

Equal Employment Opportunity Commission
Meeting on Employer Testing and Screening
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Statement of Cyrus Mehri¹

Part I: Apprenticeship Selection, A New, Old Area of Title VII

The landmark case of *Griggs v. Duke Power Company* 401 U.S. 424 (1970), recognized the disparate impact theory of discrimination and outlawed the particular use of a high school diploma requirement for hiring decisions. Often overlooked is the fact that *Griggs* also examined paper and pencil tests, including the Bennet Mechanical Aptitude Comprehension Test, which caused disparate impact adverse to African Americans. With respect to this standardized test, the EEOC had found that whites passed at rates many times higher than African American applicants. In a key passage, the Supreme Court articulated:

The objective of Congress in enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.

Griggs, 401 U.S. at 429-30.

In the 1970's, a great deal of attention was paid to paper and pencil tests that had a disparate impact on minority applicants, including those used in apprenticeship selection. However, this attention—and the resulting reduction of discriminatory barriers—has waned with the passage of time. Due to the significant challenges in litigating these cases, including huge investments in expert costs, few private firms have been willing to take the financial risks of undertaking these cases.

Since 1999, my firm has often received calls from African American hourly workers, in a variety of cities and working at different companies concerned about skilled trade positions. They all told a similar story: African Americans were all but excluded from the skilled trades at their companies. Positions in the skilled trades, such as electricians and millwrights, are highly coveted because they pay more and afford the incumbents far greater job security. These positions also confer increased opportunities for advancement inside and outside the company. And given the frequent downsizing and outsourcing in Corporate America today, the relative security of positions in the skilled trades is of critical importance.

Ironically, in many corporations today, the skilled trades appear to be more “lily white” than senior management. The exclusion of African Americans and other minorities from

these positions has enormous and tragic consequences. A position in the skilled trades can mean the difference between being able to send kids to college or not, caring for an elderly parent or not, or being able to comfortably retire or not. The consequences of this exclusion are thus exceedingly high. Yet African American workers who have been excluded from the skilled trades appear to have little or no legal recourse.

Whatever fears some people have had that reducing reliance on paper and pencil tests, would reduce the quality of the work force has not been realized. The opposite is true: replacing artificial barriers with more job related selection procedures improves the quality of the workforce.

When courageous workers, such as James Robinson, a Ford employee from Cincinnati Ohio, contacted us and we began to investigate, we soon discovered that selection procedures, almost exclusively paper and pencil tests, were at the heart of the problem. We searched for recent cases and case law on apprenticeship selection and we found few, if any, cases being prosecuted. It appeared to us that a generation had passed since there had been a focus on apprenticeship selection and that enforcement by both the private bar and the EEOC had all but ended. Fair selection procedures at major corporations were not on the back burner. They were not on the stove at all. As we started our investigations we realized that we were breaking new ground, yet covering ground from an earlier era. My co-counsel, noted civil rights attorney, Armand Derfner quipped, “these cases are new, old cases.”

Part Two: Reoccurring Themes: Common Problems with Flawed Apprenticeship Selection Procedures

Our firm has found a number of significant problems with the apprenticeship selection procedures deployed by some of our nation’s largest and most respected Corporations. We uncovered such basic problems as:

1. A failure to engage adequately in outreach and recruitment to expand the pool of minority applicants. This problem is frequently exacerbated by prior selection decisions that have excluded minority employees, making current applicants believe that applying for positions would be futile.
2. A failure to provide effective pre-testing training programs. Properly employed, pre-testing programs can help to improve test taking performance for all applicants.
3. A failure to maintain proper records so as to allow for effective adverse impact examination of the selection procedure. Such record keeping allows a company to examine and improve upon its procedures.
4. A failure to impose adequate measures to ensure that applicants do not get test questions or answers in advance. This problem can result in managers giving their favored applicants an unfair advantage. In one of our investigations, African American applicants had a basis to believe that the test answers in one instance were circulated to white employees.

With a close examination of the selection procedures and validation studies, we found significant structural problems creating unnecessary barriers for equal opportunity such as:

1. An exclusive reliance on paper and pencil tests. While some use of paper and pencil questions is recognized as proper, state of the art selection procedures also employ other devices to predict job success: such tools as job simulation, multi-media tests, and behavioral tests for conscientiousness and dependability attributes. Such additional tests reduce adverse impact while better achieving business ends.
2. Validation studies required for selection procedures, even if adequate, were often untimely and out of date. Under the Uniform Guidelines they are supposed to be reasonably current, which most experts believe means no more than 5 years old. Yet, the validation studies we examined tended to be 10 or 20 years old or more. Companies tended to do the original validation studies fairly well, yet once done let them collect dust in a back corner of the company.
3. Interestingly, often experts employed by corporations have conditionally validated selection procedures, subject to the company's completion of certain specific follow up action items. Inevitably, we have found that the required action items have been ignored. When companies ignore the action items required by their own experts it will likely lead to use of a procedure that creates adverse impact. We also found that companies tended not to fund the measures called for by their experts in the validation studies. They also did not have someone clearly tasked with ensuring that the tests were designed and implemented in a fair and nondiscriminatory way.

In sum, it appeared to us that the commitment to fair and non discriminatory selection procedures was often short lived, since companies would create a solid validation study only to be followed by neglect and inaction. These are the very conditions that result in the kind of disparate impact Griggs recognized as violating Title VII. EEOC regulations hold that if minority applicants are not selected at the rate of 80% of the rate of white applicants there is presumptive evidence of discrimination. All of the selection procedures we examined fell well short of this 80% rule.

Point Three: Alcoa and Ford Settlements Pave the Way

Over the last few years we have announced and started to implement settlements with Alcoa and Ford that could create a strong model for other companies. We are also on the verge of announcing a settlement of similar type with a third company.

Maxey v. Alcoa, Inc. (N.D. Ohio)

The central issue in this case was the use of a paper and pencil test by Alcoa for employees to be selected for the apprenticeship program for electricians and millwrights. The EEOC issued a probable cause finding in April of 2002. We filed a complaint a few weeks later. The case was brought on behalf of African American and Hispanic

individuals who took the apprenticeship paper and pencil test in certain facilities in the Cleveland area. We simultaneously litigated the case while engaging in settlement talks.

The settlement has these key features: suspension of the then existing apprenticeship selection program; the creation of a new selection procedure by an expert (Dr. James Outtz) jointly appointed by plaintiffs' counsel, the company, and the union (UAW); a special opportunity to compete for electrical apprentice positions to make up for the shortfall to African Americans and Hispanics in the past (ten positions in the Cleveland area facilities); and \$10,000 each for compensation for class members.

The programmatic relief in Maxey became the model for the programmatic relief in the Robinson case. However, in Robinson, we aimed for a more ambitious approach – nationwide relief.

Robinson v. Ford Motor Company (S.D. Ohio)

A central issue in this matter was the Company's Apprentice Training Selection System (ATSS). We brought this case on behalf of African Americans who were not selected by ATSS. EEOC's Cincinnati office conducted conciliation over many months. The complaint and the settlement agreement were filed together in December 2004. EEOC attorney Jeff Stern had a significant role in shaping the terms of the settlement agreement.

Key features of the settlement were the suspension of the ATSS, the creation of a new selection procedure developed by a jointly appointed expert (Dr. Kathleen Lundquist); a special opportunity to compete for highly coveted skilled trade apprentice positions; and compensation for unsuccessful test takers. Perhaps the most significant and long lasting feature of the settlement is the redesigned apprenticeship selection procedure. The settlement agreement set forth specific standards for the new process aimed at creating a new state of the art selection procedure that reduces disparate impact while being consistent with business needs.

Our clients were particularly concerned about exclusion in the ATSS program. Based on analysis conducted by an EEOC expert, we identified a shortfall of 279 apprentice positions compared to the number that would have been selected by a fair procedure. The Settlement called on Ford to fully make up this shortfall by selection of top African American candidates for the next 279 apprenticeship positions. To our knowledge, this is the largest creation of apprenticeship positions in a class settlement in U.S. history. We estimate that the four year training program will cost the company \$100,000 per apprentice. All class members received a monetary benefit of \$2,400 each.

All of these accomplishments would not have been possible without the cooperation of senior management at these companies and the United Auto Workers.

Point IV: Recommendations for the EEOC

The EEOC can and should make enforcement of disparate impact caused by selection procedures using flawed paper and pencil tests a top priority. Based on my firm's experience over the last several years, we have several recommendations to the EEOC Commissioners. Our recommendations for the Commission build on the Systemic Task Force Report by Commissioner Leslie Silverman. They are as follows:

1. On a nationwide basis train intake personnel to make sure that they routinely ask charging parties, particularly hourly workers, if they ever took a paper and pencil test. If so, follow up on those matters.
2. Use the technology infrastructure called for in the Task Force Report to facilitate identifying potential claims involving paper and pencil tests on a nationwide basis. This will allow for early detection of systemic problems.
3. Hiring of sufficient number of in house experts deployed for the EEOC systemic enforcement. Such experts should include industrial psychologists and statisticians.
4. Development of strategic alliances with class counsel for prosecution of these cases, such as occurred in Robinson, will maximize the prospect of success.

Footnotes

1. Cyrus Mehri has served as co-lead counsel in many of the most significant employment discrimination class action settlements of the last decade including **Roberts v. Texaco Inc.** (S.D.N.Y. 1997); **Ingram v. The Coca-Cola Company** (N.D. Ga. 2001); **Robinson v. Ford Motor Company** (N.D. Ohio 2005); and **Augst-Johnson v. Morgan Stanley & Co. Incorporated** (D. D.C. 2007). The Mehri & Skalet website is findjustice.com.