COMMENTS

Conviction Records As Barriers to Employment: Racial Discrimination Under Title VII

Green v. Missouri Pacific Railroad, 523 F.2d 1290 (8th Cir. 1975)

Plaintiff Green, a black man who had served a prison term for refusing military induction,[1] was denied a job as a clerk with defendant Missouri Pacific Railroad (Mo-Pac) because of Mo-Pac's policy of refusing employment to persons convicted of crimes other than traffic violations.[2] Green filed suit,[3] alleging that defendant's policy was racially discriminatory in violation of the Civil Rights Acts of 1870[4] and 1964.[5] Upon consideration of plaintiff's statistical evidence, the district

1. Plaintiff unsuccessfully sought conscientious objector status and was convicted in 1967 for failure to report for induction. He sought post conviction review, challenging the constitutionality of his classification. Relief was denied. Cassidy v. United States, 428 F.2d 585 (8th Cir. 1970) (at time of conviction, plaintiff's legal name was Cassidy).

2. Defendant's policy of excluding ex-convicts from employment was initiated in 1948, according to defendant's personnel manager, "in reaction to a personnel problem that then existed." Green v. Missouri Pac. R.R., 381 F. Supp. 992, 994 (E.D. Mo. 1974), *rev'd*, 523 F.2d 1290 (8th Cir. 1975).

3. After filing discrimination charges with the Equal Employment Opportunity Commission (EEOC), Green filed suit on November 7, 1972. The EEOC also filed suit against defendant on April 5, 1973, on the basis of plaintiff's charges. The court dismissed the EEOC's suit because plaintiff had already filed suit pursuant to an EEOC "right to sue" notice, thus relegating the EEOC to permissive intervention in the original suit. EEOC v. Missouri Pac. R.R., 493 F.2d 71 (8th Cir. 1974).

4. The Civil Rights Act of 1870, 42 U.S.C. § 1981 (1970) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

It is well established that the purpose and scope of the 1870 Act are co-extensive with the fourteenth amendment. Virginia v. Rives, 100 U.S. 313, 317-18 (1880); Strauder v. West Virginia, 100 U.S. 303, 312 (1880) ("[T]his Act puts in the form of a statute what has been substantially ordained by the Constitutional Amendment").

5. Title VII of the Civil Rights Act of 1964 [hereinafter cited as Act], §§ 701-18, 42 U.S.C. §§ 2000e to e-17 (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e to e-15 (1970).

court found that Mo-Pac's rule was not prima facie discriminatory[6] and was justified by business necessity.[7] On appeal, the United States Court of Appeals for the Eighth Circuit reversed and *held*: Statistical evidence supports a finding that a blanket rule against hiring ex-offenders is, prima facie, racially discriminatory, and cannot be justified by business necessity.[8]

Title VII of the Civil Rights Act of 1964[9] (Title VII) proscribes discrimination on the basis of race, color, religion, sex, or national origin in hiring, firing, promotion, transfer, salary, and job classification.[10] The use of standardized tests or seniority systems "designed, intended, or used to discriminate" is forbidden[11] unless employers demonstrate that such tests accurately predict job performance ability.[12]

6. 381 F. Supp. at 996. The district court found jurisdiction under both 28 U.S.C. § 1343 (1970) and Act § 706, 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-5 (1970). 381 F. Supp. at 993.

7. The district court's finding that business necessity justified the defendant's hiring practice was based on its determination that "the state of the art of psychology has not developed to a degree" that an employer can predict which ex-offenders will be successful employees. 381 F. Supp. at 997.

8. Green v. Missouri Pac. R.R., 523 F.2d 1290, 1298-99 (8th Cir. 1975).

9. Act §§ 701-18, 42 U.S.C. §§ 2000e to e-17 (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e to e-15 (1970). "Unlawful employment practices" are defined and enumerated in Act §§ 703-04, 42 U.S.C. §§ 2000e-2, -3 (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e-2, -3 (1970). The Civil Rights Act of 1964 took effect on July 2, 1964, except for Title VII, which became effective a year later in order to give employers a grace period in which to comply voluntarily with its provisions.

10. Act §§ 703-04, 42 U.S.C. §§ 2000e-2, -3 (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e-2, -3 (1970). An aggrieved employee may sue his employer in federal court. Act § 706(f), 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-5 (1970). The Act empowers federal courts to grant broad equitable relief and to enjoin the use of an unlawful employment practice "[i]f the court finds that the respondent employer has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . ." Act § 706(g), 42 U.S.C. § 2000e-5(g) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-5 (1970).

11. Act § 703, 42 U.S.C. § 2000e-2(h) (1970). Act § 703, 42 U.S.C. § 2000e-2(e) (1970) makes an exception for discrimination on the basis of religion, sex, or national origin (but not race or color) when such a characteristic "is a bona fide occupational qualification reasonably necessary to the operation of that particular business enterprise."

12. E.E.O.C. Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-.14 (1970). The Equal Employment Opportunity Commission (EEOC), established by Act § 705, 42 U.S.C. § 2000e-4 (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-4 (1970), is authorized to issue regulations for the construction of Title VII, and is charged with its enforcement. The EEOC guidelines require that any test having an adverse impact on minorities be validated for job relatedness and that the employer show that there are no less discriminatory tests available.

The guidelines define "employment tests" as

Until 1971, the most difficult cases that arose under Title VII involved "facially neutral" employment requirements such as high school diplomas or minimum scores on standardized tests. When such employment practices had disproportionate adverse effects on minorities, some courts held them unlawful only if adopted with an intent to discriminate;[13] other courts rejected any practice with discriminatory effects not justified by "business necessity."[14]

> all formal, scored, quantified, or standardized techniques of assessing job suitability including . . . specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

29 C.F.R. § 1607.2 (1970). The guidelines further provide that

> [t]he use of any test which adversely affects hiring, promotion, transfer, or any other employment . . . of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility . . . and (b) . . . alternative suitable hiring, transfer, or promotion procedures are unavailable. . . .

29 C.F.R. § 1607.3 (1970). According to the guidelines, appropriate validation must include empirical evidence developed in accordance with minimum standards governing representative samples, controlled test conditions, and scoring and reporting of test results. 29 C.F.R. § 1607.5 (1970). In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court endorsed these validation requirements. The Court's recent decision in Washington v. Davis, 44 U.S.L.W. 4789 (U.S. June 7, 1976), however, suggests that the Court may re-evaluate *Albemarle* and withdraw its approval of the EEOC's validation requirements in future Title VII cases. *See id.* at 4795 & n.17; 4798-800 (Brennan, J., dissenting); note 24 *infra.*

13. *See, e.g.*, Griggs v. Duke Power Co., 420 F.2d 1225, 1232 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971); United States v. H.K. Porter Co., 296 F. Supp. 40, 116 (N.D. Ala. 1968); Dobbins v. Local 212, IBEW, 292 F. Supp. 413, 446 (S.D. Ohio 1968).

14. *See, e.g.*, Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Local 189, United Papermakers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Clark v. American Marine Corp., 304 F. Supp. 603, 607 (E.D. La. 1969) (holding intent irrelevant without discussing business necessity).

The content of this court-made business necessity test varied from case to case. *See* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) ("essential to the safe and efficient operation of the company's business"); Penn v. Stumpf, 308 F. Supp. 1238, 1242 (N.D. Cal. 1970) (standardized tests that are "unrelated to the job to be performed are just as reasonably a prerequisite to hiring and promotion as is a high school diploma," *quoting* Griggs v. Duke Power Co., 292 F. Supp. 243, 250 (M.D.N.C. 1968)); Dobbins v. Local 212, IBEW, 292 F. Supp. 413, 446 (S.D. Ohio 1968) (reasonable economic purpose); Griggs v. Duke Power Co., 292 F. Supp. 243, 250 (M.D.N.C. 1968), *rev'd*, 401 U.S. 424 (1971) ("Nowhere does the Act require . . . only those tests which measure the ability and skills required of a particular job . . . ").

The first guidelines published by the EEOC equated business necessity with job relatedness. *See* Guidelines on Employment Testing Procedures, 2 CCH EMPL. PRAC. GUIDE ¶ 16,904 (1967).

In *Griggs v. Duke Power Co.*,[15] the Supreme Court resolved the issue by holding that Title VII prohibits all apparently neutral practices with racially discriminatory consequences, regardless of the employer's intent.[16] "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups . . . ."[17] A state census revealing that 34 percent of white males, compared with 12 percent of black males, complete high school underlay the Court's conclusion that the challenged high school diploma requirement was prima facie discriminatory.[18] The Court then held that business necessity was the sole justification for allowing an employer to retain the requirement:

> 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.
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> . . . [C]ongress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[19]

Courts have interpreted *Griggs* as requiring a liberal construction of Title VII and, buttressed by statistics,[20] have found several widely used

15. 401 U.S. 424 (1971), *noted in* 6 GA. L. REV. 194 (1971), 47 NOTRE DAME LAW. 381 (1971), *and* 25 SW. L.J. 484 (1971).

16. The Supreme Court noted:

> The Act proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation . . . .
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> . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.

401 U.S. at 431, 432 (emphasis original).

17. *Id.* at 431.

18. *Id.* at 430 n.6.

19. *Id.* at 431-32. The Court further held that "[w]hat Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.* at 436.

20. *See* Rogers v. International Paper Co., 510 F.2d 1340, 1344 (8th Cir. 1975); Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 53 (5th Cir. 1974); Afro-American Patrolmen's League v. Duck, 503 F.2d 294, 299 (6th Cir. 1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1335-36 (2d Cir. 1973); United States v. N.L. Indus., Inc., 479 F.2d 354, 368-69 (8th Cir. 1973); Rock v. Norfolk & W. Ry., 473 F.2d 1344, 1346-48 (4th Cir.), *cert. denied,* 412 U.S. 933 (1973); Spurlock v. United Airlines, Inc., 475 F.2d 216, 218 (10th Cir. 1972); United States v. Chesapeake & O. Ry., 471 F.2d 582, 586 (4th Cir. 1972), *cert. denied,* 411 U.S. 939 (1973); Rowe v. General Motors Corp., 457 F.2d 348, 357-58 (5th Cir. 1972); United States v. Jacksonville Terminal Co., 451 F.2d 418, 441-42 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), *cert.*

and superficially "innocent" employment practices to be racially discriminatory.[21] Employers must meet stringent standards to demonstrate business necessity.[22] Although several courts have held that job performance ability is the only relevant criterion,[23] the Supreme Court

denied, 404 U.S. 984 (1971); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970), *cert. denied,* 401 U.S. 954 (1971); United States v. City of Chicago, 385 F. Supp. 543, 552 (N.D. Ill. 1974). *See also* Note, *Employment Discrimination: Statistics and Preferences Under Title VII,* 59 VA. L. REV. 463, 468-72 (1973).

21. One such "innocent" employment practice held invalid is the requirement of a high school diploma. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1371 (5th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906, 918 (5th Cir. 1973); Broussard v. Schlumberger Well Serv., 315 F. Supp. 506, 512 (S.D. Tex. 1970). *See also* note 18 *supra* and accompanying text. Similarly, courts have struck down rules requiring dismissal from employment for wage garnishments, Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974); Johnson v. Pike Corp., 332 F. Supp. 490, 494 (C.D. Cal. 1971), *noted in* 85 HARV. L. REV. 1482 (1972), *and* 37 Mo. L. REV. 705 (1972), and minimum scores on standardized tests. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Brito v. Zia Co., 478 F.2d 1200, 1205-06 (10th Cir. 1973); United States v. Georgia Power Co. *supra* at 917.

22. *See* Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 56-57 (5th Cir. 1974); Waters v. International Harvester Co., 502 F.2d 1309, 1321 (7th Cir. 1974); Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974); Bolton v. Murray Envelope Corp., 493 F.2d 191, 195-96 (5th Cir. 1974); Vulcan Soc'y of New York Fire Dept. v. Civil Serv. Comm'n, 490 F.2d 387, 393-98 (2d Cir. 1973); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); United States v. N.L. Indus., Inc., 479 F.2d 354, 366 (8th Cir. 1973); United States v. Georgia Power Co., 474 F.2d 906, 912-14 (5th Cir. 1973); Rock v. Norfolk & W. Ry., 473 F.2d 1344, 1349 (4th Cir.), *cert. denied,* 412 U.S. 933 (1973); United States v. Chesapeake & O. Ry., 471 F.2d 582, 588 (4th Cir. 1972), *cert. denied,* 411 U.S. 939 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662-64 (2d Cir. 1971); United States v. City of Chicago, 385 F. Supp. 543, 557 (N.D. Ill. 1974). *See also* Boston Chapter NAACP v. Beecher, 504 F.2d 1017, 1021-22 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); United States v. Chesterfield County School Dist., 484 F.2d 70, 74 (4th Cir. 1973); Brito v. Zia, 478 F.2d 1200, 1205 (10th Cir. 1973).

The business necessity test articulated in Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971), is representative of the standard applied by most courts:

> [A]n overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. . . . [T]here must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

For general discussion of the business necessity test, see Comment, *Title VII: Discriminatory Results and the Scope of Business Necessity,* 35 LA. L. REV. 646 (1974); Note, *Fair Employment Practices: The Concept of Business Necessity,* 3 MEMPHIS ST. L. REV. 76 (1972); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach,* 84 YALE L.J. 98 (1974).

23. In Johnson v. Pike Corp., 332 F. Supp. 490 (C.D. Cal. 1971), the court noted

has yet to determine the precise scope of the business necessity defense.[24]

Hiring policies based on arrest records have been successfully challenged under Title VII.[25] The legality of conviction records as blanket disqualifications from employment, however, had not been

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that expense and inconvenience were the primary justifications the employer offered for its rule requiring dismissal for wage garnishments and held:

> [I]n light of the Supreme Court's definition of business necessity, they are not sufficient. The sole permissible reason for discriminating against actual or prospective employees involves the individual's capability to perform the job effectively. This approach leaves no room for arguments regarding inconvenience, annoyance, or even expense to the employer.

Id. at 495.

Cases holding that business necessity means only "ability to do the job" have been criticized in Wilson, *A Second Look at* Griggs v. Duke Power Company: *Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts,* 58 VA. L. REV. 844, 850-51 (1972), and 85 HARV. L. REV. 1482 (1972).

24. *Compare* Washington v. Davis, 44 U.S.L.W. 4789 (U.S. June 7, 1976), *with* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). *Davis,* like Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972) (*see* notes 31-33 *infra*), was not a Title VII action. The plaintiffs in *Davis* alleged that an employment test measuring verbal ability, administered by the District of Columbia Police Department, was racially discriminatory in violation of the fifth amendment due process clause and a District of Columbia statute. Defendants argued, however, that the Civil Service Act, 5 U.S.C. § 3304(a)(1) (1970), incorporated the *Griggs* test of job relatedness, with which they had complied. The Court's agreement with this contention, Washington v. Davis, *supra* at 4795, implies disapproval of the EEOC standards adopted in *Albemarle Paper*; the evidence of validity presented to the district court failed to meet those standards. 44 U.S.L.W. at 4796-800 (Brennan, J., dissenting).

Moreover, the district court's finding, approved by the Court, was that the test was sufficiently job related because it "directly related to the determination of whether the applicant possesses sufficient skills to fulfill the demands of the curriculum a recruit must master at the police academy." Davis v. Washington, 348 F. Supp. 15, 17 (D.D.C. 1972). This finding is inconsistent with prior Title VII cases, which required that a test adequately predict job performance rather than success in job training. But the Court flatly rejected the reasoning of these cases:

> [T]hat training-program validation may itself be sufficient is supported by regulations of the Civil Service Commission . . . . Nor is the conclusion foreclosed by either *Griggs* or *Albemarle Paper Co. v. Moody*; . . . and it seems to us the much more sensible construction of the job relatedness requirement.

44 U.S.L.W. at 4795.

The district court also applied Title VII standards to challenges of discrimination under the due process clause, *see* note 32 *infra,* a procedure the Court explicitly disapproved. 44 U.S.L.W. at 4794.

25. Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1971), *noted in* 32 U. PITT. L. REV. 254 (1971), *and* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 165 (1970). The employer was enjoined "from seeking from applicants for employment . . . informa-

directly addressed prior to *Green*.[26] One court rejected a Title VII challenge to an employer's dismissal of a hotel bellman after learning of his prior theft convictions.[27] That decision, however, was based on the "security-sensitive" nature of plaintiff's job, and the employer's offer of a job that did not present opportunities for theft, at a comparable wage.[28] The Supreme Court upheld an employer's refusal to rehire an employee who had been convicted of illegal activity directed against the employer in *McDonnell Douglas Corp. v. Green*,[29] but suggested in dicta that "a sweeping disqualification of all those with any past record of unlawful behavior" would be invalid.[30] In *Carter v. Gallagher*,[31] the Eighth Circuit considered the validity of convictions as a bar to hiring, in a suit brought under the Civil Rights Act of 1866

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tion concerning their prior arrest records *which did not result in conviction.*" *Id.* at 404 (emphasis added).

26. Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975). For a discussion of constitutional challenges to conviction records as barriers to public employment, see United States v. City of Chicago, 385 F. Supp. 543 (N.D. Ill. 1974); Carr v. Thompson, 384 F. Supp. 544 (W.D.N.Y. 1974); Butts v. Nichols, 381 F. Supp. 573 (S.D. Iowa 1974); 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 165 (1970).

27. Richardson v. Hotel Corp., 332 F. Supp. 519 (E.D. La. 1971), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

28. *Id.* at 521.

29. 411 U.S. 792 (1973).

30. *Id.* at 806. The Court found that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it." *Id.* at 804. Justice Powell's majority opinion stated:

> We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification for refusing to hire.

Id. at 803 n.17.

When plaintiff stressed the "job relatedness" issue from *Griggs*, the Court noted that the *Griggs* reasoning was inapplicable because

> petitioner does not seek his [plaintiff's] exclusion on the basis of a testing device which overstates what is necessary for competent performance or through *some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee.*

Id. at 806 (emphasis added).

31. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). The suit, a class action against the Minneapolis Fire Department, alleged violations of 42 U.S.C. § 1981 (1970) and the fourteenth amendment. At that time defendant, a municipal governmental entity, was not an "employer" within the meaning of Title VII. Act § 701(b), 42 U.S.C. § 2000e(b) (1970), *as amended*, 42 U.S.C. §§ 2000e(a), (b) (Supp. II, 1972). State and local governments are no longer exempted from the Act. Act § 701(a), (b), 42 U.S.C. §§ 2000e(a), (b) (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e(b) (1970).

rather than Title VII. The court nevertheless employed Title VII standards[32] and required the employer to revise its rules so that conviction would not absolutely bar employment.[33] The precise question whether a blanket rule against hiring ex-offenders is racially discriminatory, or whether such a rule is justified by business necessity, remained undecided.

In *Green v. Missouri Pacific Railroad*,[34] plaintiff's statistical evidence of racial discrimination[35] demonstrated that in urban areas, blacks are

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32. The *Carter* court focused primarily on Griggs v. Duke Power Co., 401 U.S. 424 (1971). 452 F.2d at 324-26. The application of Title VII standards to an equal protection claim was discredited by the Supreme Court in *Washington v. Davis*, 44 U.S.L.W. 4789 (U.S. June 7, 1976), *discussed in* note 24 *supra*. The Court ruled in *Davis* that proof of racially discriminatory purpose is necessary to establish an equal protection violation, and that the "more rigorous" Title VII standards are not applicable to constitutional claims of racial discrimination:

> [E]mployees or applicants proceeding under [Title VII] need not concern themselves with the employer's possibly discriminatory purpose but instead focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

Id. at 4792.

33. In *Carter*, the trial court had ordered that:

> (i) no person will be rejected as an applicant for the position of fire fighter with the Minneapolis Fire Department by reason of the conviction of any felony or felonies at any time prior to five years from the date of application or by reason of the conviction of any misdemeanor or misdemeanors at any time prior to two years from the date of application. . . .
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> . . . (ii) no person will be rejected . . . by reason of the conviction of any felony, misdemeanor, or other criminal act, or the conviction of felonies, misdemeanors, or other criminal acts, except upon a written finding by the Civil Service Commission after notice to the applicant and an opportunity to respond in person or in writing that the act or acts upon which such convictions were based, considering the circumstances in which it occurred, involve behavior from which it can reasonably be inferred that such applicant cannot adequately fulfill the duties of a fire fighter . . . .

452 F.2d at 320. On appeal, the Eighth Circuit modified the trial court's order; the employer was required to revise its rules so that conviction would not absolutely bar employment, but the court "would not consider any rule giving fair consideration to the bearing of the conviction upon the applicant's fitness for the . . . job to be inappropriate." *Id.* at 326. *See also* Wilson, *supra* note 23, at 849-50.

34. 523 F.2d 1290 (8th Cir. 1975).

35. Both the district court and the Eighth Circuit limited the statistical analysis to a demonstration of how Mo-Pac's policy affected blacks and whites in the metropolitan St. Louis area, paying particular attention to its effect upon blacks who had applied for employment with Mo-Pac.

Proof of discrimination against minorities has been buttressed by statistical evidence

convicted of crimes at a rate two to three times greater than the percentage of blacks in the population.[36] The additional proof that defendant's policy against hiring ex-offenders excluded a significantly greater proportion of black than white applicants[37] convinced the court that Green had established a prima facie case of discrimination.[38]

The court acknowledged that the Supreme Court had not explicitly determined the validity of conviction records as hiring considerations, but noted the implication of *McDonnell Douglas*[39] that a blanket disqualification based on past convictions would be disapproved when it has a disparate racial impact.[40] Mo-Pac defended its hiring

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that shows: 1) that the questioned employment practice will automatically exclude a higher proportion of minority workers than white workers in a particular geographical area; 2) that the racial composition of defendant's workforce, compared to the racial composition of the geographical area, reflects discriminatory employment practices; or 3) that the questioned employment practice has in fact excluded more minority employees than whites at the defendant's company. Green v. Missouri Pac. R.R., 523 F.2d 1290, 1293-94 (8th Cir. 1975). *See also* Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1973); Note, *supra* note 20, at 463.

36. 523 F.2d at 1294.

37. *Id.* at 1294-95.

38. *Id.* at 1295. The district court, considering the same statistics, had found that conviction records disqualified 5.3 percent of black applicants, compared to 2.23 percent of white applicants, for employment at Mo-Pac. The district court went on to compare the number of blacks rejected for convictions to the total number of applicants. This further computation resulted in a finding that 2.05 percent of all applicants were blacks with conviction records, and 1.4 percent of all applicants were white ex-convicts. Holding that these figures did not prove discrimination, the district court stated:

> A comparison of the 2.05% . . . with the 16% (percentage of blacks in the St. Louis metropolitan area in 1970) shows that the percentage of blacks adversely affected by the subject hiring policies is not disproportionately large when compared with the percentage of blacks in the subject population. The 2.05% figure shows a de minimis discriminatory effect against blacks with conviction records . . . .

381 F. Supp. at 996. The Eighth Circuit found that the district court's statistical analysis was erroneous because the 2.05 percent figure "dilutes the actual discriminatory impact against blacks," and "does not reflect a disparity of impact separately against each race." 523 F.2d at 1295. The Eighth Circuit also held that comparing the percentage of black applicants with conviction records with the percentage of blacks in the metropolitan area was incorrect, since

> [t]he issue to be examined statistically is whether the questioned employment practice operates in a disparate manner upon a minority race or group, not whether the individuals actually suffering from a discriminatory practice are statistically large in number.

Id.

39. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See* notes 29-30 *supra* and accompanying text.

policy by arguing that ex-offenders lack moral character, cannot be bonded, expose the employer to tort liability for hiring a person with "known violent tendencies," have unstable employment records because of recidivism, and increase the risk of cargo theft. The court found these justifications insufficient to support Mo-Pac's use of conviction records as an absolute bar to employment and inadequate to satisfy its burden of proving business necessity.[41]

The court's treatment of statistical evidence in *Green* was consistent with the use of such evidence by other courts.[42] The statistics indicated that Mo-Pac's policy "operated automatically to exclude from employment 53 of every 1000 black applicants but only 22 of every 1000 white applicants,"[43] a rejection rate almost two and one-half times greater for blacks than for whites. The court correctly rejected the district court's comparison of the percentage of disqualified black applicants to the percentage of blacks in the relevant labor pool. A substantially disparate racial impact establishes discrimination, not proof that "the individuals actually suffering from a discriminatory practice are statistically large in number."[44] The court appropriately found that the discriminatory impact of Mo-Pac's rule was "substantial."[45]

Although it is conceptually difficult to see the racial discrimination inherent in Mo-Pac's policy, since the rule more obviously "discriminates against both blacks and whites on the basis of their criminal records,"[46] a contrary finding would have departed from the Title VII

40. 523 F.2d at 1294.

41. *Id.* at 1297-98.

42. *See* cases cited note 20 *supra.*

43. 523 F.2d at 1294-95.

44. *Id.* at 1295.

45. Whether the discrimatory impact of a challenged employment practice is "substantial" is a factual determination. The racial composition of the relevant labor market varies from case to case, as does the number of minority group members who possess the requisite occupational skills. The courts, therefore, have remained flexible, and have not "identified precisely the showing required to shift the burden of persuasion to the defendant." Note, *supra* note 20, at 478. *See 1974-1975 Annual Survey of Labor Relations and Employment Discrimination Law*, 16 B.C. IND. & COM. L. REV. 965, 1080-86 (1975) (general discussion of burden of proof in Title VII cases).

46. 523 F.2d at 1300, Order Denying Petition for Rehearing En Banc (Gibson, C.J., dissenting). Chief Judge Gibson, joined by Judges Stephenson and Henley, found that the disparate effect of Mo-Pac's policy on blacks was de minimis, that the rule prohibiting hiring ex-offenders was not racially discriminatory, and that

Title VII should be construed in a manner to preserve the employers' right to

standards established in *Griggs* and adopted by many post-*Griggs* cases.[47] Absent business necessity, Title VII analysis does not permit distinction between conviction records and high school diploma requirements or wage garnishment rules, previously found to be racially discriminatory.[48]

As the employer's sole defense, the scope of business necessity is crucial. Unfortunately, however, the court's brief consideration of the business necessity defense did not explain what justifications are relevant to business necessity. While purporting to apply the business necessity test previously adopted by the Eighth Circuit,[49] the *Green* court summarily condemned Mo-Pac's rule for overbreadth, rather than discussing its justifications in light of the test:

> We cannot conceive of any business necessity that would automatically place every individual convicted of any offense . . . in the permanent ranks of the unemployed.[50]

The effect of the *Green* decision on efficiency in hiring and business operation is unclear. The court limited its holding by noting that the reasons underlying Mo-Pac's practice "can serve as relevant considerations in making individual hiring decisions,"[51] but did not suggest how a valid rule implementing those considerations should be fashioned. It is possible that the burden placed on employers will be minimal, if they may simply specify those jobs for which persons convicted of certain

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> make reasonable business judgments in these matters based upon the exigencies of the particular business.

Id. at 1300.

47. *See* notes 15-24 *supra* and accompanying text.

48. *See* notes 18 & 21 *supra* and accompanying text.

49. United States v. St. Louis-San Francisco Ry., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973), *quoting* Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971):

> [T]his doctrine of business necessity, which has arisen as an exception to the amenability of discriminatory practices, "connotes an irresistible demand." The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal. . . . In other words, there must be no acceptable alternative that will accomplish that goal "equally well with a lesser differential racial impact." (emphasis original).

See note 22 *supra*.

50. 523 F.2d at 1298.

51. *Id.* The court noted that the EEOC guidelines, *see* note 12 *supra*, apply not only to standardized tests, but also to background requirements like that challenged in *Green*. The court deemed it unnecessary, however, to decide whether the defendant would have to comply with the guidelines in modifying its hiring practices with respect to conviction records. *Id.* at 1299 n.13.

crimes may never be hired. For example, the employer could decide that no one convicted of theft is eligible for jobs demanding easy access to funds, cargo, or valuable equipment. If, on the other hand, the employer must determine the "nature and seriousness of [each applicant's] crime in relation to the job sought, . . . the time elapsing since the conviction, the degree of rehabilitation, and the circumstances under which the crime was committed,"[52] the time and expense involved in personnel decisionmaking will be increased substantially.[53]

The business world will probably look upon this decision as another example of courts "forcing employers to pay for society's shortcomings."[54] To the extent that the courts allow employers discretion to decide which crimes are job related, however, a sacrifice of business efficiency is unlikely. Criminologists, on the other hand, will probably applaud judicial elimination of blanket rules against hiring ex-offenders, since inability to obtain employment is considered a major cause of recidivism.[55] Recognizing that few employers will voluntarily "assume the risk" of hiring ex-offenders,[56] several states have recently enacted laws prohibiting discrimination against ex-offenders by private and public employers.[57] Acceptance of the *Green* analysis in future Title VII cases, coupled with this trend of state laws, would vastly improve employment possibilities for both white and black ex-offenders.[58]

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52. Butts v. Nichols, 381 F. Supp. 573, 581 (S.D. Iowa 1974).

53. The time involved in the hiring decision is increased because the employer must thoughtfully consider, rather than summarily reject, the applications of what may be a substantial number of ex-offenders. Evidence in *Green* showed that 292 ex-offenders applied for jobs at Mo-Pac's general office in St. Louis from September 1, 1971, to November 7, 1973, 174 of whom were black. 523 F.2d at 1294.

54. Wilson, *supra* note 23, at 851.

55. *See* Note, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 HAST. L.J. 1403, 1404-08 (1975).

56. *See* Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 307 (1970); Note, *Employment Discrimination Against Rehabilitated Drug Addicts*, 49 N.Y.U.L. REV. 67, 68 (1974).

57. FLA. STAT. ANN. § 112.011 (Supp. 1974) (excepting prior convictions of felony or first degree misdemeanor "directly related" to the job sought); HAWAII REV. STAT. § 378-2(1) (Supp. 1974); WASH. REV. CODE ANN. § 9.96A.020 (Supp. 1974). *See* Note, *supra* note 55, at 1426-31.

58. Even absent a state law prohibiting employment discrimination against ex-offenders, white ex-offenders may benefit from the Title VII analysis set forth in *Green*. Clearly, the modifications required in Mo-Pac's hiring policy will benefit future applicants of all races. For example, Mo-Pac may not simply retain its ex-offender policy for

all applicants except blacks; any white ex-offender applicant would then have a Title VII action against Mo-Pac for overtly discriminatory hiring policies.

Additionally, in response to *Green*, other employers may alter their rules against hiring ex-offenders to avoid Title VII litigation, thus similarly benefiting white ex-offenders. Blanket rules against hiring ex-offenders which are not voluntarily changed, however, would probably require initial challenge by a member of a minority group, because the statistical "adverse impact" necessary to show discrimination does not exist for a white ex-convict. If a broad view of "standing" were adopted in Title VII cases, however, whites might be able to challenge racially discriminatory practices. This theory is supported by the Supreme Court's decision in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), which held that white residents of a housing project had standing to challenge a landlord's racially discriminatory rental policies. For a more thorough discussion, see Note, *Employment Discrimination Against Rehabilitated Drug Addicts*, 49 N.Y.U.L. REV. 67, 72-73 (1974).