & Sobol, *supra* note 38, at 1600. The recent Kerner Commission Report makes clear that this cumulative disadvantage obtains not just in the Southern states, as is sometimes assumed, but across the country. *See* Kerner Commission Report, *supra* note 55 at 4 ("Social and economic conditions in the riot cities [including Cincinnati, Newark and other areas in New Jersey, and Detroit] constituted a clear pattern of severe disadvantage for Negroes compared with whites, whether the Negroes lived in the area where the riot took place or outside it. Negroes had completed fewer years of education and fewer had attended high school. Negroes were twice as likely to be unemployed and three times as likely to be in unskilled and service jobs. Negroes averaged 70 percent of the income earned by whites and were more than twice as likely to be living in poverty. Although housing cost Negroes relatively more, they had worse housing – three times as likely to be overcrowded and substandard. When compared to white suburbs, the relative disadvantage was even more pronounced.").

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(memorandum of Sen. Case). We must interpret Title VII's broad language in light of this context and purpose, which leads us to conclude that employment practices are unlawful under Title VII not merely when adopted or used with discriminatory intent, but also when they meet the following standard.

B

An employment practice is unlawful under Title VII, irrespective of the employer's intent in adopting or using it, when (1) the practice disproportionately and negatively affects the employment opportunities of a statutorily protected group; and (2) the employer cannot demonstrate that the practice is either (a) designed to ensure that employment opportunities are distributed strictly on the basis of job qualifications; or (b) designed to affirmatively eliminate or reduce existing inequality in employment opportunities on the basis of a protected characteristic.

1

The first requirement of this standard ensures that employment practices are declared unlawful only when they create employment-related harm and race is a substantial factor (i.e., a cause) in bringing about this harm. *See supra* Part III.A. Where there is a significant difference in the degree to which members of different racial groups can meet a particular employment requirement (and thus have access to a particular employment opportunity), it is fair to conclude that their race is a substantial factor, a cause, in bringing about this outcome. There are at least two reasons supporting this conclusion.

First, in statistical terms, whenever the ability to meet an employment requirement is significantly *correlated* with race, i.e., when there are significant differences between the success rates of members of different racial groups in meeting the requirement, it is fair to assume that race is also a *cause* of those differences. Take, for example, an employer who has a high school graduation requirement for initial hires. If graduation rates differ significantly between racial groups – for example, whites graduate at significantly higher rates than blacks – then race (variable A) is significantly correlated with high school graduation (variable B). As a result, if the employer consistently applies the requirement, race will also be correlated with access to the employment opportunity that depends on meeting the requirement – being hired. That is, the employer will hire whites at a significantly greater rate than blacks. To put it differently, in this example, race predicts graduation and, as a result, the likelihood of being hired. Does the high school graduation requirement therefore "tend to deprive" rejected black applicants of the employment opportunity of being hired *because* of their race? Is race a cause of, a substantial factor in bringing about, the harm of being rejected for employment? The answer is yes.

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Typically, when two variables A and B are significantly *correlated*, there are two reasons why it is not reliable to assume a particular *causal* relationship between the variables (*e.g.*, that variable A *causes* correlated variable B) from their correlation alone. The first is the possibility that the causal relationship is the inverse of that assumed (e.g., that variable B causes correlated variable A instead of the other way around). The second is the possibility that a third variable C, which has not been considered, causes both A and B and thus the correlation between A and B is a coincidental or spurious function of their common relationship to C. However, neither concern applies in the context of race's causal influence on employment opportunity. Although race is not a forever-fixed biological construct but a social construct that is often ascribed based on ideas about ancestry as well as certain physical and other characteristics (for example, skin color, facial features, or hair),[62] racial categorization practices are generally highly stable over time. Therefore, any individual person's racial categorization is also stable over time and from birth. As a result, it is not a realistic possibility that high school graduation, for example, "causes" a person to be of a particular race, or that there is an unknown third factor that causes people to both graduate from high school and be of a particular race. A person who is considered black or white before going to school will also be considered black or white thereafter, regardless of whether the person graduates. Where race is correlated with differences in any given outcome, therefore, the proper conclusion is that race is a causal factor in some form. Thus, if there are substantial differences in the rates at which members of different racial groups can meet a particular employment requirement, we can fairly assume that race is a cause, a substantial factor, in bringing about those differences and the unequal access to employment opportunities that follows.[63]

[62] The socially constructed nature of race is evidenced by the fact that a number of different racial categories with varying definitions have existed both over time and in different locations at the same time. For example, in the now-overruled decision of *Plessy v. Ferguson*, this Court noted that at the time "the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, [was] one upon which there [was] a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race . . . ; others, that it depends upon the preponderance of blood; and still others, that the predominance of white blood must only be in the proportion of three-fourths." 163 U.S. 537, 552 (1896). Similarly, this Court has in the past deemed the question of who may be considered "white" for purposes of naturalization laws (which at the time were partially race-based) to be "not . . . a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground." Ozawa v. United States, 260 U.S. 178, 198 (1922).

[63] This causal process could be simple – for example, if differences in graduation rates by race are the result of school administrators refusing to issue diplomas to black students because of their race even though the students met their graduation requirements. It could also be more complex – for example, if differences in graduation rates are a function of racial disparities in the quality of students' primary education, or in their subjection to school discipline, or in their family income leading to dropping out so as to find work, and so on. In either case, race is a cause of the ultimate result – differences in graduation rates.

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Second, and more importantly, the same conclusion is suggested when one takes into account the effects of the long and broad history of race discrimination in this country. *See supra* Part III.A. If race has been a substantial factor driving where members of different racial groups can live and go to school, what resources their schools have, and so on, then race will also be a substantial factor determining their ability to graduate from high school or score highly on a general ability test – and thus to be hired or promoted. In other words, tests and similar employment practices often act as "'carriers,' which translate discrimination [from areas such as] education into discrimination in employment." Blumrosen, *supra* note 59, at 503; *see also supra* note 61. Our recent decision in *Gaston County v. United States*, 395 U.S. 285 (1969), serves as an example geographically "close to home" to the facts of this case. There, we invalidated a North Carolina literacy requirement for voting because long-standing racial discrimination had led to inferior educational opportunities for black residents, and thus even "'[i]mpartial' administration of the literacy test ... would serve only to perpetuate these inequities in a different form." *Id.* at 297. Education and testing requirements in employment such as those at issue in this case often operate in a similar manner. And while race may not be the *sole* or *only* causal factor in the process leading to racial differences in outcomes, Title VII does not require that race be the sole cause of employment harms for relief to be available. *See supra* Part II.A.

Thus, we hold that where an employer uses an employment practice which disproportionately excludes or disadvantages members of a particular racial group in their employment opportunities, there is a *prima facie* case that the employment practice violates Title VII.[64] This is because such a practice "classif[ies] employees in a ... way which ... tend[s] to deprive" the members of the disadvantaged racial group "of employment opportunities ... because of" their race. 42 U.S.C. § 2000e-2 (a)(2). Such employment practices discriminate on the basis of race because they pull race-based disadvantage from other areas of life, or earlier points in time, into the workplace and allow it to influence the opportunity to succeed there.[65]

[64] The most appropriate method of inquiry for determining whether such a disproportionate impact exists will depend on the facts and the data available to the parties in each case. As a general matter, we suggest that if an employment practice selects members of a protected group to a significantly lower extent than their proportion in the general population from which the employer could reasonably draw its workforce, this element is likely to be met. We caution courts to be particularly careful when evaluating data about the relevant "labor market" or "qualified workforce." In many cases, upstream racial discrimination will have biased who has "entered" the relevant labor market or obtained certain qualifications in the first place. Courts should be careful not to allow segregated labor markets to become a simplistic justification for the perpetuation of segregated workforces. Where particular qualifications are necessary for successful job performance, employers can offer evidence of this necessity at the second stage of our standard.

[65] In other words, employers are not held responsible because they *created* the initial race-based disadvantage – in a number of cases they may not have. They are held responsible when they allow such disadvantage to be *perpetuated* through their employment practices where this is not necessary (whether it is necessary is regulated by the second step in our standard). Judge Sobeloff was correct in

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2

But we also hold that an employer should not automatically be held liable under Title VII when one of its practices disproportionately affects members of a protected group. Congress set out to ensure that employment opportunity is made available "on the basis of job qualifications, rather than on the basis of race," 110 Cong. Rec. 7247 (memorandum of Sen. Case).[66] In doing so, Congress intended to preserve some management prerogatives for employers when pursuing these goals and the success of their businesses. It also intended to permit employers to pursue the most qualified workforce and accepted that this pursuit would sometimes have adverse effects on members of protected groups.[67]

The second part of our standard incorporates these concerns and makes clear that employers will not be held liable for employment practices that align with Title VII's statutory goals. Thus, an employer has the opportunity to defeat a *prima facie* case by demonstrating that the employment practice in question is either (a) designed to ensure that employment opportunities are distributed strictly on the basis of job qualifications;[68] or (b) designed to affirmatively eliminate or reduce existing

his dissent below when he noted that under Title VII a "history of deprivation may not be fastened on as a test for employment when [it is] irrelevant to the issue of whether the job can be adequately performed." 420 F.2d at 1240 (Sobeloff, J., concurring in part and dissenting in part). As the various judges of the Court of Appeals in this case pointed out, some lower courts have recognized this basic principle and found business practices unlawful where their adverse effects on a protected group reflect the "present effects of past discrimination" or where they "freeze" members of a protected group into an inferior status because of prior discrimination. *See* 420 F.2d at 1230 (citing and discussing cases finding that under Title VII "relief may be granted to remedy present and continuing effects of past discrimination"); *id.* at 1247–48 (Sobeloff, J., concurring in part and dissenting in part) (discussing cases recognizing an "anti-freezing principle" in various contexts).

[66] Accordingly, in Sections 703(e)-(h) of the Act, Congress expressed its judgment that certain employment practices, most of which relate to qualifications and job performance, were consistent with Title VII's statutory goals and therefore explicitly not prohibited. *See*, *e.g.*, 42 U.S.C. § 2000e-2(e) (permitting reliance on protected characteristics, not including race, where they are a "bona fide occupational qualification," as well as reliance on religion in context of employment in organizations propagating religion); 42 U.S.C. § 2000e-2(g) (employment requirements permitted where necessary for national security reasons); 42 U.S.C. § 2000e-2(h) (distinctions based on merit and quantity or quality of production, as well as acting in reliance on results of "professionally developed ability test," permitted).

[67] For example, during debate over Title VII, a decision of the Illinois Fair Employment Practices Commission in *Myart v. Motorola*, which had been interpreted by some as invalidating any employment test with an adverse impact on black employees regardless of whether it measured qualifications or responded to business needs, caused fears that Title VII would be interpreted in the same way. In response, Senators Clark and Case (the managers of Title VII in the Senate) stated: "An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." 110 Cong. Rec. 7213 (1964).

[68] Some lower courts have required a similar showing from employers under the heading of "business necessity." While we agree with the substantive conclusions of many of these courts, we believe that our phrasing is more precise than the somewhat vague term of "business necessity." *See*, *e.g.*, Hicks, 319 F. Supp. at 318–24 (1970) (collecting "decisions [that] establish that where an employer adheres to a practice which significantly prefers whites over Negroes, that practice must fall before Title VII

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inequality in employment opportunities on the basis of a protected characteristic.[69] Although the parties and the judges in the lower courts in this case have fought animated battles over the special role of section 703(h) in the context of employment tests, we think that Congress simply made explicit in section 703(h) that the above principles also apply to the many objective general intelligence and ability tests that have come into increasing use in the workplace.[70] Congress outlawed such tests where "designed, intended, or used to discriminate because of race." 42 U.S.C. § 2000e-2 (h). Where a test disproportionately excludes or disadvantages members of a protected group and is not designed to ensure that employment opportunities are distributed strictly on the basis of job qualifications, it is "used to discriminate because of race." *Id.* But where such tests are "professionally developed" to ensure that those who pass the test are also the most qualified for the job, they do not discriminate under Title VII.[71] *Id.*

unless the employer can show business necessity for it" and describing business necessity variably as "shown to be relevant to the employer's job performance needs," "job related," and "founded in ... objective business considerations"); Local 189, 416 F.2d at 994 (employment practices that carry forward past discrimination are invalid unless required by business necessity, i.e. limited to "those that safety and efficiency require"); *see also* Griggs v. Duke Power Co., 420 F.2d 1225, 1238 (4th Cir. 1970) (Sobeloff, J., concurring in part and dissenting in part) ("The critical inquiry is business necessity and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end."). The critical point is that employment requirements must be designed to ensure that employment opportunities are distributed on the basis of who is most qualified for a particular job. *See also infra* note 71.

[69] This aspect of the standard clarifies that Title VII permits employers to "undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin." Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, 12336 § 1607.14 (1970). This case does not call for us to decide which forms such affirmative action can or should take. We make clear, however, that employment practices designed to equalize employment opportunity – for example, special training programs designed to help black workers gain the skills necessary for further employment that were provided to white workers through access to superior schooling or prior discrimination in training – are permitted by Title VII. *Cf.* Local 189, 416 F.2d at 995 ("Title VII's imposition of an affirmative duty on employers to undo past discrimination permits compensatory action for those who have suffered from prior discrimination" such as "compensatory training and help."). When properly designed to equalize employment opportunity by race, it cannot be said that such affirmative action has an "adverse effect" on white workers. *See also supra* note 16.

[70] Section 703(h) came about in response to fears caused by the state fair employment practices commission decision discussed *supra* in note 67 that had suggested the possibility that *all* tests with a disparate impact on protected groups, regardless of their relation to qualifications, would be disallowed.

[71] As with the first element of our standard, the most appropriate way to determine whether a specific employment practice or test is designed to ensure that employment opportunities are distributed strictly on the basis of job qualifications will likely vary to some extent from case to case and practice to practice. However, the Equal Employment Opportunity Commission, the agency charged with enforcement of Title VII and whose interpretation is therefore entitled to significant deference, *see, e.g.*, Udall v. Tallman, 380 U.S. 1, 16 (1965); Power Reactor Development Co. v. Electricians, 367 U.S. 396, 408 (1961), has developed guidelines that set out in detail what employers ought to do in order to "validate" employment practices in this context. Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 *et seq.* (1970). These guidelines should serve as an appropriate starting point and guidepost in future cases applying the standard that we lay out

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C

Because the district court and the Court of Appeals based their rulings on their finding that Duke did not act with discriminatory intent when implementing and using its education and testing requirements, they did not fully evaluate the facts of this case in light of the standard set out above. We therefore remand for a full analysis under this standard. The parties and *amici* have submitted data suggesting that the specific education and testing requirements used by Duke have a disproportionately negative impact on black workers.[72] These data can serve as a useful starting point for the lower court's analysis of step one of our standard. That the tests were not designed to ensure that employment opportunities are distributed strictly on the basis of job qualifications, as required by step two of our standard, is indicated by the district court's finding that "[t]he two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available," 292 F. Supp. at 250. The lower court will have an opportunity to confirm this finding on remand and to make any additional findings that are necessary as well.

IV

In sum, we hold that:

1 Both lower courts applied an improperly restrictive legal standard when evaluating the question whether Duke implemented or used its education and testing requirements for promotions and transfers with illegal discriminatory intent. Therefore, their finding that there was no discriminatory intent must be set aside. We remand to the lower court to re-evaluate the question of intent based on the considerations laid out in Part II of this opinion.
2 Title VII does not require a showing of discriminatory intent before an employment practice can be found unlawful.
3 Irrespective of the employer's intent in adopting or using a particular employment practice, such a practice is discriminatory and unlawful under Title VII when (1) the practice disproportionately and negatively affects the employment opportunities of a statutorily protected group; and (2) the employer cannot demonstrate that the practice is either (a)

today. *Cf.* Hicks, 319 F. Supp. at 319 (also referring to EEOC guidelines as appropriate reference point).

[72] The data cited by Petitioners and the United States as *amicus curiae* in their respective briefs indicate a clear disparity in high school graduation rates in various relevant populations. If the lower court finds that these data are reliable, step one of our standard would be satisfied with regard to the high school requirement. Petitioner and the United States also cite data that suggest that the Wonderlic and Bennett tests disproportionately disadvantage black test-takers. If the lower court finds that these data accurately describe the effect that the tests would have when used as the company decided to use them, step one would be satisfied with regard to the testing requirement as well.

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> designed to ensure that employment opportunities are distributed strictly on the basis of job qualifications; or (b) designed to affirmatively eliminate or reduce existing inequality in employment opportunities on the basis of a protected characteristic. Because the lower courts did not apply this standard, we remand for a full analysis based on the considerations laid out in Part III of this opinion.

Accordingly, the aspect of the judgment of the Court of Appeals that is before us on appeal is reversed and the case is remanded for further consideration in light of this opinion.

It is so ordered.

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