

WITH NEW TECHNOLOGY, COMES FAMILIAR DISCRIMINATION

Exploring the patterns of hiring practices and how
discrimination has been perpetuated

A BRIEF HISTORY OF EMPLOYMENT DISCRIMINATION POST CIVIL WAR

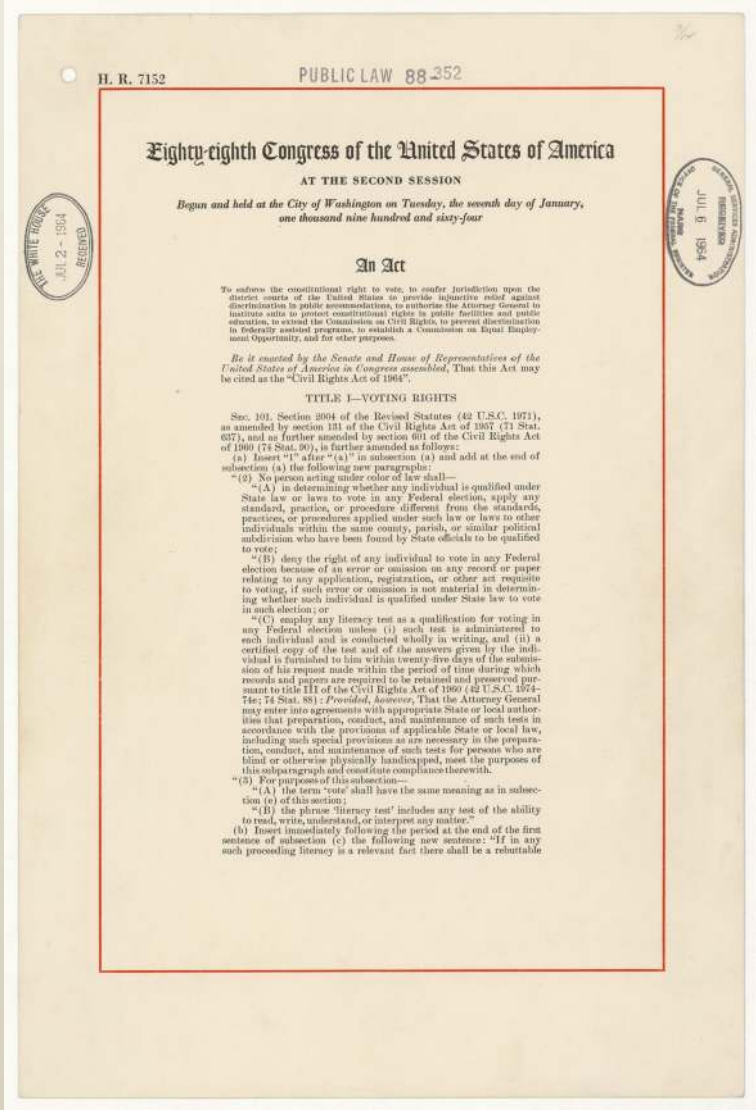
- Post Civil War (1860s-1910s)
 - 13A did little to change a system of exploiting Black labor
 - Expansion in geographical distribution, industry representation and range of occupation was minimal.
 - System of Sharecropping
- Great Depression (1920s-1930s)
 - Agricultural jobs still the predominant industry
 - Forced migration
 - Continuous open discrimination

A BRIEF HISTORY OF EMPLOYMENT DISCRIMINATION POST CIVIL WAR

- World War II and Post World War II (1940s – 1950s)
 - Great migration into urban centers.
 - Need for labor pushed employers to hire Black workers.
 - Though there was some improvement, Black workers faced extreme discrimination in hiring, promotion and in the conditions of work.

CIVIL RIGHTS ACT OF 1964 - TITLE VII

- July 2, 1964 signed into law.
- Title VII specifically related to employment and outlawed discrimination based on a number of protected categories.
- Applied to private employers with more than 25 employees, labor unions and employment agencies.
- Creation of Equal Employment Opportunity Commission



SECTION 703 (H) OF TITLE VII

- 703 (H) – allows for “professional developed ability tests” provided that such test, its administration or action upon results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.
- Also discusses the lawfulness of a seniority or merit system so long as the differences are not the result of an intention to discriminate.

H. R. 7100-17

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration, or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer (if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 368(d))).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion.

“COVERT” EMPLOYMENT DISCRIMINATION IN THE FACE OF TITLE VII

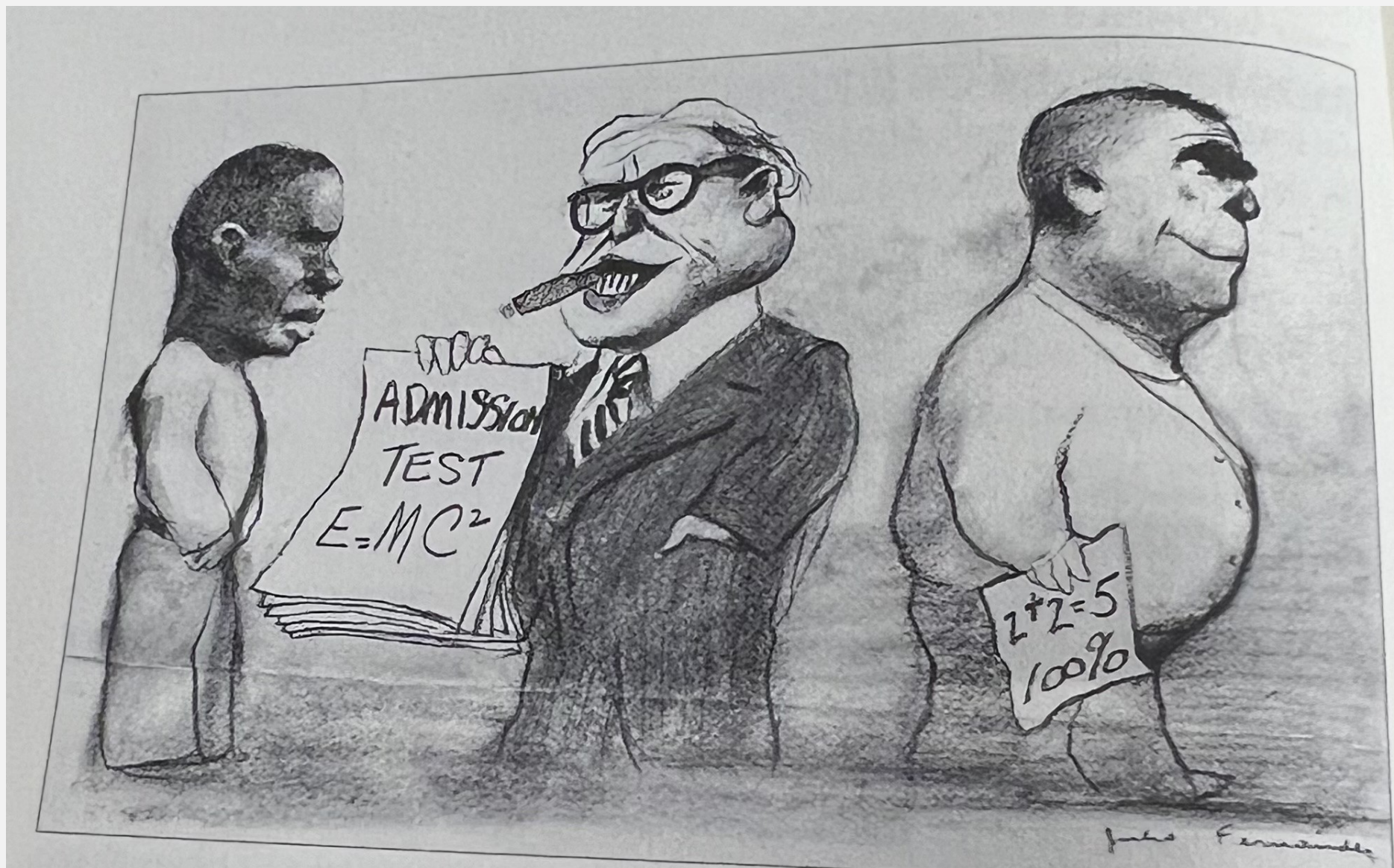
- Employers utilized pre-employment testing, degree requirements, and word of mouth recruiting to perpetuate a racist employment structure.
- EEOC was aware of the pervasive issue.
- Employers not particularly motivated to change their policies, as right after passage of Civil Rights Act, the EEOC didn't have the ability to bring charges.

GRIGGS V. DUKE POWER
COMPANY (1971)



GRIGGS V. DUKE POWER HISTORY

- Duke Power supplied electricity to textile factories and individual residences in North Carolina.
- Dan Station Plant in Draper, NC prior to July 1964 openly discriminated against Black employees.
- On July 2, 1965 – Duke Power began using hiring tests for new employees.
 - For the labor department – required to pass a “basic examination”
 - For all other departments – passing score on two tests and high school degree
- Class Action of 13 employees from the Draper Plant



OUTCOME OF GRIGGS V. DUKE POWER

- Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are a “demonstrably a reasonable measure of job performance”
- Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and if, as here, an employment practice that operates to exclude cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent.
 - Notion of Disparate Impact
- In the case of Duke Power
 - General intelligence test is not related to job performance
 - Both the high school education and intelligence test requirements operate to disqualify Black workers more than White workers
 - Long standing discrimination against Black workers and preference for White workers
- Limitations of Griggs v. Duke Power

“WHAT I WOULD LIKE PEOPLE TO KNOW IS THAT [RACIAL DISPARITIES] HAVE EXISTED. AND YOU NEED TO WORK HARD TO KEEP IT FROM EXISTING AGAIN. IT CAN COME BACK. I CAN FEEL IT ON ITS WAY HERE AGAIN.” – WILLIE RUFUS BOYD

THE INTERSECTION OF NEW TECHNOLOGY, HIRING METHODS AND DISCRIMINATION

- Culture Fit
 - Present since the 1980s
 - Companies have devoted attention to ensuring that new hires are “good fits”
 - This perpetuates a homogenous workforce.
- Psychological Tests
 - Personality Tests: measure the emotional, motivational, interpersonal and attitudinal characteristics
 - Cognitive: measure logical thinking, critical thinking, problem solving skills, decision making skills

[1]: I RESPECT AUTHORITY. OR [2] I AM
A HARD WORKER.

- A) Statement [1]: is much more like me
- B) Statement [1] is more like me
- C) Statement [2] is more like me
- D) Statement [2] is much more like me

[1]: SOMETIMES, SOLVING A COMPLEX PROBLEM TAKES MORE TIME THAN ITS WORTH OR [2] I SOMETIMES FIND IT DIFFICULT TO APPROACH OTHERS AT WORK.

- A) Statement [1]: is much more like me
- B) Statement [1] is more like me
- C) Statement [2] is more like me
- D) Statement [2] is much more like me

THE INTERSECTION OF NEW TECHNOLOGY, HIRING METHODS AND DISCRIMINATION CONTINUED

- Automated Hiring Tools
 - 407 of the Fortune 500 Companies use some combination of AI hiring tools
 - AI is utilized in almost every step of the hiring process
 - Advertising the job
 - Resume review
 - One-way video scanning
 - AI tools are ripe for automation bias. Replicates the bias found in the data fed to train the system.

DIFFERING INTENTS

Intent of “old hiring methods”

- Preserve the status quo of the Pre-Civil Rights Act employment discrimination

Intent of “new hiring methods”

- Means of decreasing costs, saving time and identifying the best candidates
- Often advertised as a way to prevent discrimination

SIMILAR IMPACTS

Impact of “old hiring methods”

- Freeze the status quo of pre-Civil Rights Act discrimination

Impact of the new hiring technology

- Works to perpetuate status quo
- Allows of unconscious bias to discriminate against those unlike the individuals who have the hiring power.

HOW HAS THE LEGAL FIELD ADDRESSED THIS?

- Automated Hiring Decisions
 - Legislation
 - New York Local Law 144
 - Senator Markey AI Civil Rights Bill
 - MA Anti-Discrimination Law
 - Cases
 - Mobley v. Workday (too early) but the liability under agency theory for discrimination wasn't dismissed.
 - Best Buy Settlement with EEOC, CVS, Target

HOW CAN WE RECKON WITH THE POWER OF THIS TECHNOLOGY AND MITIGATE THE NEGATIVE EFFECTS?

- Acknowledge the fact that this technology will probably remain
- New Federal and Local Legislation
- Interlocking process of External (Government Regulation) and Internal (Corporation) Policies
 - Analysis of Pre-Employment Tests
 - Companies must work to identify and interrupt bias.
 - Audits of the AI tools used in the decision-making process.
 - A shift from “culture fit” to “culture add”