FAIR EMPLOYMENT WILL INCREASINGLY DEPEND ON THE TRAINING AND DEVELOPMENT SKILLS OF TODAY'S HRD MANAGER.

# FAIR EMPLOYMENT IMPLICATION FOR HRD: THE CASE OF WASHINGTON VS. DAVIS

BY JAMES C. SHARF

The objective of this article is to acquaint ASTD members with how fair employment laws impact on human resources development (HRD) managers in general and specifically how the Supreme Court's recent decision in the case of Washington vs. Davis may impact on the evaluation of training.[1] In order to grasp the complexity of contemporary fair employment, today's HRD manager has necessarily had to learn a great deal more about case law as well as job relatedness.[2] This article is not intended to address fully the precedent of case law nor the complexities of the developing discipline of industrial psychology. Its purpose is to alert ASTD members and other training and development practitioners to the need for developing and documenting consensus with regard to the evaluation of training. Otherwise, the precedent of case law may usurp this prerogative.

To see how training may be affected by fair employment laws, it will be necessary first to look at a brief overview of the legal context in which fair employment decisions are made. Secondly, it is necessary to look at where training falls among personnel decisions under the scope of Title VII of the Civil Rights Act of 1964. Finally, the implications of Title VII for training and development will be examined in light of the recent *Davis* decision.

The impetus to define illegal selection procedures came in 1964, when Congress passed the Civil Rights Act, which *"allows employers to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."*[3]

First of all, while Title VII of the Act of 1964 did not mention training per se, the 1970 administrative interpretation of the Act articulated by the Equal Employment Opportunity Commission stated the following: *"the term test is defined as any paper-and-pencil or performance measure used as a basis for employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership,* training, *referral or retention."*[4]

Secondly, although the wording from the Act of '64 cited above might have been interpreted by the courts to require a showing that a selection procedure is illegal only where it was implemented with *intent* to discriminate, the courts have in fact ruled that use of a selection procedure is prohibited if it results in biased effects and cannot be shown to be job-related.[5]

### Griggs vs. Duke Power Co.

Writing the unanimous Supreme Court opinion in *Griggs,* Chief Justice Burger noted: *"Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person to be hired simply because he was formerly the subject of discrimination, or be-*

*cause he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification* (emphasis added)."[6]

*"If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."*[7]

Accordingly, the courts have looked first at whether the use of a selection procedure appears to be illegal, i.e., disproportionately disqualifies a group on the basis of race, sex or national origin. Secondly, the courts look for evidence submitted by the employer that selection procedures having such results are job-related, i.e., whether the procedure is predictive of job performance or samples the critical job knowledge, skills or behavior required to perform the job.

The Supreme Court has recently, in *Albemarle Paper Co. vs. Moody,* stated these rules as follows: *"In* Griggs vs. Duke Power Co., *this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement (has) . . . a manifest relation to the employment in question.' . . . This burden arrises, of course, only after the complaining party or class has made out a prima facie case of discrimination . . . has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants . . . If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination."*[8]

Thirdly, since success in training has been specifically recognized by the EEOC as a "criterion measure" against which a selection procedure can be validated, it is necessary to look at the various validation models.

There are essentially two major ways an employer can demonstrate that selection procedures are job-related, involving primarily two types of validation strategies: content validity and criterion-related validity.[9,10,11]

With respect to the former, the EEOC Guidelines state that a content-validation strategy may be used for "well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors . . . (which) should be accompanied by sufficient information from job analysis to demonstrate the relevance of the content in the case of job knowledge or proficiency tests. . . ."[12]

The key to content validation is in recognizing that, as it is a sampling strategy, it always requires as a first step that the job be analyzed. Without the information developed from a job analysis, there is no way to judge whether a job's frequent or critical behaviors are being sampled by the test. The adequacy of a claim of content validity, accordingly, cannot be judged by the eye of the beholder alone.

### Evaluating Success

Since the evaluation of training is likely to be more closely scrutinized as a result of the *Davis* decision, it is my opinion that the model of content validity may provide a framework for ASTD to develop consensus as to relevant measurement methodologies for the evaluation of training success.

The second strategy of demonstrating job-relatedness is criterion-related validity. Without going into great detail, in the criterion-related validation study an attempt is made to show statistically that a relationship exists between the scores of a group of persons on a test and their subsequent respective performances on the job. This is shown by correlating test scores with important relevant measures of job performance.

The EEOC Guidelines note: *"The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described. . . . Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used, they must represent major or critical work behaviors as revealed by careful job analysis* (emphasis added)."[13]

Essentially then, training falls under the administrative interpretation of Title VII in two ways. First, a selection procedure adversely affects members of classes covered by Title VII with regard to who is to receive training, that selection procedure must be shown to be "job-related."

Secondly, as has been noted, a measure of training success is recognized administratively as a "criterion" which a selection procedure can be shown to predict in developing evidence of criterion-related validity. The Supreme Court has endorsed this latter approach in *Davis* as will be shown shortly.

Prior to the Supreme Court decision in *Davis,* however, a number of lower-court decisions had split on the question of whether training success was a sufficient criterion against which to validate a selection procedure in the absence of evidence that success in training was related to success on the job. In *Buckner vs. Goodyear Tire and Rubber Co.,* for example, the court accepted criterion-related validity evidence where training success was the criterion against which the selection procedure had been validated in selecting applicants for an apprentice training program for skilled craft jobs.[14] However, lower-court decisions have not always accepted such evidence that the selection procedure was predictive of training success.

In *Pennsylvania vs. O'Neill* the

court rejected criterion-related validity evidence that an entry test correlated with success in a police training program on the grounds that there was no ". . . showing of any correlation between success in the Police Academy and effective performance on the job."[15] In yet another case, *United States vs. City of Chicago* the court concluded that selection procedure must be shown to predict actual job performance to the exclusion of any measure of training success.[16]

In *Washington vs. Davis,* "Test 21," an 80-question test of general verbal ability, had been used by the District of Columbia Metropolitan Police Department to screen applicants for the police training academy. The job-relatedness of the test had been established using a criterion-related validation strategy where the test was significantly correlated with training-academy performance for both black and whites. The criterion was the average per cent correct on the first taking of eight subject-matter tests given during the 12-week police recruit training academy.

### Testing Challenge

In challenging the testing practices in the District Court, the expert for the plaintiffs contended: 1) the validation study was of no benefit for selecting blacks since no relationship was demonstrated between academy performance and job performance (at least for the minority recruits), and 2) since no one fails the academy where tutoring was used and candidates continued retaking subject-matter tests until a passing score was attained, there was no significance to the showing of a correlation between tests scores and academy performance. The District Court ruled in favor of the Metropolitan Police Department.

The Court of Appeals reversed the lower-court's decision on the grounds that the correlation between the test and academy performance ". . . tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations."[17] It was further noted: *"The ultimate issue in this controversy thus becomes whether that kind of proof is an acceptable substitute for a demonstration of a direct relationship between performance on Test 21 and performance on the job."*[18] The Court of Appeals reversed the lower-court's decision and ordered the plaintiffs' motion for summary judgment be granted.

The Supreme Court, while reaffirming the applicability of the *Griggs vs. Duke Power Co.* standard for defining discrimination cases brought under Title VII, refused to extend this standard to the *Davis* case which had been brought under the Fifth Amendment and not under Title VII for procedural reasons. The Court reaffirmed the *Griggs* standard as follows: *"Under Title VII, Congress provided that when hiring and promotion practices disqualify substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that is an insufficient response to demonstrate some rational basis for the challenged practice. It is necessary, in addition, that they be 'validated' in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question."*[19]

Even though this case had been brought under a Constitutional argument, the Supreme Court apparently proceeded with the statutory standards of Title VII in deciding the job-relatedness question: *"The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands and attempting to impart a modicum of required skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen. Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. . . . Nor is the conclusion foreclosed by either* Griggs *or* Albemarle Paper Co. vs. Moody; *and it seems to us the much more sensible construction of the job-relatedness requirement."*[20]

The Supreme Court thus concluded: *"The District Court's accompanying conclusions that Test 21 was in fact directly related to the requirements of the police training program was supported by a validation study, as well as other evidence or record; and we are not convinced that this conclusion was erroneous."*[21]

Since the question has been answered affirmatively by the Supreme Court as to whether or not training success by itself is an adequate criterion for validation of selection procedures, it is my opinion that a number of more narrowly focused questions are likely to be addressed in fair-employment litigation.

### ASTD Action

First of all, subsequent litigation is likely to focus more closely on what constitutes adequate measures of training success. ASTD needs to anticipate such inquiry in order to develop and to articulate consensus. It should be noted that the legislative history of Title VII intended that: *"In any area where the new law does not address itself, . . . it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."*[22] Hence case-law precedent may define acceptable training-evaluation methodologies unless ASTD fills this gap.

Secondly, the courts increasingly are likely to look for selection procedures which overcome the present effects of past discrimination. This means in practice the courts will increasingly prefer those selection practices which minimize the differences between

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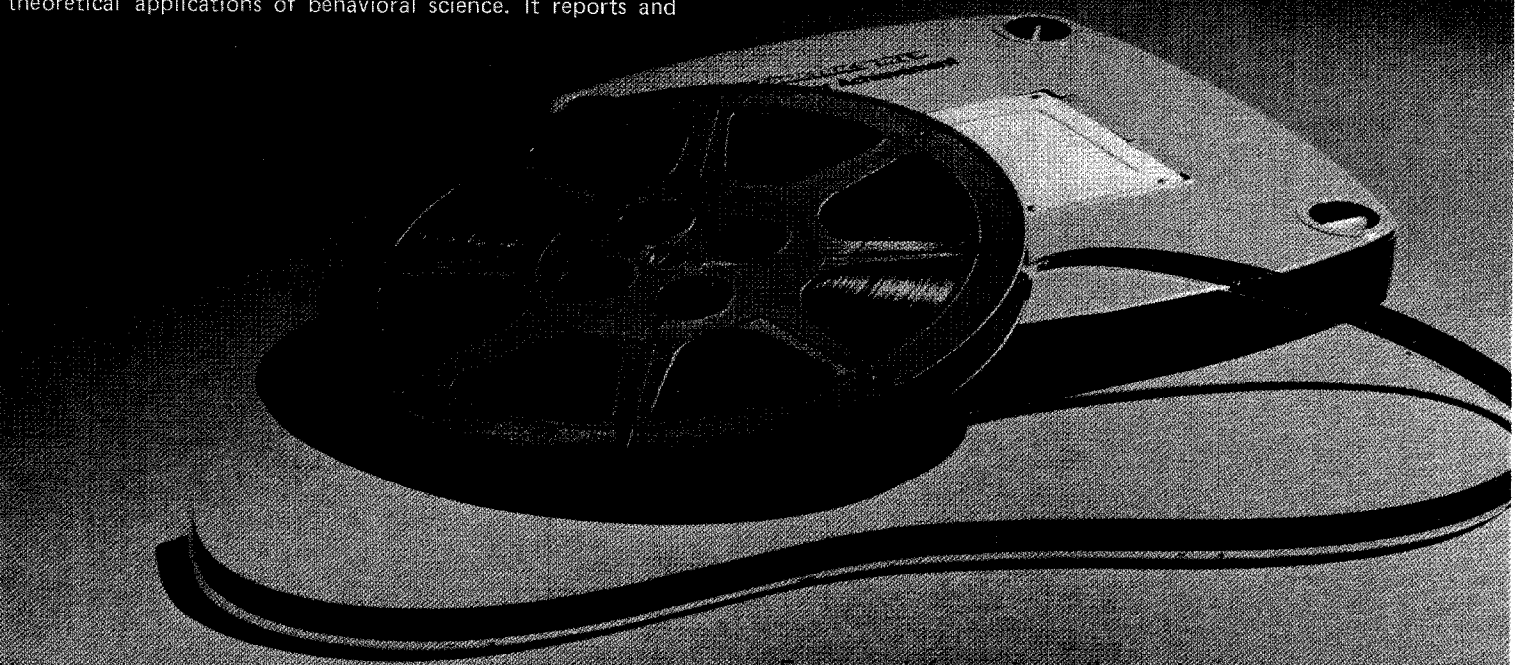

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classes of applicants (adverse effect) covered by Title VII.

While the question of who assumes the burden of proof is legally ambiguous, ASTD must recognize the so-called "business necessity" language the Supreme Court used in *Moody* where: "*(I)f an employer does then meet the burden of proving that its tests are 'job-related', it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'.*"[23]

Questions will be asked as to whether alternative measures of training success are available that minimize differences between classes covered by Title VII. It can generally be shown in comparing measures of training success for blacks and whites, for example, that the criteria of whether training can be completed satisfactorily will have a lesser adverse effect than would use of the criterion of how long it took to complete training.

Finally, should the ASTD mem-

Increasingly, training and development people are having to cope with the legal language of fair employment practices. To help *Journal* readers with this problem, we are publishing here a brief guide to some of the key terms which Dr. Sharf has prepared previously.

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# A Psychologist's Guide to Title VII Legal Language

**by JAMES C. SHARF**

In a Title VII case, a CHARGING PARTY alleges that he or she is aggrieved as the result of an unlawful employment practice. When a charging party files suit, that person assumes the legal status of a PLAINTIFF — the person who initiates litigation. The RESPONDENT is that person against whom an administrative charge of discrimination is filed. Should a lawsuit be filed, the respondent takes on the legal status of a DEFENDANT — the person being sued.

An AFFECTED CLASS is a group of similarly situated persons and with respect to Title VII, any person may potentially be the member of an affected class. A COMPLAINT is the first paper filed by the plaintiff to initiate a lawsuit which states who the parties are, describes the nature of the charge and requests relief. The ANSWER is a response by the person who is sued either admitting or denying in part or in whole allegations in the complaint and offering some defense to the charge. A SUMMARY JUDGMENT could be issued by the court at this point where this is no dispute or material facts — i.e., there are no facts offered by the defense to try and disprove, hence there is no need for a trial. A CONCILIATION is a settlement through administrative processes such as those initiated by EEOC and is a means by which a case is settled by resolution of charges without a trial. A CONSENT DECREE by comparison is the judicial counterpart to conciliation and is a formal court document approved by a judge.

Certain conduct by an employer such as refusing to hire women or maintaining segregated facilities is called a PER SE violation for which there is no defense. The typical situation is a PRIMA FACIE violation where evidence is shown that an employment practice has an adverse impact affecting an individual as a member of a similarly affected class covered by Title VII. The significance of a prima facie case is that it shifts the burden of proof to the defendant and if the defendant fails to answer the charge, the judgment is awarded to the plaintiff.

DISCOVERY is the legal term for the investigation phase after a complaint is filed and the defendant has answered. Discovery includes: 1) INTERROGATORIES — written questions with a prescribed time period to answer;

2) DEPOSITIONS — an oral interrogation of a witness in front of a court reporter;

3) requests for production of documents; and

4) requests for admission of fact — where, upon the presentation of a document such as a published set of norms, the question is asked as to its authenticity, accuracy, etc.

BENCH TRIAL follows discovery by both parties and is always before a judge in Title VII proceedings and never before a jury. The plaintiff attempts to establish a prima facie case by demonstrating that an employment practice had an adverse impact and assuming the plaintiff meets this burden of proof, the defendant attempts to REBUT it — i.e., offers a validation study. The plaintiff in addition to establishing the prima facie case may also attempt to discredit the defendant's validation study.

An EXPERT WITNESS is qualified by credentials which generally include at least an MS in psychology and experience in the field and may additionally include publications and teaching. If an expert witness is qualified to the court's satisfaction, that person may offer his or her professional opinion as to what others have done. A bench trial is more informal than a JURY TRIAL and the judge is more likely to allow the nonexpert witness to offer opinions other than related to facts with which he has had firsthand experience.

At the conclusion of the trial, the judge makes FINDINGS OF FACT where he serves as an umpire and "calls them as he sees them" or as he understands the facts to be. The findings of fact include: 1) facts as he understands them, 2) applicable law as he understands it, and 3) a DECISION. The decision generally goes one of two directions. The judge may either dismiss the case if a violation of Title VII is not proven or issue an INJUNCTION. The injunction may either require that a certain practice be stopped or that something be done in the future and orders other actions such as relief to affected class members MAKING WHOLE in the award of back pay what they would have received but for the effects of the unlawful practice.

DISCRIMINATION is thus a conclusion of law based on a demonstration of adverse impact by the plaintiff and failure by a defendant to demonstrate that the practice was job-related to the court's satisfaction.

bership fail to anticipate such questions which are likely to be raised in litigation, and fail to respond by developing and documenting consensus with regard to the evaluation of training, the prerogatives of how training success is measured is likely to be usurped by case law. At a minimum, a timely effort should be initiated by ASTD to anticipate and to respond to what I believe is likely to become this focus of subsequent Title VII litigation.

It is my firm belief that realization of this nation's goals of fair employment will increasingly depend on the training and development skills of today's HRD manager. It is my hope that the environment of fair-employment litigation will not be seen so much as a threat but rather as a stimulus to ASTD members in exploring new and innovative ways to meet these national goals.

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