LEGAL REMEDIES FOR RACIAL DISCRIMINATION IN EMPLOYMENT: THE EVOLVING SEARCH FOR EFFECTIVENESS

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INTRODUCTION

IN MARCH 8, 1971, the United States Supreme Court, in *Griggs v. Duke Power Company*,[1] held that an employer violated Title VII of the 1964 Civil Rights Act[2] by requiring a high school education or the passing of a general intelligence test as a condition of employment when neither the test nor the high school requirement was shown to be significantly related to successful job performance. Less than two months later, the Third Circuit Court of Appeals in *Contractors Association of Eastern Pennsylvania v. Shultz*,[3] upheld the validity of the controversial Philadelphia Plan.[4] Paradoxically, in *Griggs*, Black employees sucessfully relied upon Title VII for relief, while in *Contractors Association*, a combination of employers and the AFL-CIO Building Trades Council unsuccessfully argued that Title VII invalidated the Philadelphia Plan, which was devised to increase Black employment in the Philadelphia area construction industry. Considered together, the two cases highlight the growing complexity of the search for effective employment discrimination remedies.[5]

In juxtaposition, this article analyzes the *Griggs* and *Contractors Association* decisions in the context of their impact on the effective administration of Title VII and Philadelphia-type plans, respectively. Finally, the Plan and Title VII are examined from the perspective of their possible coordinated use as instruments of law enforcement in the developing area of equal employment opportunity.

THE GRIGGS CASE AND LEGAL RESTRAINTS ON EMPLOYMENT TESTING

BACKGROUND

Personnel testing is on the rise. The testing process has become increasingly standardized, with a growing emphasis on formal written tests as destinguished from informal oral examination. Ostensibly, a test's quality of predictability — of measuring the person for the job — has increased as a result. Yet, the new refinement of personnel testing comes at a time when personnel tests are increasingly the object of a sustained Title VII legal attack directed at their ability to do what

1. 401 U.S. 424 (1971).
2. 42 U.S.C.A. §§ 2000e *et. seq.* (1964).
3. 442 F.2d 159 (3rd Cir. 1971), *cert denied* — U.S. — (1971).
4. The Philadelphia Plan is but one of several "plans" thta have been put into operation in other cities. A plan is named after the city in which it is implemented. See, e.g., the Washington Plan, C.C.H. Employment Prac. Guide ¶ 16,180.02 (1971).
5. See Peck, "Remedies For Racial Discrimination In Employment: A Comparative Evaluation Of Forums," 46 Wash. L. Rev. 455 (1971), analyzing racial discrimination remedies afforded by the Equal Opportunity Commission, the Office of Federal Contact Compliance, the National Labor Relations Board, and the Washington State Board Against Discrimination. The author also analyzes racial discrimination remedies under arbitration provisions of collective bargaining agreements and under the recently revived Civil Rights Act of 1866.

they are designed to do without restricting Blacks and other minorities from entering the labor force in the United States.[6]

Obviously, an employer intent on banning Blacks from employment may attempt to further his aims by formulating and using a personnel test contrived to accomplish a discriminatory objective.[7] Such cases of intentionally discriminatory uses of personnel tests would not present difficult problems concerning the application of either Title VII[8] or of federal Executive Order 11246[9] (sometimes described here as the Executive Order), the immediate source of authority for the Philadelphia Plan. At the other extreme, the application of these and similar laws to cases where employers are not motivated by an intent to discriminate poses relatively difficult questions of law for courts and administrative agencies to resolve. This was precisely the nature of the difficulty confronting the courts called upon to decide *Griggs v. Duke Power Company.*

UNDISPUTED FACTS IN GRIGGS

It was undisputed that the Duke Power Company's test and high school requirements were instituted nine years before passage of Title VII, and at a time when integration of the employer's work force was neither accomplished, anticipated, nor contemplated. At that time, the segregation of workers on the basis of race was not prohibited by either the laws of North Carolina, where the employer was located, or by any federal law. Subtly contrived forms of racial discrimination were accordingly unnecessary. Under those circumstances, it could not be said that the personnel test and high school requirements were instituted with even a partially discriminatory purpose.

Until 1965, Duke Power Company openly discriminated on the basis of race in hiring and assigning employees at its Dan River plant. With five operating departments, Black employees were relegated to one, the labor department, where the highest paying jobs paid less than the lowest paying jobs in the other "operating" departments. Departmental promotions were based on departmental and not plant-wide seniority. When this segregation policy was abandoned in 1965, the company instituted the following policies: (1) Effective on July 2, 1965, new employees were required to pass two professionally prepared aptitude tests, the Wonderlic Personnel Test[10] and the Bennett Mechanical Aptitude Test,[11] *and* have a high school education. (2) Effective in September 1965, incumbent Black employees in the labor department who lacked a high school education could transfer out of the labor department by passing the two aptitude tests.

INTENTIONAL vs. UNINTENTIONAL DISCRIMINATION

The Court of Appeals, in the application of its version of Title VII's scope to the undisputed facts in the case, resolved the test issue by finding as a fact that

6. See Cooper and Sobol, "Seniority Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," 82 Harv. L. Rev. 1598 (1969); Note, "Legal Implications Of The Use Of Standardized Ability Tests In Employment And Education," 60 Colum. L. Rev. 691, 695-696 (1968).
7. See Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968), where a union intentionally used a test for discriminatory purposes as part of a pattern of discriminatory devices aimed at excluding Blacks from referrals and from membership. The court found a Title VII violation.
8. 30 Fed. Reg. 12319 (Sept. 24, 1965), *as amended* by Exec. Order No. 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967), 3 C.F.R. 406 (1969), superseded in part by Exec. Order No. 11478, 4 Fed. Reg. 12985 (Aug. 8, 1969), 3 C.F.R. 133 (1969 Supp.).
9. Section 703(a) of Title VII, 42 U.S.C.A. § 2000e-2a (1964), defines unfair employment practices as follows: "It shall be an unlawful employment practice for an employer . . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . ."
10. The Wonderlic test is designed to measure general intelligence. See Decision of EEOC, C.C.H. Eplt. Prac. Guide ¶ 1209.25 (Dec. 2, 1966). (EEOC decisions do not provide the names of either the charging party or the respondent, probably in deference to the Title VII mandate that it shall be unlawful "for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to *the institution of any [federal district court] proceeding* under this title involving such information." 42 U.S.C.A. § 2000e-8 (1964)).
11. The Bennett test is designed to measure knowledge of physical principles. The EEOC has found that in one instance 58 percent of whites, as compared with 6 percent of Blacks, were able to pass a battery of tests which included the Wonderlic and Bennett tests. Decision of EEOC, C.C.H. Empl. Prac. Guide ¶ 1209.25 (Dec. 2, 1966), cited by the Court of Appeals, 420 F.2d 1225, 1239, n. 6, and the Supreme Court, 401 U.S. 424, 430, n. 6. The Supreme Court cited segregation-based inadequate educational opportunities as reasons for the disparate test scores of whites and Blacks. 401 U.S. 424, 430.

there was no intent to discriminate and, hence, as a matter of law, no unlawful discrimination.[12]

The Court of Appeals decision was very likely consistent with the interpretation that most personnel administrators would have given Title VII before the Supreme Court's *Griggs* decision. There is perhaps an ingrained layman's concept of the law — valid more often than not — that regulatory laws are not violated unless they are intentionally violated.[13]

One might fairly question why a view, probably widely held by professional personnel administrators, and embraced by the lower courts that had dealt with the issue,[14] was unanimously rejected by the Supreme Court. Further analysis of this question is best undertaken by way of a preliminary examination of Title VII's legislative history on personnel test requirements.

Congress, in enacting Title VII, was very much aware of the test problem. Written into Title VII was a proviso, Section 703(h), which states in pertinent part that it is *not* unlawful:

> "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. . . ."[15]

When read literally, Section 703(h) provides some support for the view that a personnel test does not violate Title VII in the absence of an intentionally discriminatory administration of the test. Further ostensible suport for that view is the interpretive memorandum prepared by Senators Case and Clark, both supporters of the legislation that eventually passed. Their memorandum states in part:

> "There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. 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."[16]

To what extent was the proviso intended to limit the reach of Title VII as applied to employment tests?

Section 703(h) was obviously intended to place some kind of limitation on the extent to which personnel tests might be held invalid under Title VII's broad provisions making discrimination on the basis of race, religion, nationality, and sex an unlawful employment practice.[17] It would not be possible, for example, for a Black employment applicant to argue successfully that the mere existence of a qualifying test was a per se violation of Title VII. At the same time, it seems at least equally clear that Section 703(h) does not legitimatize all personnel tests by placing them entirely outside of Title VII's coverage. The hard question for the courts considering the *Griggs* case was how far beyond negating a sweeping ban on all personnel testing did Congress intend to proceed in enacting Section 703(h).

Under the proviso, a test which is "designed, intended or used to discriminate because of race . . ."[18] is not within the Section 703(h) proviso and is banned as discriminatory within the meaning of Section 703(a)[19] of Title VII. The meaning of "designed" and "intended" in this section might be fairly described as a shorthand expression for "intentionally discriminatory conduct in the administration of a personnel test." Volitional acts, incident to test administration, and aimed at excluding minorities from an employer's work force, fall within the phrases "designed" and "intended," as used in Section 703(h). So much seems clear.

Other questions concerning the proviso's meaning remain unclear on a literal reading of its language. The meaning of

12. 420 F.2d 1225 (4th Cir. 1970). On the test issue, the Court of Appeals divided 2-to-1. Judge Sobeloff dissented.
13. Lockwood, "Testing Minority Applicants for Employment," 44 Personnel J. 356 (Aug. 1965).
14. Like the Court of Appeals for the Fourth Circuit, the federal district court in the *Griggs* case held in favor of the employer on the test and high school requirement issue, 292 F. Supp. (M.D.N.C. 1968).
15. 42 U.S.C.A. § 2000e-2(h) (1964).
16. 110 Cong. Rec. 7213 (1964).
17. 42 U.S.C.A. § 2000e-2(a) (1964). See note *supra* for text of Section 703(a).
18. 42 U.S.C.A. § 2000e-2(h) (1964).
19. See note 9 *supra*.

"professionally developed ability test" is not clear. Does it mean any test developed by a behavorial scientist, even though that development does not result in a test that is reasonably related to the job for which the applicant is tested? Does the expression *"used* to discriminate . . ." (emphasis added), mean intentionally "used," thus requiring, like the preceding words "designed" and "intended," an element of volition? Or does it mean *used* in a manner, the effect of which is to exclude minorities from jobs they seek? What degree of employment test job-relatedness is required by Title VII?

Not all of these questions are answered by Chief Justice Burger's opinion in *Griggs*. While the Court concludes that a non-job-related test is invalid in the context of the factual situation in *Griggs*, the decision might be susceptible of a wider breadth than it deserves.

THE SCOPE OF GRIGGS

The Factual Issue of Job-Relatedness

The Supreme Court had to decide as a threshold question the factual issue of whether the Duke Power Company's test and high school requirements were job-related. The Court did so with little difficulty, relying in part upon the facts as found by the district court,[20] and as approved by the Fourth Circuit Court of Appeals.[21]

While the factual issue of job-relatedness was not a close one in *Griggs*, the Supreme Court's supportive reasoning in reaching that conclusion is of some assistance in predicting how that issue might be resolved in future cases where, unlike *Griggs*, the question is close.

The Court noted that both the test and high school requirements were instituted because the company thought that they "generally would improve the overall quality of the work force."[22] Further, employees who left the company's labor department before the test and high school requirements were instituted performed satisfactorily and made progress in those departments. This suggested the possibility that the test and high school requirements were not needed "even for the limited purpose of preserving the avowed policy of advancement within the Company."[23]

The EEOC's employment test guidelines place the burden on the employer to show by way of empirical data that a test has been validated within the meaning of the EEOC guidelines; that it evidences a high degree of utility; and that alternative suitable hiring, transfer or promotion procedures are unavailable.[24]

Ostensibly, an employment test designed — like the one in *Griggs* — to improve the quality of the employer's work force, and not intended for discriminatory purposes, would also be job-related. Surprisingly, though — at least to the layman behavorist — many tests are administered with no attempt at correlating test scores and job requirements. And when correlation is attempted in good faith, the correlation factor is surprisingly low.[25] Not surprisingly, then, even the EEOC's comprehensive guidelines on the subject do not provide much more than the mini-

20. 292 F. Supp. 243, 250 (M.D.N.C. 1968). The court said, "The two tests [Wonderlic and Bennett] were never intended to accurately measure the ability of an employee to perform the particular job available. Rather, they are intended to indicate whether the employee has the general intelligence and overall mechanical comprehension of the average high school graduate, regardless of race, color, religion, sex, or national origin."
21. 420 F.2d 1225, 1232 (4th Cir. 1970). In the view of the Court of Appeals, the test and high school requirements, while not shown to be related to the specific jobs in question, did fairly measure the applicants' ability to progress through promotional ladders into supervisory positions, "thereby eliminating road blocks which would interfere with movement to high classifications and tend to decrease efficiency and morale throughout the entire work force." This, according to the court, satisfied a valid "business motive" and "objective." 420 F.2d 1225, 1232, n. 2. On the same subject, the EEOC's test guidelines provide that a test may take into consideration an applicant's potential for promotion to positions higher than the entry level position, but only when "the job progression structure and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level . . . ." In other cases, EEOC considers that candidates are being evaluated for a job at or near the entry level. § 1607.4(c)(1), EEOC Guidelines on Employment Testing Procedures, C.C.H. Employment Prac. Guide ¶ 16904.2 (1970).
22. 401 U.S. at 431.
23. *Id.* at 432.
24. § 1607.3 EEOC Test Guidelines, C.C.H. Employment Prac. Guide ¶ 16904.2 (1970).
25. See Note, note 6 *supra*, at 691, 698-700, particularly the authorities cited at footnotes 43-50 therein. The problem is not unknown to personnel managers. See note 13, *supra*, at 356, 360: "And in the validation process one of the areas too frequently overlooked is the study of job requirements. Too seldom do we really go out and study the job and what it requires — the critical requirements — before we pull a battery of tests off the shelf and begin to use them in selection."

mum standards that tests must satisfy in order to avoid successful challenge as Title VII unfair employment practices. Consequently, it will become incumbent upon the EEOC to develop on a case-by-case basis, in conjunction with its rule-making authority,[26] answers to questions concerning test-job correlation factors, and to determine what is otherwise required beyond the minimum guideline standards.

Although neither the Supreme Court's rationale in *Griggs* nor the EEOC's employment test guidelines furnishes an easily defineable standard of job-relatedness, the resolution of that factual issue against the employer in *Griggs* was an essential preliminary to the resolution of important questions of law flowing from the chief question before the court: whether Title VII requires a job-related test.

The Motorola Case: Culturally Biased Tests and Affirmative Action

By chance alone, the timing of the debate on Title VII and the decision of a hearing examiner for the Illinois Fair Employment Practice Commission almost coincided. The examiner in *Myart v. Motorola, Inc.*,[27] appeared to hold that a personnel test administered to a Black applicant for employment was culturally biased to his disadvantage and was therefore administered in violation of Illinois' anti-discrimination law. A rough definition of a culturally biased test, as the expression was used by the Illinois examiner, is a test that does not effectively take into account the educational, social and cultural deprivation of Blacks.[28]

If the examiner in *Motorola v. Myart*[29] had so concluded, his decision might not have prompted the degree of concern with which it was greeted, principally by opponents of Title VII's passage.[30] The examiner went further. He also said:

> "The employer may have to establish in-plant training programs and employ the heretofore culturally deprived and disadvantaged persons as learners, placing them under such supervision that will enable them to achieve job success."[31]

On the basis of this statement, the examiner's opinion could not be read to define a culturally biased test as one having the quality of excluding from employment Blacks who are in fact qualified to perform the job for which they are tested.

By requiring affirmative action in the nature of on-the-job training, the examiner, in *Motorola v. Myart,* assumed an absence of qualifications for the jobs in question and required the employer to provide the training that would compensate for qualifications deficiencies. Although it is not clear to what extent the Illinois FEPC adopted the opinion of its hearing examiner,[32] the Commission's decision was widely interpreted as condemning all personnel tests not free of cultural bias and as requiring the type of affirmative action training the examiner recommended.

During the debates leading to the passage of Title VII, the *Motorola* case was frequently alluded to as standing for a proposition of law that Congress would avoid emulating. A fair reading of that

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26. Section 713(a) of Title VII, 42 U.S.C.A. § 2000e-12(a) (1964), authorizes the EEOC to issue procedural regulations.
27. The full text of the *Motorola* decision appears in the Congressional Record, 110 Cong. Rec. 5662-64 (1964).
28. Not surprisingly, there is no unanimity of opinion on what constitutes a culture-free or culture-fair test; nor is there substantial agreement among behaviorists on the question of whether it is possible to devise a culture-test. See Lockwood, note 13 *supra*, quoting an industrial psychologist: "A culture-free test would also be a validity-free test." See Note, note 6 *supra*, at 691, 701-706, where the authors analyze studies that note educational, social, and cultural deprivation as within the ambit of reasons which explain discrepancies between white and Black test scores.

    A narrower view of cultural bias is offered by the following statement from the Lockwood article:

    > "We should be alert . . . to the fact that some tests may have a small amount of cultural confusion in them. Take for example, the Wechsler test given to college students. What is missing in the picture of a man with a shirt buttoned at the collar? The obvious answer is a tie. But some of these college students who were used to wearing sports shirts without a tie, buttoned at the collar, couldn't see anything missing. . . . This is a rather obvious culturally loaded type question that we should try to avoid." Note 13 *supra* at 358.

29. See note 27 *supra*.
30. See the remarks during the Senate's debate on Title VII of Senator Ervin, 110 Cong. Rec. 5614-5616; Senator Smathers, *id.* at 5999-6000; Senator Holland, *id.* at 7012-7013; Senator Hill, id. at 8447; Senator Tower, id. at 9024; Senator Talmadge, *id.* at 9025-9026; Senators Fullbright and Ellender, *id.* at 9599-9666, each of whom voted aaginst final passage of the 1964 Civil Rights Act, including Title VII, concerning employment discrimination.
31. See note 27 *supra*.
32. It is doubtful that the opinion of an examiner in a state administrative proceeding would have attracted anything more than local attention had it not been for the fortuitous circumstance that the examiner's decision was filed on Feb. 26, 1964, almost immediately preceding the Senate debates on Title VII.

legislative history illustrates that Section 703(h), the test proviso, was intended to do nothing more than avoid a Motorola-type interpretation that personnel tests not demonstrably free of cultural bias are invalid as applied to Black applicants for employment, transfer or promotion. This view of the legislative history was adopted by the Supreme Court.[33]

EEOC's Employment Test Regulations

As the sharp disagreement with this view by the lower court judges indicates,[34] the legislative history of Section 703(h) is also susceptible of another meaning; namely, that employment tests are valid in the absence of an intentionally discriminatory application. The history of Section 703(h) is perhaps best described as susceptible of differing interpretations. Senators Case, Clark, and Humphrey were intimately involved in the passage of Title VII. Senator Humphrey was of the view that Section 703(h) did not protect tests if they were "irrelevant to the actual job requirements."[35] On the other hand, the Case-Clark interpretive memorandum states in part that the employer "may set his qualifications as high as he likes . . .",[36] a statement hardly consistent with a job-relatedness requirement for employment tests. Rather than acknowledge the conflicting nature of the legislative history of Section 703(h), Chief Justice Burger wrote that the job-relatedness requirement was an "inescapable" conclusion to be derived from "the sum of the legislative history."[37]

In further support of its conclusions on the job-relatedness issue, the court relied upon the doctrine of deference to administrative expertise,[38] as reflected in the EEOC's comprehensive employment test regulations.[39] This might be regarded as a blanket approval of all the EEOC's employment test guidelines; or it might be read as narrowly adopting the interpretation of the guidelines only insofar as they relate to the issue of the job-relatedness requirement, and the inseparable question of whether intentional discrimination is an element of proof in Title VII cases involving employment tests. The matter of administrative deference also focuses on what is perhaps the most far-reaching and important question flowing from *Griggs:* If intentional discrimination is an element of proof in personnel test cases, to what extent, if at all, does the application of Title VII to unintentional discrimination extend to matters of proof unrelated to the issue of testing?

If the Court's opinion may be read as a blanket approval of all the EEOC's employment test guidelines, it clearly follows that proof of an intent to discriminate is not required in any Title VII employment test case. For the guidelines are explicit: They define discrimination as the "use of any test which *adversely affects* hiring, promotion, transfer or any other employment . . . opportunity unless . . . the test has been validated. . . ."[40] (Emphasis added.) It is the effect on minorities of an invalidated test that is the essence of a Title VII violation. This appears to mean that a test which (1) is not demonstrably job-related, and (2) is failed in substantial numbers only by minority applicants, is not consistent with the guidelines and is acocrdingly in violation of Title VII. A test that only minority applicants fail in substantial numbers is consistent with the guidelines if the test is demonstrably job-related. This is the essential meaning of *Griggs* if, as it very likely did, the Supreme Court

33. 401 U.S. at 436.
34. Both the federal district court and the Court of Appeals for the 4th Circuit relied heavily upon the legislative history in concluding that the employer's test and high school requirements were not prohibited by Title VII. See 292 F. Supp. 243, 248 (M.D.N.C. (1968); 420 F.hd 1225, 1234-35 (4th Cir. 1970).
35. See letter to American Psychological Association, quoted in *The Ind. Psychologist 6 (Div. 14, Am. Psychological Ass'n Newsletter),* (Aug. 1965), cited in Judge Sobeloff's dissenting opinion in Griggs v. Duke Power Co., 420 F.2d at 143, 143, 1244, n. 23. (4th Cir. 1970).
36. 110 Cong. Rec. 7213 (1964).
37. 401 U.S. at 436.
38. 401 U.S. on 433-34.
39. EEOC Guidelines On Employment Testing Procedures, C.C.H. Employment Prac. Guide ¶ 16904.1 (1970). The testing guidelines were originally adopted by the EEOC on Aug. 24, 1966. They were reissued and codified on July 21, 1970, effective Aug. 1, 1970.
40. § 1607.3, EEOC Test Guidelines, C.C.H. Employment Prac. Guide ¶ 16904.2 (1970).

placed its imprimatur on the EEOC's test guidelines.[41]

SUMMARY AND PROGNOSIS

Answered Questions

In summary, this much appears to be known from a contemporaneous reading of *Griggs v. Duke Power Company* and the employment test guidelines: (1) *Title VII does not invalidate employment tests solely on the ground that they are not free from cultural bias, particularly as "cultural bias" was defined by the examiner in the Motorola decision.* While the Title VII legislative history of Section 703(h) is perhaps in conflict on the question of proof of an intent to discriminate and the related question of job-relatedness, the legislative history unquestionably disclaims a free-from-cultural bias requirement. (2) *Title VII does not require the hiring and upgrading of unqualified minorities.* The possibility of a contrary conclusion is negated by the legislative history of Title VII, particular the Senate's rejection of *Motorola v. Myart,*[42] and the Supreme Court's emphasis on "the controlling factor" of job "qualifications" as distinguished from the "irrelevant factors" of race, religion, nationality and sex.[43] (3) *Title VII invalidates employment tests which (a) have an adverse effect upon minorities and (b) have not been shown to be job-related within the meaning of the employment test guidelines.* So much is known. But many imponderables remain.

Unanswered Questions

From the tactical viewpoint of civil rights proponents, the key aspect of *Griggs v. Duke Power Company* is its bearing on the subject of proof of racial discrimination. Undoubtedly, substantial numbers of employment discrimination charges with no merit are filed annually with appropriate administrative agencies. Of far greater significance is the number of meritorious employment discrimination cases that are incapable of proof because of the impossibility of overcoming the preponderance-of-the-evidence burden that most agencies and courts establish as the burden-of-proof criterion in civil cases. While difficult to establish by means of empirical data, some things which are known about proof of racial discrimination defy another conclusion.

Absent proof of unabashed segregation or discrimination, active racial discrimination is a highly subjective matter. The intent to discriminate, which the Supreme Court found unnecessary as an element of proof in employment test cases, is often nothing more than a mental process, with little or no outward manifestations. Hence, proof of racial discrimination often requires proof of objective conduct, of tanglible and external manifestations that reveal a discriminatory subjective intent. Objective manifestations of prejudice or discrimination may be nonexistent. Further, the entire problem of proof of racial discrimination is seriously compounded by the unconscious nature of some forms of racial prejudice, entirely capable of translation to unconscious acts of discrimination that are not susceptible of objective proof.[44]

Given this peculiar problem of proof, together with the acknowledged seriousness of racial discrimination in the United States,[45] one may fairly conclude that substantial numbers of meritorious employment discrimination cases fail for lack of proof of a violation of the law. Important,

41. The Supreme Court's opinion contains approving references to the following portions of the EEOC Employment Testing Guidelines: the EEOC's definition of "professional developed ability test" and the EEOC's requirement that employers using tests provide data demonstrating their predictive quality, 401 U.S. at 433, n. 9. While guidelines are comprehensive, most of the detail contained in them is subsidiary to the matter cited with approval by the Supreme Court. It seems reasonably clear that the Supreme Court will leave to the EEOC the job of further defining, within the framework of the existing guidelines, Title VII's testing requirements. At least with respect to employment tests, the EEOC, it would seem, would have to stray far from the clear intent of Congress before the Supreme Court would no longer reason, as it did in *Griggs*, that the "administrative interpretation of [Title VII] by the [EEOC] is entitled to great deference." 401 U.S. at 433-434.
42. See note 27 *supra*.
43. 401 U.S. at 436.
44. See generally Allport, *The Nature of Prejudice* 297-308 (1958).
45. The extent of racial discrimination in the United States and its effects upon Blacks has been more than well documented. See, e.g. *Report of the National Advisory Commission on Civil Disorders* (1968), concluding in its summary and introduction: "Segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans." *Id.* at 2. See particularly Chs. 7 and 8, pp. 251-277, concerning employment and "conditions of life in the racial ghetto."

then, in terms of ease of proof, is a decision like *Griggs*, which, in at least one known context — employment testing — teaches that proof of a legal violation is satisfied by proof of the adverse effect upon Blacks of unintentionally discriminatory conduct that has no rational basis.

Does *Griggs* mean that in all Title VII cases unrelated to employment tests, an intent to discriminate is not an element of proof? It seems clear that the case may not be so read. It appears that the court found no rational basis for the test in view of its inability to measure the ability of the job applicants for the jobs they sought. Accordingly, in future Title VII cases, the court may conclude that an intent to discriminate need not be shown in any case where (1) there is no rational basis for a Title VII defendant's conduct and (2) where that conduct has an adverse effect upon minority workers or minority applicants for work. Conversely, it would appear that where conduct challenged under Title VII has a rational basis, proof of an intent to discriminate must be established before a Title VII violation may be found.

Griggs does not appear to mean that the absence of a rational basis for an employment test merely satisfies or partially satisfies proof of intentional discrimination. Citing the tests' absence of job-relatedness as proof of an intent to discriminate in *Griggs* would be inconsistent with the disputed fact that the tests were not instituted with discrimination in mind. The decision has a much broader scope:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[46]

It would appear that many employment practices — apart from tests — may be "fair in form but discriminatory in operation" and hence in violation of Title VII. Temporary or partial plant closings and plant moves from the cities to white suburbs, and away from accessibility to Blacks, are examples of employer conduct that, if unrelated to a valid business purpose, and detrimental to Blacks, may constitute Title VII violation.[47] The theory is bound to be tested. It is doubtful that the Supreme Court has seen the last of *Griggs*-related controversies.

CASE-BY-CASE v. AFFIRMATIVE ACTION REMEDIES

Even the beneficial aspects flowing from the *Griggs* decision are limited. Title VII requires the filing of individual charges and the processing of charges through the inordinately slow and complex machinery of the Equal Employment Opportunity Commission. The affirmative burden is upon the charging party to place this machinery in motion, to wait on the government's investigation process, to hire his own lawyer and to proceed de novo in the federal courts after the EEOC exerts the limits of its authority and finds probable cause that Title VII was violated and is unable to conciliate and persuade the employer or labor union to remedy the "probable" violation. In metropolitan Los Angeles, for example, so heavy is the caseload of the EEOC regional office that the investigation of a discrimination charge does not begin until one year after the filing date.[48] Title VII cases currently on file in the federal district court for the central district of California were originally filed with the EEOC more than two years ago.[49] Obviously, as an effective means of ending employment discrimination based on race, Title VII has serious procedural limitations.

Partly because of these limitations of proof and time-consuming procedures,

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46. 401 U.S. at 431.
47. The EEOC has recently considered the position that companies that move to the suburbs may, under some circumstances, be in violation of Title VII.
48. Interviews with personnel in the Los Angeles Regional EEOC Office. The interviews were undertaken in connection with an uncompleted empirical study of the impact of anti-discrimination agencies in metropolitan Los Angeles. The research is being conducted with the support of the University of California Academic Senate's (Los Angeles Division) research Committee and the UCLA Afro-American Center. This support is gratefully acknowledged.
49. *Ibid.*

antidiscrimination concepts involving "affirmative action" on the employer's part are being increasingly looked to as effective discrimination remedies. One of these is the Philadelphia Plan. Formidable on paper, but singularly weak in operation, the Plan is one of the paradoxes of the law.

THE PARADOXICAL PHILADELPHIA PLAN

INTRODUCTION

Three judicail opinions[50] and one important administrative interpretation[51] of the Philadelphia Plan have so far confirmed its validity as an executive enactment that does not conflict with any statutory law or provisions of the Constitution. Neither those decisions nor the various scholarly commentaries on the Philadelphia Plan deal with both the mechanics of the Plan's operations and the allied matter of how the Plan actually affects its intended beneficiaries.[52] The Plan is analyzed here on the premise that a valid and ineffective Philadelphia Plan is of no more use than an invalid Plan.

The stated objective of the Philadelphia Plan is to increase minority employment in federally assisted construction and construction firms having contracts with the federal government.[53] The Plan implements Executive Order 11246[54] of September 24, 1965, requiring that all contracts with the Federal Government contain a clause requiring the contractor to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."[55] Failure or refusal to comply with the Order, or the implementing Plan, subjects the contractor to cancellation, termination or suspension of its government contract.[56]

HISTORY AND BACKGROUND

In the spring of 1970, the head of the Office of Federal Contract Compliance (OFCC) in Philadelphia said:

> "[T]here is no doubt the contractors are behind in compliance [with the Philadelphia Plan]. We are taking steps now to determine what is wrong and to do something about the situation, such as [getting] the Federal agencies involved to get after the contractors."[57]

This announcement came three years after the birth of the Philadelphia Plan in 1967, five years after the promulgation of the Plan's immediate source of authority, Executive Order 11246, nine years after President Kennedy's initial federal contractor's antidiscrimination Executive Order 10925,[58] and almost thirty years after the first Presidential Executive Order concerning employment discrimination by government contractors.[59] A history of this interim period is essential to an understanding of the Philadelphia Plan, its goals, problems and potential for effectiveness.

The Evolution of Executive Sanctions

Until 1961, Presidential Executive Orders concerning employment discrimination contained no sanctions, no provisions for an administrative enforcement body,[60] and relied entirely upon persuasion and conciliation for results. Executive Order 10925,[61] issued by President

50. Contractors Ass'n of E. Pa. v. Shultz, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd* 442 F.2d 159 (3d Cir. 1971); see Weiner v. Cuyahoga Community College, 19 Ohio 2d 35 (1969), 249 N.E. 907 *cert. denied* 396 U.S. 1004 (1970), holding that a "Cleveland Plan," established by the state and federal governments, was constitutionally valid and not in conflict with Title VII.
51. Rejecting arguments like those presented in Contractors Ass'n, note 50 *supra*, the Attorney General of the United States declared the Philadelphia Plan valid. Att'y Gen. Op. Letter to Sec. of Labor (Sept. 22, 1969).
52. The Plan has been the subject of extensive commentary. See Comment, "The Philadelphia Plan And Strict Racial Quotas On Federal Contracts," 17 U.C.L.A.L. Rev. 817 (1970); Jones, "The Bugaboo Of Employment Quotas," 1970 Wis. L. Rev. 391 (1970); Jones, "Federal Contract Compliance In Phase II — The Dawning Of The Age Of Enforcement Of Equal Employment Obligations," 4 Ga. L. Rev. 756 (1970); Note, "The Philadelphia Plan: Equal Employment Opportunity In The Trades," 6 Colum. J. L. & Soc. Prob. 187 (1970); Coleman, "The Philadelphia Plan Goes To Washington," 57 A.B.A.J. 135 (1971).
53. See policy statement and "findings" set forth in the text of the Plan in Sections 1 and 3, respectively. The full text of the Plan appears at C.C.H. Employment Prac. Guide ¶ 16,175 (1971).
54. See note 8 *supra*.
55. *Ibid.*
56. The Plan's Section 8 adopts by reference, the sanctions contained in Section 209 of Exec. Order No. 11246, note 8 *supra*.
57. 74 L.R.R. 30 (1970).
58. 26 Fed. Reg. 1977 (1961).
59. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).
60. For a history of the early anti-discrimination executive orders see Note, "Executive Order 11246: Anti-Discrimination Obligations In Government Contracts, 44 N.Y.U.L. Rev. 590 (1969).
61. 26 Fed. Reg. 1977 (1961).

Kennedy in 1961, established the President's Committee on Equal Employment Opportunity (PCEEO), the first agency within the executive branch with at least nominal enforcement powers to cope with racial discrimination by government contractors. Members of PCEEO were the then Vice President of the United States, Lyndon B. Johnson, as Chairman, and various cabinet officers and private citizens as members.

Through "compliance reviews" conducted by a contracting agency, efforts were made to commit the contractor to an affirmative action program to increase his minority work force, and to end segregated and dead-end lines of progression for minority employees.[62]

Because different federal agencies administered their own equal employment opportunity contract clauses, enforcement ranged from little or no enforcement attempts by some agencies to vigorous attempts at enforcement by others. Even the Army, Navy, and Air Force, administratively under the Department of Defense, operated separate and independent programs under the Executive Order, while the Defense Supply Agency, part of the Defense Department itself, operated its own equal employment opportunity contract compliance section.[63]

In a report dated September 1970, the United States Civil Rights Commission reported that since 1964, the Department of Defense had cancelled more than 6,500 defense contracts for shortcomings in quality or production, but had never cancelled a single contract because of a contractor's discriminatory hiring practices.[64] The affirmative action obligation had not resulted in any adversary proceedings between the government and any of its contractors.[65] In short, the Order was singularly ineffective in its attempts to grapple with the complex problem of unequal employment opportunity.

Enforcement of the Executive Order was particularly difficult in the construction trades.[66] Because construction contractors ordinarily hire a new employee-complement for each construction job, they find it convenient to hire employees referred from union hiring halls,[67] a practice formalized by collective bargaining agreements sometimes obligating signatory employers to hire workers referred from the union hiring hall and from no other source.[68] It was the combined force of the hiring-hall referral process and a long history of racial discrimination with respect to membership in the building trade unions that prompted the Government on November 30, 1967, to further implement the Executive Order with the Philadelphia Plan.[69]

"THE PLAN"

The Plan follows the rationale of the Order by requiring "affirmative action" by contractors, but differs from the Order in a number of material respects. First, the Plan is applicable to a specific locale — certain counties in the Philadelphia area — while the scope of the Order is nationwide. Second, the Plan is limited to specific trades, all of which had been found by the Secretary of Labor to be organized by unions practicing racial discrimination with respect to membership, apprentice program training, and referrals from their hiring halls.[70] The Execu-

62. *See Federal Civil Rights Enforcement Effort: Report of the United States Commission on Civil Rights* 217-262 (1970). The description of how reviews were conducted under PCEEO is based in part upon the author's experiences in a contract compliance capacity during the years 1963, 1964.
63. *Ibid.*
64. See note 62 *supra*, at 165, n. 125.
65. *Id.* at 164, 165.
66. Evidence adduced at the Labor Department hearings resulting in the promulgation of the Philadelphia Plan revealed that only one percent of Blacks were engaged in the constructions trades later covered by the Plan. It was found that this low rate of participation by blacks was due to "the traditional exclusionary practices of these unions in admission to membership and apprenticeship programs and failure to refer minorities to jobs in these trade." § 3(a) of the Plan, C.C.H. Employment Prac. Guide ¶ 16,176 (1971).
67. See note 53 *supra*.
68. In the exclusive hiring-hall arrangement, the employer is permitted to hire from a source other than the hiring hall, only if the union cannot supply qualified candidates within a time prescribed in the collective bargaining agreement, usually 48 hours. At that, some agreements provide that the "48-hour man" may be replaced as soon as someone becomes available for referral. See Dobbins v. Local 212, IBEW, note 7 *supra*. While only 17 percent of all collective bargaining agreements contain hiring-hall clauses, most of these are concentrated in the construction industry and the publishing, maritime, retail trade, and services industries. See Bureau of National Affairs, *Basic Patterns In Union Contracts* 87.3 (B.N.A. 1966). The Plan's findings, note 53 *supra*, note that hiring halls are often used as a matter of custom where no collective bargaining provision provides for one.
69. See note 53 *supra*.
70. *Ibid.*

tive Order, in contrast, applies across the board to all of a government contractor's classifications of employment. Third — and the most drastic difference between the Plan and the Order — the Plan requires contract bidders "to commit themselves to specific goals of minority manpower utilization. . . ."[71] The Executive Order, in sharp contrast, makes no such requirement as part of the affirmative action obligation. Fourth, and paradoxically, the Plan was conceived because of discrimination by labor unions, while the Executive Order is directed specifically to employers, and mentions unions almost incidentally.[72]

The Great Paradox

At the fountainhead of the Government's so-far abortive efforts to make the Philadelphia Plan work is the paradox of a government plan with no power to challenge directly the membership and referral practices of unions.

That the drafters of the Philadelphia Plan considered building trades unions the primary inhibiting factor in the effort to integrate the building trades is made clear by the following excerpt from the Plan's preamble:

> "Because of the exclusionary practices of labor organizations, there traditionally has been only a small number of Negroes employed in these seven trades. . . . Equal employment opportunity in these trades in the Philadelphia area is still far from a reality. The unions in these trades still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few Negroes being referred to employment."[73]

Thus, the Plan attempts to alter union membership and referral practices by attempting to compel employers to compel unions to alter their referral and membership policies in a manner consistent with the employer's obligations under the Plan. Yet, unions have no direct obligations under the Executive Order or the Plan, and neither the Plan nor the Order contains sanctions directly applicable to unions. It is the employer who is the government contractor, who submits a bid to the government, who agrees to a minority hiring goal, who submits to compliance inspections, and who is subject to sanctions for violations of the Plan.[74]

The Mechanics of the Plan

On May 22, 1968, the Comptroller General of the United States issued an opinion stating that the Philadelphia Plan — then in the proposal stage — was "technically defective" because it failed to set out an affirmative action standard on which approval or disapproval of a contract might be based. He held the Plan provisionally valid, subject to the condition that the Department of Labor issue implementing regulations with a statement defining minimum requirements of affirmative action.[75]

With due regard for the Comptroller General's views, the Secretary of Labor two years later issued a revised Philadelphia Plan with implementing regulations, both purporting to spell out a contractor's affirmative action obligations in considerable detail.[76] Circumspectly approaching the sensitive subject of racial quotas, the Plan requires contract bidders to "commit themselves to specific goals of minority manpower utilization. . . ."[77] The standards established by OFCC establish a minimum and a maximum percentage of minority workers for each trade. The following criteria are established for determining the range of minority hiring in the six trades.

(1) The current extent of minority group participation in the trade;
(2) The availability of minority group persons for employment in such trade;

71. § 6 of the Plan, note 53 *supra*.
72. Section 207 of the Executive Order provides that the Secretary of Labor shall "use his best efforts" to seek the cooperation of unions in implementing the Executive Order. C.C.H. Employment Prac. Guide ¶ 16,007 (1969).
73. See note 53 *supra*.
74. *Ibid.*
75. 47 Comp. Gen. 666 (1968).
76. This is the current Plan, note 53 *supra*.
77. *Id.* at § 6.

(3) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs;
(4) The impact of the program upon the existing labor force.[78]

The Plan's requirements are ostensibly formidable. But a close analysis of its requirements, including an implementing Order,[79] warrants a prognosis of failure, and reveals why the Plan may have held out unfulfilled promises and raised false hopes.

The "Quota" and "Reverse Discrimination"

In a question-and-answer statement prepared by the Department of Labor to explain the Plan, the question, "Does the Plan set quotas for hiring minority workers?" is answered:

> "No, it does not. . . .
> "If a contractor meets his goals, he will be presumed to be in compliance. However, if he fails he will not automatically be in noncompliance. All that is required of the contractor is a good faith effort to satisfy his goals, and providing such efforts are made, he will not be disqualified for falling short of his goals."[80]

The contractor's obligations under the Plan are further complicated by the Plan's section 6(b)(2) admonition that in attempting to meet his minority hiring goals, the contractor "shall not . . . discriminate against any qualified applicant for employment."[81] This requirement is underscored by regulations requiring the bidder to notify the OFCC whenever it comes to his attention that minority hiring goals are being used in a discriminatory manner, "in order that appropriate sanction proceedings may be instituted."[82]

The Plan's promulgation in Philadelphia had a firm empirical basis. Hearings conducted by the Department of Labor revealed that the cities had a high unemployment rate for Blacks, that Blacks trained and qualiifed to work at one of the six trades involved were unemployed, and that the Philadelphia community had a high percentage of Blacks.[83] Based on these findings, the no-discrimination aspect of the Plan can only mean that contractors, in carrying out their affirmative action obligations, may not discriminate against whites and in favor of Blacks. In close cases involving a white-black choice of applicants from any source, this will tend to make contractors err on the side of hiring white applicants. In the case of applicants from union hiring halls, the problem is compounded, inasmuch as a combination of the Plan's nondiscrimination-against-whites proviso and pressure from unions for adherence to a hiring-hall contract clause will very likely cause the contractor not to take the kinds of steps that will in fact integrate his work force in accordance with the Plan's stated objectives.

Given the Plan's objective of increasing minority employment in the construction trades, the combination of the good faith effort and no-discrimination-against-whites provisions poses a major dilemma in view of the strong likelihood that each requirement is self-defeating and that the two requirements together are inherently contradictory.

Good Faith Effort Criteria

On September 23, 1969, the Secretary of Labor issued an order entitled "Ranges for Implementation of Philadelphia Plan."[84] Among other things, the Order contains criteria for measuring a contractor's good faith effort in attempting to meet his hiring goals under the Plan.

If a contractor, who, for example, in conjunction with the OFCC Area Coordinator, has agreed to a minority hiring range of 11 percent to 15 percent Black ironworkers during the calendar year 1971 and fails to meet that goal, the

78. *Id.* at § 2.
79. Order establishing "Ranges For Implementation Of Philadelphia Plan" (hereinafter cited as Implementing Order), issued Sept. 23, 1969, and later amended, effective March 1, 1971. C.C.H. Employment Prac. Guide ¶ 16,176 (1971).
80. C.C.H. Employment Prac. Guide ¶ 16,178 (1969).
81. See note 53 *supra*, at § 2(b)(2).
82. § 6, Appendix to Implementing Order, C.C.H. Employment Prac. Guide ¶ 16,176 (1971).
83. See note 53 *supra*, at § 5.
84. See note 89 *supra*.

implementation order provides that a determination of the contractor's good faith will be based upon his efforts "to broaden his recruitment base through at least the following activities":

(1) By notifying OFCC-listed community organizations, which have agreed to assist the contractor in achieving his hiring goals, of opportunities for employment.

(2) By maintaining a file indicating the name and address of each Black worker referred and noting what action was taken with respect to each.

(3) By notifying the OFCC whenever the union with which the contractor has a collective bargaining agreement has not referred to the contractor a Black worker sent by the contractor, or when the contractor has other information that the union referral process has impeded him in his efforts to meet his goals.

(4) By demonstrating to the OFCC that the contractor has particpated in Labor Department-funded programs designed to provide trained craftsmen.[85]

Are these effective criteria that, if followed, will enhance the Plan's objective of increasing the number of Black workers employed in the construction trades? Or are they merely pro forma requirements, capable of being routinely effectuated by a clerical employee? None of the four criteria can affect a contractor's efforts to reach his Black hiring goals if the contractor must adhere to a collective bargaining agreement clause obligating the contractor to hire exclusively from a union hiring hall that refers none but white workers for employment.

Notifying community organizations of opportunities for minority workers with government contractors, as required by criterion (1), can have little effect in the face of a discriminatorily operated hiring hall. Should such an organization refer a Black worker to the contractor, the contractor would be obligated to send the worker to the hiring hall for the union's referral to the contractor. The union would be bound not to discriminate against the worker because of his nonmembership in the union,[86] but would not be obligated to place the worker ahead of other out-of-work union members on its referral list. Active racial discrimination by the union would obviously compound the difficulties.

Maintaining a file of each minority worker referred, as required by criterion (2), and participation Labor Department training programs, as required by criterion (4), would be meaningless, if, because of discrimination in the operation of the hiring hall, no Blacks were referred and Black applicants merely remained filed and recorded statistics, that is, trained but unemployed workers.

Notifying the OFCC of union referral problems would have an effect on the integration process only if the OFCC, by some indirect means, could work its will upon a union that impeded the contractor's integration efforts through the discriminatory operation of a hiring hall and through discriminatory membership practices. The Plan purports to meet this problem head on:

> "Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. . . . To the extent that [contractors] have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations . . . such contractors cannot be considered to be in compliance with Executive Order 11246 . . . or the implementing rules, regulations and orders."[87]

In short, the Plan provides that a contractor's reliance upon the existence of discrimination in the operation of a hiring hall as a reason why the contractor has not met its numerical range of Black employees is not a good faith reliance

85. See note 79 *supra*, at § 5, Implementing Order.
86. While the hiring hall is not *per se* invalid under the National Labor Relations Act, Local 357 v. NLRB, 365 U.S. 667 (1961), the operation of the hiring hall in a manner which discriminates against nonunion members clearly violates Section 8(b)(1)(A) of the National Labor Relations Act, as a device which unlawfully encourages union membership, as opposed to leaving that decision to the uncoerced choice of the individual. See e.g. NLRB v. Carpenters, Dist. Council of New Orleans — F.2d — (5th Cir. 1971).
87. See note 53 *supra*, at 8b.

and does not excuse a failure to achieve the hiring goal.

Correctly cited by the Plan is the National Labor Relations Act,[88] which prohibits, among other things, hiring-hall discrimination based on lack of union membership, as well as hiring-hall discrimination based on race;[89] and Title VII of the 1964 Civil Rights Act,[90] which prohibits unions from discriminating on grounds of race, including hiring-hall referral and union membership discrimination.[91] Neither the National Labor Relations Act nor Title VII has met with anything approaching success in halting discriminatory union hiring-hall referrals.

NLRA Hiring-Hall Discrimination Remedies

Labor unions have long been concerned with collective bargaining agreements designed to secure and increase their membership rolls.[92] One such device, the closed shop clause — an agreement that no nonunion member may be hired by the employer — was banned by the 1947 Taft-Hartley amendments to the National Labor Relations Act.[93] Notwithstanding the closed shop ban, a union hiring hall can achieve the effect of a closed shop by referring only union members for employment under an exclusive hiring-hall provision in the collective bargaining agreement. If the same union bars Blacks from membership, Blacks will not be referred for two reasons: (1) They are not union members; (2) They are Black. The union's refusal to refer for reason (1) would alone violate Section 8(b)(1)(A) of the National Labor Relations Act[94] on the ground that this practice coercively encourages union membership. On similar grounds, an employer who is party to a collective bargaining agreement so administered is also in violation of the National Labor Relations Act.[95] Indeed, the underlying policy of the NLRA, as observed by the Supreme Court, is "to allow employees to freely exercise their right to join unions or abstain from joining any union without imperiling their livelihood."[96]

Despite these formidable paper proscriptions, the rankest forms of racial discrimination are still practiced by many construction craft unions.[97] The problem and any solution that might exist are inextricably linked to the de facto closed shop. an institution that has successfully withstood numerous assaults on its racially discriminatory character.

That the NLRA has been unsuccessful in preventing hiring halls from effectively operating as closed shops is one of the harsh realities of the industrial world. A former NLRB General Counsel has written:

> "One need not be a cynic to observe that a union which bears the burden of maintaining a hiring hall or referral system will be tempted to favor its adherents when employment opportunities arise. The employer who makes an exclusive delegation of clearance or referral for employment to a union would be indeed naive if he did not anticipate this result."[98]

Another writer on the same subject is more blunt:

88. 29 U.S.C.A. § 151 *et seq.* (1964).
89. See Houston Maritime Ass'n, Inc., 168 N.L.R.B. No. 83 (1967), where the NLRB held in violation of the NLRA a union's freeze on acceptance of all new job applicants on the ground that the freeze had the effect of preserving a pool of white employees for referral.
90. Section 703(c) of Title VII, 42 U.S.C.A. § 2000e-2(c) (1964), makes it unlawful for a union to exclude or expel from its membership, or to limit, segregate, or classify its membership, or to fail or to refuse to refer for employment, on grounds of race, color, religion, sex, or nationality.
91. *Ibid.*
92. Between 75 percent and 80 percent of collective bargaining agreements provide for some form of union security. Excluding bargaining agreements in "right-to-work" states (states where union shop clauses are illegal), 90 percent of collective bargaining agreements contain union security clauses. See *Basic Patterns In Union Contracts*, note 72 *supra*, at 87:1, 82:2 (B.N.A. 1966). Union shop clauses require union membership wtihin a prescribed time following the hiring date; agency shop clauses do not compel union membership, but obligate the nonunion member to pay union service fees equal to union dues; maintenance-of-membership clauses require those who become union members to remain so, but impose no membership requirements upon others.
93. Section 7 of the Original Wagner Act protected employees in their rights to "self-organization, to form, join, or assist labor organizations. . . ." The Taft-Hartley amendments expanded these rights to include the right "to refrain from any or all of such activities. . . ." 29 U.S.C.A. § 157 (1964).
94. See note 86 *supra*.
95. E.g., Buck Kreihs Co., Inc., 185 N.L.R.B. No. 52 (1970).
96. Radio Officers Union v. NLRB, 347 U.S. 17 (1954).
97. Nationwide figures for 1968 on minority group membership in local unions with hiring hall or other referral arrangements were released by the EEOC on May 19, 1970, C.C.H. Employment Prac. Guide ¶ 5067 (1970), and are reflected in the following table:
98. Fenton, "Union Hiring Halls Under the Taft-Hartley Act," 9 Lab. L.J. 505, 506 (1958). See Rains, "Construction Trade Hiring Halls," 10 Lab. L.J. 363 (1969); "The Closed Shop in Hiding," Fortune 62 (Sept. 1951).

TOTAL AND MINORITY GROUP MEMBERSHIP IN REFERRAL UNIONS IN THE U.S., 1968

	Number Reporting	Membership in Referral Unit				
			NEGRO		SPANISH SURNAMED AMERICAN	
		Total	Number	Percent	Number	Percent
ALL UNIONS	2,987	1,852,807	170,009	9.2	118,469	6.4
BUILDING TRADES	2,189	1,131,051	83,510	7.4	49,814	4.4
Mechanical Trades	853	386,558	5,424	1.4	10,787	2.8
Boilermakers	38	22,482	876	3.9	834	3.7
Elevator Constructors	14	6,660	46	.7	120	1.8
Electrical Workers	289	125,927	2,373	1.9	4,058	3.2
Iron Workers	117	62,120	1,160	1.9	2,086	3.4
Plumbers	330	138,208	882	0.6	2,059	1.5
Sheetmetal Workers	65	31,161	85	0.3	1,630	5.2
General Construction Trades	999	535,934	17,263	3.2	20,025	3.7
Asbestos Workers	22	4,740	0	.0	54	1.1
Bricklayers	99	25,470	2,551	10.0	625	2.5
Carpenters	538	302,721	5,370	1.8	9,461	3.1
Lathers	15	5,284	247	4.7	334	6.3
Marble, Slate & Stone Polishers	12	3,043	70	2.3	244	8.0
Operating Engineers	57	111,453	2,747	2.5	2,055	1.8
Painters	155	50,398	1,836	3.6	4,227	8.4
Plasterers	62	21,928	2,920	13.3	2,658	12.1
Roofers	39	10,897	1,522	14.0	367	3.4
Laborers	337	208,559	60,823	29.2	19,002	9.1

The widely held but erroneous notion that these figures reflect lack of ability and not discrimination is rebutted by, among other things, the Department of Labor findings on the number of trained, qualified and available Blacks in Philadelphia construction trades versus the number actually working in those trades. See note 79 *supra* at § 3(b), Implementing Order. For similar craft trades findings of local advisory committees to the United States Commission On Civil Rights, see note 62 *supra,* at 37-44.

> "Is there any realistic person who believes that a union will happily send along a non-member to a job while its members are out of work? . . . [M]ore often than not union members will be sent by so-called nondiscriminatory hiring halls to fill jobs while nonunionists wait in the the union hall for jobs, which seem excessively long in coming."[99]

Familiar means of avoidance employed by artful hiring-hall dispatchers include keeping jobs off the hiring-hall board, referring nonunion members to jobs of short duration, and losing referral records.[100] More subtle schemes known only to practitioners of the art must surely exist. Further, insurmountable problems of proof and fatal delays inevitably defeat the rights of those challenging the system.

Assuming for the sake of argument that the National Labor Relations Board may ultimately ferret out subtle, discriminatory hiring-hall schemes, practical white men might well prefer to join rather than fight the union through the NLRB's time-consuming procedures, thus defeating the Act's objective of leaving to the uncoerced choice of the individual the decision of whether or not to join a union. Even this choice to succumb to an illegal referral practice is not open to Blacks denied union membership because of race.

Title VII Hiring-Hall Discrimination Remedies

Title VII has been singularly successful in remedying openly discriminatory hiring-hall practices used for the admitted purpose of excluding Blacks from employment. No problems of proof are presented by such cases. *Local 53, International Association of Heat and Frost Insulators and Abestos Workers v. Vogler*[101] is a classic example. The union in that case was compelled to admit that under an exclusive hiring-hall arrangement it had a policy of never referring Blacks or Mexican-Americans for work in the Southeastern Louisiana asbestos and insulation trade. The union defended a Title VII action by arguing that the discriminatory referrals and membership policies were products of an earlier day. They argued that the union currently had membership standards unrelated to race, namely, that the applicant (1) be under thirty years of age, (2) obtain written recommendations from three members, (3) obtain the approval of a majority of the members voting by secret ballot at a union meeting, and (4) have four years experience as an "improver" or "helper" member of the union — experience obtainable only by sons or close relatives of union members. The union cited these requirements as neutral, nondiscriminatory requirements that did not violate Title VII. The Fifth Circuit Court of Appeals disagreed and held that these requirements, while apparently neutral, were in fact discriminatory within the meaning of Title VII.

The distinctive character of *Vogler* and other cases where proof of racial discrimination is supplied with ease is that the admitted exclusion is usually that which predates passage of Title VII, segregation practiced at a time when there was virtually no need to engage in subtleties. The difficult cases of proof are those occurring in parts of the country — usually outside the South — where discriminatory practices have usually not been open and admitted. It is in these areas that Philadelphia-type plans have been instituted, and where Title VII has not succeeded in reaching less obvious forms of hiring-hall racial discrimination.

On its face, the Plan purports to do more than prohibit a contractor from being party to the discriminatory operation of a hiring hall. The Plan provides that if a union prevents a contractor from meeting its obligations, i.e., minority hiring goals, the contractor is not in compliance with the Executive Order or the Plan.[102] It appears that the OFCC has so far interpreted this to mean noncompliance when the Union has engaged in affirmative acts of discrimination. OFCC has never denied participation in feder-

99. Rains, note 98 *supra*, at 373.
100. *Ibid.*
101. 407 F.2d 1047 (5th Cir. 1969).
102. *Ibid.*

ally financed construction solely on the ground that a union has made it "difficult if not impossible for the contractor to meet his obligation of affirmative action,"[103] simply by not referring Blacks to the contractor. It is possible for a union to refer whites without violating Title VII. Title VII does not require the kind of affirmative action that the Executive Order and the Plan require. Indeed, the Section 703(j) proviso of Title VII,[104] applicable only to Title VII,[105] appears to disclaim hiring requirements based on a racial imbalance. Accordingly, by relying upon Title VII as a standard in holding a contractor responsible for a union's conduct in the operation of a hiring hall, OFCC narrowly limits its authority to hold the contractor responsible for the union's conduct to those cases in which the union engages in active and provable violations of Title VII.

BREATHING LIFE INTO THE PLAN

At this juncture, several questions relating to effective administration of the Philadelphia Plan are suggested: (1) Can the employer, for the sake of complying with his obligations under the Plan, unilaterally breach the hiring-hall provision of a collective bargaining agreement in the case of a union that (a) is not in violation of Title VII or the NLRA, (b) is in violation of Title VII or the NLRA? (2) In the case of an expired, or about to expire collective bargaining agreement, or an agreement being negotiated for the first time, can the employer insist that the agreement contain no hiring-hall clause, or insist that the contract contain a provision that the hiring hall be operated in a manner consistent with the employer's affirmative action obligations under the Plan?

The Plan on Its Own Two Feet

Contractors Association of Eastern Pennsylvania v. Shultz[106] holds that the Philadelphia Plan, through Executive Order 11246, stands independently of Title VII, does not conflict with Title VII, and is not preempted by Title VII. It would thus appear that the Plan need not rely upon Title VII standards as a basis for holding contractors responsible for union conduct that prevents the contractor from achieving his hiring goals. But this does not answer a related but more difficult question of whether the OFCC may insist that a contractor abandon an existing hiring-hall provision in a collective bargaining agreement in the absence of proof of a legal violation (Title VII or the NLRA) that might justify the contractor's refusal to abide by the hiring-hall clause. The difficulty of the question is illustrated by the manner in which the Attorney General of the United States dealt with it in his opinion declaring the Philadelphia Plan valid. The Attorney General said:

> "To comply with his affirmative action obligation an employer may be forced to depart from his customary reliance on union referrals (though this will depend to a great extent on the union's own response to the Plan), but since the law permits an employer to obtain employees from additional sources, I see no reason why the Government is not free to bargain for his assurance to do so. In other words, the employer may have a right to refuse to abandon his customary hiring practices, but he has no right to contract with the Government on his own terms."[107]

The statement is somewhat ambiguous. On the one hand, according to the Attorney General, the law—it is not made clear what law — permits employers to abandon the hiring hall; on the other hand, "the employer has a right to refuse to abandon his customary [e.g., hiring-hall] practices. . . ." The Attorney General's concluding statement that the employer has no right to contract with the Government on his own terms appears to suggest that the Government has a right to insist that a contractor abandon a hiring-hall agreement as a condition of contracting with the Federal Government.

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103. OFCC Questions And Answers About Philadelphia Plan, C.C.H. Employment Prac. Guide ¶ 16,179 (1969).
104. 42 U.S.C.A. § 2000e-2(j) (1964).
105. Contractor Ass'n of E. Pa. v. Schultz, note 3 *supra*.
106. *Ibid.*
107. See note 51 *supra*.

It would appear that the search for an effective Philadelphia Plan, one that in fact increases the number of Black employees in the construction industry, may begin with the premise that the Government may use its contracting power to compel the abandonment of hiring halls that produce no available Blacks for referral, even though the union operating the hiring hall has not violated Title VII standards requiring affirmative proof of discrimination.

Abandonment of Existing Hiring-Hall Agreements

In the simplest case, if a union flatly refuses to refer a Black worker on racial grounds, the Black worker so victimized might apply directly to the employer for work. The employer could no doubt hire this worker without incurring liability for breach of the hiring-hall agreement, inasmuch as the union in that case would be unlawfully implementing the hiring-hall clause. Further, in this instance, if the employer ignored the union's malfeasance, adhered to the letter of the hiring-hall clause, and turned away the Black worker, the strongest case could be made that the employer had violated the Plan. For the Plan at least requires that the employer not acquiesce in the Union's illegal acts of discrimination. If the Government so held, and compelled the abandonment of the hiring hall in the case of this single employee, the union, under general principles of contract law excusing the breach of an illegal agreement, would have no recourse for breach of the collective bargaining agreement's hiring-hall clause.

Insofar as ease of proof is concerned, few cases of discrimination are susceptible of such easy hypothetical proof. Courts, however, are beginning to take close looks at ostensibly neutral practices of employers and unions in order to determine whether Title VII has been violated. For example, in *United States v. Sheet Metal Workers International Association, Local No. 36*,[108] it was held unnecessary for the United States to prove that the defendant unions had refused membership or work referrals to Blacks since the effective date of Title VII. Two locals of the union were involved. In the case of both locals, the collective bargaining agreeemnt required employees to become union members within 31 and 8 days, respectively, of their employment. Black workers could not meet this requirement because of the unions' past policies of discrimination. Referrals were made on the basis of pre-Act experience in the industry and pre-Act experience under the collective bargaining agreements — experience Blacks could not obtain because of pre-Act discrimination by the unions. In determining that the unions engaged in pre-Act discrimination, the court looked to such criteria as the absence of Black union members, the absence of Black referrals, the absence of Black apprentices in the union's apprentice program, all coupled with the fact that there was a large source of Black employees from which the union could have drawn. In drawing inferences in this fashion, the court soundly recognized the realities of subtle forms of discrimination.

On Local 36-type reasoning, if a Government contractor or federally assisted contractor is party to a collective bargaining agreement that, notwithstanding the absence of proof of affirmative discrimination, has few or no Black members, makes no Black referrals, has no Black apprentices, and operates in an area with a substantially high Black population, then, arguably, the contractor is in violation of the Plan by virtue of its relationship with that union. It would not be necessary for a Title VII proceeding to be processed before the OFCC could adjudge that the contractor was party to an unlawfully administered hiring-hall agreement that should be abandoned.

The statements in *Contractors Association* to the effect that the Plan and the Executive Order operate independently of Title VII[109] can be taken to mean that

108. 416 F.2d 123 (8th Cir. 1969).
109. See note 3 *supra*, at 171, 172.

the OFCC can adopt independent standards of proof of union discrimination for evaluating contractors' adherance to a hiring-hall agreement.

In these cases, the hiring-hall arrangement need not be completely abandoned. The government could insist that the hiring-hall agreement not be followed to the extent that the employer would be free to reach his minority hiring goals from sources outside the union hiring hall. If the union began to refer Blacks, the hiring-hall agreement would simply be followed in the normal course. If the union referred some Blacks, but in numbers less than those required to meet the employer's goals under the Plan, the employer could make up the difference from sources other than the union hiring hall.

In summary, it is ineffectual for the Plan to simply state that a contractor's delegation of hiring authority to a union hiring hall does not place a contractor in compliance with the Plan. At minimum, the Plan should specifically provide that the failure of a union to supply a contractor with Black workers in and of itself means that the contractor has an affirmative obligation to seek Black workers from sources other than the hiring hall. The failure to make that effort should be regarded as the kind of noncompliance that subjects the contractor to the Plan's sanctions.

What of hiring-hall clauses in collective bargaining agreements that are about to expire or have expired? May the government effectively compel the contractor to take a negotiating stance in favor of no hiring-hall agreement or a modified hiring-hall agreement that would permit the contractor to hire Blacks from sources other than the hiring hall?

Bargaining for the Modified Hiring-Hall Clause

At one time, the hiring hall appeared to be doomed. In a 1957 case, the NLRB held that the hiring hall inherently encourages union membership in violation of the NLRA; that in order to be lawful a hiring-hall agreement had to contain certain protective provisions.[110] This assault on the hiring hall was short-lived. Four years later, the Supreme Court held that hiring halls were not inherently unlawful; that the kind of discrimination prohibited by the National Labor Relations Act could not be inferred from the face of a hiring-hall clause.[111]

The decision effectively limits NLRA hiring-hall violations to those cases where proof of active discrimination because of nonunion membership may be established. The combination of this prohibition, Title VII's sanctions, and Philadelphia-type plans' affirmative-action requirements may serve as a firm basis for the Government's insistence that contractors bargain for hiring-hall clauses that permit hiring from sources other than the hiring hall for the purpose of meeting minority hiring goals. The contractor's success would depend largely upon the Government's commitment to its insistence that the contractor hire outside the hiring hall for compliance purposes. To administer the Plan effectively, the OFCC would have to provide by rule that a contractor's failure to so operate would constitute noncompliance with the Plan, thus subjecting the contractor to the debarment sanction.[112]

The Validity of an Effective Plan

A fair summary of the Plan's effectiveness requirements follows: The Plan needs compliance criteria that go substantially beyond pro forma requirements unlikely to produce an increase in the number of Black employees in the construction industry. OFCC, in short, should become more result oriented. The Department of Labor's findings that the Philadelphia area contained a surplus of unemployed and underemployed Black tradesmen[113] should have prompted the Government to issue a Plan that cast a heavy burden on contractors to meet their

110. 119 N.L.R.B. 883 (1957).
111. Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961).
112. The Plan purports to make this a present requirement; but as the court in *Contractor Ass'n* notes, it does so only by implication. Note 3 *supra*, at 174.
113. See note 53 *supra*, at § 4.

hiring goals. The goals, after all, are determined by the OFCC area coordinator in conjunction with the contracting federal agency;[114] they are presumably based on realistic possibilities, as measured by man-power availability. To excuse the failure to meet those goals by applying a modest good faith effort criterion is not consistent with the Plan's Black manpower findings. If Blacks are available and prepared to work, only the most compelling reasons should excuse the contractor's failure to hire them in numbers consistent with his announced hiring goals. Explicit standards of proof of noncompliance, including the contractor's failure to abandon the usual hiring-hall arrangement, would be a means of measuring the compelling nature of a contractor's reasons for failing to meet the hiring goals.

If, on avoiding the union hiring hall to obtain Black workers, the contractors in a given locale are unable to find a suitable referral source, the Government should operate a hiring hall for minority workers as a necessary incident to implementing the Executive Order and the hiring goals agreed upon by the contractor and the Government pursuant to the Plan.

Would a Plan operated as described above be a valid Plan? *Contractors Association of Eastern Pennsylvania v. Schultz*[115] appears to provide a clearly affirmative answer.

The court's opinion in that case presents one more paradox for discussion. The opinion describes the Executive Order and the Plan as authorizing implementation steps going beyond those so far taken by the Government.

When the Attorney General upheld the validity of the Philadelphia Plan, he relied heavily upon the Plan's good faith effort proviso. It was stressed that the Plan did not require a strict quota, and was therefore not invalid because of a quota requirement.[116] Consistent with that opinion, the Plan goes to elaborate lengths to disclaim an unqualiifed quota and to stress the contractor's good faith effort as the key to compliance.[117]

In *Contractors Assocaition,* the Plan's validity was sustained on a broader basis. The court characterized the plaintiffs' due process contentions concerning the hiring goals as "pure sophistry."[118] Without relying upon the Plan's good faith effort proviso, the court sustained the hiring goals requirements as reasonable in that they could be met, "considering normal employee attrition and anticipated growth in the industry, without adverse effects on the existing labor force."[119] Further, it was noted, "[T]he construction industry has an essentially transitory labor force and is often in short supply in key trades."[120] The gist of the court's analysis is that reasonable quotas may be applied strictly. The nub of the matter is the reasonableness of the quota. A quota of four Black sheetmetal workers, for example, out of a workforce of one hundred sheetmetal workers, in a city with a 25 percent Black population, and where fifty Black sheetmetal workers were found to be unemployed or underemployed, could hardly be called unreasonable. It would follow that a strict requirement that the contractor meet the goal of four Black sheetmetal workers in that example would be a valid one; and the contractor's failure to meet it, barring extraordinary and compelling circumstances, should alone constitute noncompliance with the Plan.

Further, the Plan treats Title VII and the National Labor Relations Act as though the standards applied under those laws are also the standards governing the operation of the Executive Order and the Plan. The opinion in *Contractors Association* makes it clear that the basis of authority for the Plan — the President's

114. *Id.* at § 6.
115. See note 3 *supra.*
116. See note 51 *supra.*
117. See particularly, OFCC's Questions And Answers About Philadelphia Plan, C.C.H. Employment Prac. Guide ¶ 16,179 (1969).
118. Note 3 *supra,* at 176.
119. *Ibid.*
120. *Ibid.*

implied contracting authority — and the basis for Title VII and NLRA authority are separate and distinct; that while Title VII does not require, and perhaps disclaims, affirmative action, the President may require specific affirmative action of parties to federal contracts.[121] On the same reasoning, said the court, even though the NLRA authorizes hiring halls that are not operated in a discriminatory manner, the Government may nonetheless require that they be abandoned as part of the affirmative action covenant.[122]

The opinion in *Contractors Association* does not deal with all that has been suggested here. Questions concerning the Government's insistence that modified hiring-hall agreements be bargained for and that the Government operate hiring halls for Black workers were necessarily not raised and not decided in *Contractors Association.* But the decision, like the Supreme Court's decision in *Griggs v. Duke Power Company,* relies upon the doctrine that "the courts should give more than ordinary deference to an administrative agency's interpretation of an Executive Order or regulation which it is charged to administer."[123] The Executive Order and the Plan may, it seems, be read as sanctioning all that is required for their effective implementation, unless what is required is inconsistent with other federal statutory or constitutional provisions.

Finally, a decision holding the Plan valid necessarily validates the Plan's and the Executive Order's atrophied contract debarment sanction. That this potentially powerful weapon — and all that might flow from the deterrent effects of its use — has never been used is perhaps the greatest of all the paradoxes of employment discrimination legal remedies. Either all covered contractors and federally assisted employers are in compliance with the Executive Order or the Government, for any number of possible reasons, is simply reluctant to use the sanction. Possibly, with the validity of the Plan confirmed, the debarment sanction will be applied in proper cases.

CONCLUSION

With a chilling lack of substantial deviation, the Black unemployment rate for years has hovered around a figure twice that of the prevailing unemployment rate for whites.[124] Thus, in times of moderately high unemployment, the Black unemployment rate is fixed at or near what a serious recession level would be for the nation as a whole. What has been discussed in this paper is but a small part of a governmental effort to facilitate the entry of Blacks into the job market.

What is often overlooked is the Government's own interest and the interest of employers in ending employment discrimination. In *Contractors Association,* for example, the court noted: "In direct procurement the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects."[125] Sometimes, the benefits derived from an antidiscrimination effort by the government have long-range beneficial effects for those who oppose it. It is more than likely, for example, that *Griggs v. Duke Power Company* will contribute not only to an improved job picture for blacks, but will also benefit the testing process as a whole, to the benefit of industry as a whole. And of course, there is a broad national interest in ending the incidental effects of chronic unemployment: crime and poverty. There are, without question, other examples, outside the narrow context of the statute and the Executive Order dealt with here, which might be illustrative.

The extent to which benefits will flow in either direction cannot be measured by the letter of the law, or even the detailed regulations that might be written to implement them. It is how the laws are administered in fact that counts. While this may be a truism in the law, civil-rights

121. See note 3 *supra,* at 172.
122. *Id.* at 174.
123. *Id.* at 175.
124. U.S. Bureau of Labor Statistics, Dep't of Labor, and U.S. Bureau of the Census, Dep't of Commerce, *The Social and Economic Status of Negroes in the United States,* 1970, p. 48 (1971).
125. See note 3 *supra,* at 171.

enactments appear to be peculiarly susceptible of wide discrepancies between the enactment on paper and the enactment in operation. To wait three years for vindication in a personal injury suit is one thing; to wait one or two years for an unenforceable administrative ruling involving a discharge or promotion and then spend one or two years seeking redress in the courts, is something else altogether. Neither the job nor the will to pursue the right to hold it may exist by that time. Unused sanctions, like those of Executive Order 11246 and the Philadelphia Plan, tend to hold out false hopes to aspiring minority working people.

Needed is a constant process of examination and re-examination of the impact that statutes like Title VII and executive enactments like the Philadelphia Plan have on minorities. Procedural barriers, long delays, inherent substantive weaknesses, and an absence of vigorous administration commonly defeat the objectives of remedial employment discrimination laws despite judicial receptiveness to these laws. If the hopes of minority workers are to be vindicated, the question of effectiveness must be addressed as the critical issue in applying and strengthening federal laws against employment discrimination.

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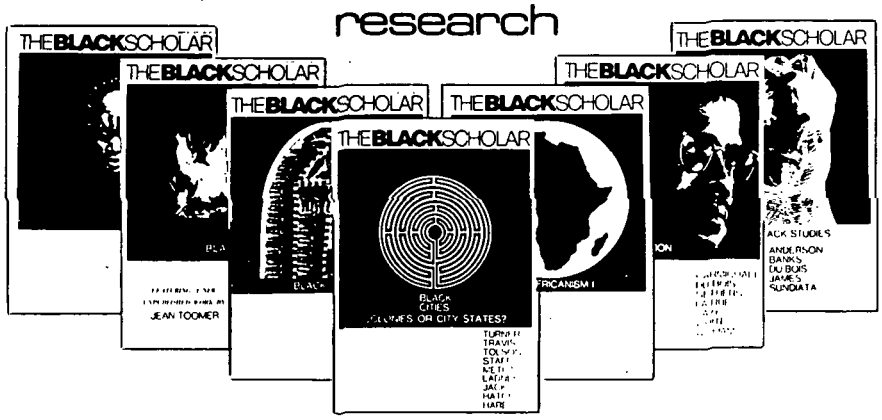

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