How *Griggs* Came To Be

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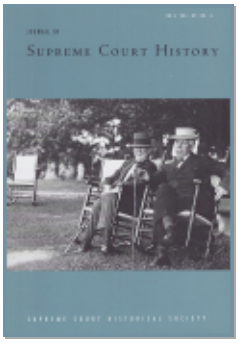

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How *Griggs* Came To Be

ROBERT BELTON (AS EDITED BY STEPHEN L. WASBY)

Editor's Note: The history of *Griggs v. Duke Power Co.* (1971) and of the theory of disparate impact was told by the late Robert Belton in his book, **The Crusade for Equality in the Workplace: The *Griggs v. Duke Power* Story**, which Professor Stephen L. Wasby prepared for publication after Professor Belton's death in 2012. Material drawn from that book, published in 2014, is presented in this article, with a brief introduction and conclusion by Professor Wasby. Material reprinted with permission from the University Press of Kansas.

Introduction, by Stephen L. Wasby

In 1971, the Supreme Court decided the first major case on the substance of Title VII of the Civil Rights Act of 1964, *Griggs v. Duke Power Co.*[1] As President Nixon's appointee Warren Burger had replaced Earl Warren as Chief Justice and Burger's friend Harry Blackmun had also joined the Court, observers had expected a withdrawal from the rulings supportive of civil rights complainants. They had not expected a ruling strongly supporting African-Americans' claims of employment discrimination. Indeed, there was still a question as to what "discrimination" was precluded by the Civil Rights Act. Many thought that only direct, intentional discrimination—what has come to be called *disparate treatment*—was all that was barred. However, with the passage of Title VII, employers ceased blatant discrimination of the "no Irish need apply" or "no Negroes except in the labor pool" variety. Instead they adopted employment tests and requirements that were racially (or gender) neutral on their face but which had a disproportionately negative impact on racial minorities and women: that is, these actions had a *disparate impact* on racial minorities. *Griggs* is so significant because the Supreme Court went beyond disparate treatment to rule that, under Title VII, employers could not engage in actions that had a disparate impact on racial minorities. The theory of disparate impact adopted in *Griggs* has now had a history of more than forty years, with some Supreme Court rulings eroding the theory and with Congress enacting the Civil Rights Act of 1991 to restore the theory's strength. Yet before that history took place, there had to be *Griggs*. The case was no accident. It was part of a planned litigation campaign against

employment discrimination undertaken by the NAACP Legal Defense and Educational Fund (LDF). The story of how *Griggs* came to be is worth telling, and Robert Belton, who played a major role in the litigation of the case, tells it here.

* * *

Griggs: The Factual Setting, by Robert Belton

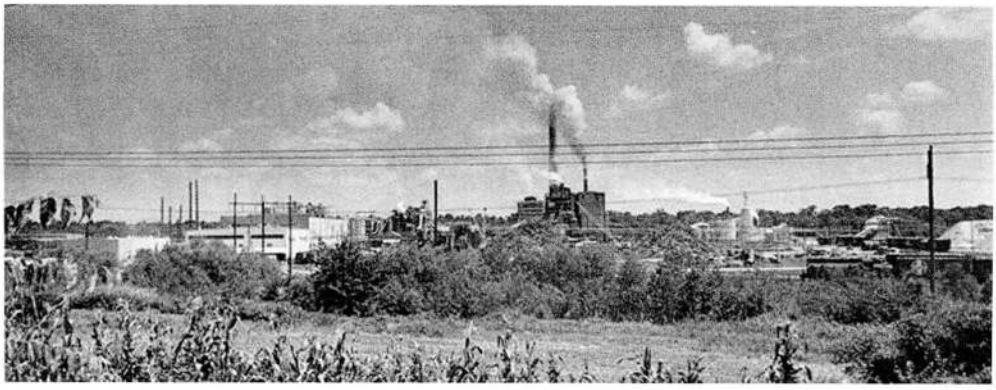
Griggs v. Duke Power Co. arose against the background of decades of widespread overt racial discrimination against African-Americans in the South in all facets of public and private activities: employment, education, places of public accommodation, transportation, and voting. *Griggs* involved the legality of racially neutral educational and testing practices. In 1990, it was reported that, for more than 100 years, employers had been requiring more and more education of applicants for an increasing number of jobs.[2] And a 1963 study, published the year before the enactment of Title VII, reported that although the evidence was fragmentary, it was fairly clear that a large number of industrial firms in the United States used standardized tests in selecting, promoting, and transferring personnel.[3]

The *Griggs* case arose in context of the reality of the difficulty of effective enforcement of Title VII based solely on the disparate treatment theory, which requires proof of intent to discriminate The NAACP Legal Defense Fund's litigation team which focused on employment discrimination cases was also concerned about trying disparate treatment cases before all-white juries. That team, along with the Equal Employment Opportunities Commission (EEOC) and law professors, struggled to articulate a theory of discrimination that was not based solely on discriminatory intent and to find a remedy that would substantially expand the employment opportunities of African Americans.

The employer in *Griggs*, Duke Power Company, was a public utility corporation that was engaged in the generation, transmission, distribution, and sale of electric power to the general public in North Carolina and South Carolina.[4] Duke Power also supplied electric power to federal government agencies and, for that reason, was subject to an Executive Order that prohibited discrimination in employment. The plaintiffs were Willie Griggs, James Tucker, Herman Martin, William Purcell, Clarence Jackson, Robert Jumper, Lewis Hairston, Jr., Willie Boyd, Junior Blackstock, John Hatchett, Clarence Purcell, Eddie Galloway, and Eddie Broadnax. All were employed and classified as laborers or semi-skilled laborers at Duke's Dan River Steam Station, a steam generating facility in Eden, Rockingham County, North Carolina, that went into operation in late 1969 and converted the energy in coal into electrical energy that Duke Power sold to its customers. Some of the plaintiffs, for example, Willie Boyd, who played the leading role in initiating action to challenge the company's discriminatory practices and was the principal spokesperson for the plaintiffs, and William Purcell, had earlier worked as laborers in the construction of the Dan River facility; they became full-time employees after the facility became operational.[5] Employees were not represented by a union.

At the time the LDF began to represent the plaintiffs, Duke Power owned and operated approximately 120 offices, branches, district offices, and power-generating plants throughout the two states and employed more than 5,600 persons in all of its facilities. The overwhelming majority of its African American employees were employed throughout all of its operations in semiskilled, unskilled, or service worker jobs, with African Americans filling 562 out of 600 such jobs. Duke Power employed ninety-five employees at the Dan River Station; of these ninety-five, fourteen were African American and eighty-one were white.

The Dan River station was divided for operational purposes into five departments:



In the 1960s, Duke Power segregated employees by race, with African Americans at the Dan River plant stuck in the least desirable and lowest paid positions. It also maintained racially segregated facilities such as locker rooms, showers, toilet facilities, and drinking fountains.

(1) Operations; (2) Maintenance; (3) Laboratory and Testing; (4) Coal Handling; and (5) Labor. The jobs of watchman, clerk, and storekeeper were in a miscellaneous category. There were approximately thirty-six job titles used at Dan River, but Duke Power had never prepared written job descriptions for any of them. Employees in all of the departments, except coal handling and labor, worked inside the plant, or in the "inside" departments. The employees who worked coal handling and labor generally worked outside, or in the "outside" departments. The "inside" positions were reserved for white employees while both African-Americans and whites held "outside" positions.

The plaintiffs, held the least desirable and lowest-paid laborer positions, which involved, among other things, janitorial duties throughout the Dan River facility and other menial and manual tasks, such as driving trucks or cleaning equipment and machines. The maximum wage earned by any of the plaintiffs, including some who had almost twenty years of service, was $1.645 per hour, whether or not they had a high school education. This maximum was lower than the minimum wage of $1.875 per hour Duke Power paid to any white employee, many of whom also did not have a high school education. Of the eighty-one white employees, only thirty-three, or forty-nine percent, had finished high school. Of the fourteen African American employees, three, or twenty-one percent, had finished high school.[6] The wages earned by the plaintiffs were drastically lower than the wages paid to white employees with comparable seniority in the "inside" departments, where the top pay was $3.18 per hour or more. After the effective date of Title VII, Duke Power also created a new job classification: auxiliary service man. This new job was established primarily for African American employees in the labor department who "exhibited . . . extraordinary skills," but no one held that position at the time the case went to trial in 1968.

Not only were jobs rigidly segregated by race but Duke Power also maintained racially segregated facilities such as locker rooms, showers, toilet facilities, and drinking fountains at the Dan River station. The EEOC concluded in its investigation that the segregated facilities for African American employees were located in a crowded filthy brick building by the railroad tracks at the base of the soft coal stock-pile. Locker rooms, drinking fountains, and showers for white employees, including those working in the coal-handling department, were located inside the main building. Duke Power made no effort to eliminate its racially segregated facilities until after the plaintiffs had filed their charge of unlawful employment discrimination with

the EEOC, which they did on March 15, 1966. The EEOC's investigation team visited the Dan River facility on April 21, 1966, to begin its investigations. Several days after the visit by the investigation team, Duke Power advised the EEOC that on April 28, 1966, all employees were assigned to the same locker room.

About ten years before the effective date of Title VII, or around 1955, Duke Power had instituted an employment policy of requiring all new applicants for jobs historically reserved for the white "inside" departments have a high school education. On July 2, 1965, the same date that Title VII became effective, Duke Power added a new requirement that all applicants for jobs in the inside departments had to satisfy, in addition to the high school education requirement; it was that the applicants must successfully pass a written test battery. Duke Power stated that it added the test battery to the high school education requirement because its experience was that some of its employees who did not have a high school education had insufficient ability to be promoted to top-level jobs as the complexity of its operations grew. Another reason Duke Power added the test battery was that other public utilities companies had done so.

Even though Duke Power had at least a year to take appropriate measures to bring its employment into compliance with the mandate of Title VII, it did substantially nothing until it actually became subject to the mandate of the Act on July 2, 1965. It seemed ironic to the litigation team that Duke Power instituted its test battery on the same date Title VII became effective. The tests Duke Power selected, after consultations with its expert, Dr. Dannie Moffie, were the Wonderlic Personality Test-Form 1, a general intelligence test including verbal, mathematical, analytical, and pictorial items; the Revised Beta Examination, also a general intelligence test designed to measure the general intellectual ability of persons relatively illiterate or non-English speaking; and the Bennett Mechanical Comprehension, Forms AA and BB, which examines an individual's level of mechanical information, spatial visualization, and mechanical reasoning. It is doubtful that even one of the questions on the Wonderlic test was relevant to some of the white jobs the plaintiffs sought. Duke Power knew, or should have known, that the passing scores on the tests were stringent standards because they would eliminate about half of all high school graduates in the United States. Dr. Moffie put Duke Power on notice of this fact in a July 7, 1965, letter.[7]

Several months after the effective date of Title VII, on September 10, 1965 Duke Power adopted yet another policy, which applied only to employees who did not have a high school education. This policy was adopted in response to complaints from white employees in the coal-handling department who wanted to be promoted to inside jobs but did not have a high school education. The policy provided that employees without high school diplomas who worked in coal handling, as watchmen, or as laborers and who were hired prior to September 1, 1965, could become eligible for promotion to inside jobs if they took both the Wonderlic and the Bennett Mechanical test and scored thirty-nine on the Bennett Mechanical and twenty on the Wonderlic. If they made these scores, then they would be deemed to have the equivalent of a high school education. No one had been promoted under this policy at the time of trial in 1968. The high school diploma and tests were not required for maintaining an employee's present position or for securing promotion to jobs paying $3.18 per hour or more. As an example, Clarence M. Jackson, a black employee with a seventh-grade education, was hired in 1951 as a laborer, remained a laborer in 1967 (with a salary of $1.645 per hour), and was unable to transfer to a better job, while three white employees—with fifth-grade, seventh-grade, and eighth-grade educations, provide a contrast: they had been promoted and one, as labor foreman of the

plaintiffs in 1966, supervised three of the plaintiffs who had a high school education.

The circumstances that eventually led the plaintiffs to file a charge of racial discrimination with the EEOC against Duke Power were powerfully captured in a 1991 *Los Angeles Times* article based on an interview with Willie Boyd:

> [The Dan River Station's] 81 white employees were supervisors, machine operators and technicians. They monitored shiny dials and gauges that operated the massive boilers. Each job could lead to one better. [African American employees] on the other hand were all janitors, and that is what they could expect to do for the rest of their life.
>
> Trains would haul in huge loads of Appalachian coal, rolling along tracks besides the slow, brown-green waters of the Dan [River]. White workers would mechanically transfer the freight, adding it to the plant's coal pile that rose higher than any building in this part of the Carolina upland.
>
> Sometimes dust and grime would clog the iron claws as they scooped up the lumpy fuel. The janitors were then summoned to help with the filthy work of unclogging the machinery. Only whites, however, were allowed the job title of "coal handler," and only they earned the extra pay.
>
> Willie Boyd was one of the [African American employees]. Son of a sharecropper, he had dropped out of high school in 1938 after his father took ill. Someone had to help the family meet the landowner's quota of tobacco production.
>
> Like millions of other Southern black men, Boyd escaped the farm in the post-war boom. Factories were springing up all around the Piedmont [area in North Carolina]. And with them came a demand for power—and more generating stations.
>
> Boyd's job at Duke Power was hard, though no harder than chopping tobacco. It was a big step up for him. And it paid actual cash. Pretty soon he had enough money to meet his bills and even to buy a few items on installment.
>
> As the years wore on, however, something always rankled him. White men—many with no more education than he had—rose up through the ranks to become managers or supervisors, taking spots in comfortable offices with bathrooms down the hall.
>
> Blacks cleaned those toilets—ones they themselves were forbidden to use. For them, the company built a "colored" bathroom outside across the railroad tracks, behind the coal pile.
>
> Why can't black folks get some of the better jobs? Boyd asked his bosses. And they "would tell us we had no chance," he recalled.[8]

The question Boyd raised—"why can't black folks get some of these better jobs?"—was a question that the members of the LDF litigation team heard many times from plaintiffs and class members they represented. In 1966, Boyd began to take action on behalf of his co-workers to find an answer to his question.[9] The president of the Reidsville, North Carolina, NAACP chapter was J.A. (Jay) Griggs, related to but not the lead named

plaintiff in *Griggs*, who was named Willie Griggs. Boyd was active in the Reidsville Chapter, and he and Jay Griggs were neighbors. On many occasions, Boyd complained to Jay Griggs about the racially discriminatory practices at Dan River and about the fact that African American employees at the Reidsville facility of the American Tobacco Company were beginning to take steps to seek relief from racial discrimination at that plant.[10] Jay Griggs had assisted a number of African Americans in preparing charges to file with the EEOC, so he finally told Boyd to fill out a charge to be filed with the EEOC or stop complaining.[11] Jay Griggs knew and had worked with Julius Chambers, a very active LDF cooperating attorney with an office in Charlotte, North Carolina, on other important civil rights cases, and he was to become one of the lead attorneys in *Griggs*. Jay told Boyd about Chambers. So Boyd, with the assistance of Jay Griggs, composed a petition to give to J.D. Knight, the superintendent at the Dan River Station. The petition stated that the signees had given Duke Power satisfactory service for a number of years and, therefore, were justified in requesting the opportunity for promotion to jobs in coal handling, maintenance, and other "inside" departments.[12] All fourteen of the African American employees signed the petition. The petition was dated March 1, 1966, and the plaintiffs left it on Knight's desk the same day.

When Knight arrived at work on the morning of March 3, he scheduled a meeting around 10:00 a.m. with the plaintiffs to find out what the petition was all about. The plaintiffs had selected Lewis Hairston to be their spokesperson at the meeting because "he was the kind of guy who was afraid of nothing, no how," and he had "more nerves" than some of the others had. Hairston boldly told Knight that the plaintiffs "wanted a crack at some of the better jobs" because the most the plaintiffs could earn was $1.65 per hour and the white employees started at $1.81 per hour. Knight's response was that no one without a high school diploma would be promoted to an inside job because Duke Power was moving into the atomic age. He also said the plaintiffs could be considered for promotion to inside jobs under the same policy Duke Power had adopted in September 1965 for white employees in coal handling; that is, if the plaintiffs who did not have a high school diploma successfully passed the test battery they could be promoted to inside jobs as if they had a high school education. The plaintiffs also complained to Knight about the segregated facilities, such as showers, drinking fountains, and locker rooms.

After the meeting with Knight, the plaintiffs concluded that Duke Power did not consider their petition meritorious. A few days later, the plaintiffs went to Chambers' office in Charlotte and, with his assistance, prepared a charge of racial discrimination to be filed with the EEOC. The plaintiffs met at a funeral home in Reidsville on March 14, 1966, to sign fourteen separate but identical EEOC charges to be filed with the EEOC.

The EEOC received the charges on March 15, 1966. A day later, a Duke Power official, A.C. Thies, met with some of the plaintiffs at the Dan River station. This meeting took place before the EEOC had served a copy of charges on Duke Power in April, so the company did not know that the plaintiffs had, in fact, filed their EEOC charges. The plaintiffs again raised the issue of the unfairness of subjecting them to the test battery as condition for consideration for inside jobs. This raised the possibility that Duke Power would provide tuition refunds for those who opted to obtain a high school diploma or its equivalent instead of passing the test battery. But when pressed about which courses Duke Power would approve for tuition refund, Thies told them that they would have to talk with the superintendent of the Dan River facility and that courses would be reviewed on an individual basis. Prior to this meeting, however, Thies had discussed with the superintendent what courses might be

available locally to allow the plaintiffs to obtain a high school diploma.[13] Duke Power made no mention whatsoever of the tuition refund in its September 22, 1965, memo to supervisors notifying them that it had adopted a policy on September 10, 1965, to provide employees in jobs in coal handling, watchman, and labor who did not have a high school education the option of passing the test battery for promotion to inside jobs.[14] Eventually, only one person, Willie Boyd, opted to take advantage of the tuition refund program. Only five employees, two blacks and three whites who did not have a high school education, took the test battery; none passed.

The EEOC initiated its investigation of the plaintiffs' charge on April 21, 1966, when several of its investigators visited the Dan River Steam Station. In its final report, the EEOC stated that Duke Power officials were reluctant initially to cooperate and gave misleading answers to their questions. The next day, the investigators toured the steam station, during which they saw for themselves the racially segregated locker rooms, drinking fountains, showers, and toilet facilities. The investigators returned to the Dan River facility on April 26, 1966, to do a thorough investigation of the plaintiffs' EEOC charges that they were unable to do on their earlier visit. Two days later, on April 28, 1966, Thies sent a memo to all of the superintendents at Duke Power's stations advising them to immediately take steps to move all of their employees into one locker room. The reason for this decision, as stated in the memo, was that even though Duke Power had "no specific segregation of our negro employees into one Locker Room since last July 1965, we are now informed that we are in violation of Title VII, of the Civil Rights Act of 1964, by permitting our negro employees to occupy separate facilities."[15] Immediately after these facilities were desegregated, plaintiff Lewis Hairston, whose duties as a laborer included, among others, cleaning the white locker room and toilet facilities, used the shower in the formerly all-white locker room. After this episode, white employees refused to use the shower for a period of time.[16]

On May 4, 1966, just over a week after the last visit by the EEOC investigators, Duke Power wrote a letter to the EEOC denying the allegations that its practices with respect to the plaintiffs were in violation of their rights under Title VII. Based on the investigators' final report, the EEOC issued an administrative decision on September 21, 1966, in which it found reasonable cause to believe that the allegations the plaintiffs made in their charges constituted a violation of their rights under Title VII. On the same date, the EEOC notified the plaintiffs of their right to bring a civil action and notified Duke Power that it would undertake an effort to conciliate the plaintiffs' charge. On October 5, 1966, an EEOC conciliator, Jules Gordon, met with officials of Duke Power to discuss the possibilities of resolving the case without the need for the plaintiffs to sue in federal court. Duke Power and Gordon met for several hours but were unable to resolve the plaintiffs' charges because Duke Power disagreed with EEOC's finding of cause. Duke Power's position then, and throughout the litigation, was that its employment practices, including its use of the test battery, complied with its obligations under Title VII.

Griggs was not the first Title VII complaint filed on behalf of private plaintiffs. The complaint in *Griggs* was filed by the Legal Defense Fund's litigation team in the U. S. District Court for the Middle District of North Carolina on October 20, 1966, about three months after the EEOC issued its first testing guidelines and a year after the first Title VII complaint on behalf of private plaintiffs, in *Brinkley v. Great Atlantic & Pacific Tea Co.*, on October 18, 1965.[17]

LDF's Enforcement Strategy

Those are the basic facts of the situation at Duke Power leading to the initiation of the *Griggs* case. But what was the organizational

context leading to the filing of the complaint in the case? How did *Griggs* fit into the LDF's work? There were very few opportunities for public interest legal organizations like the LDF to undertake a major law development program on employment discrimination prior to Title VII to show, for example, that employment practices like neutral-seeming tests and seniority systems were highly discriminatory. No right of private enforcement existed under the federal fair employment practice orders and regulations beyond the opportunity to file a complaint. If the complaint was dismissed, or if the complaint was valid but efforts to conciliate failed, no further private recourse was available against private employers, unions, or employment agencies. Some state laws provided aggrieved individuals the opportunity to seek judicial review of adverse commission actions, but the chances of obtaining a favorable judicial ruling were slim because federal and state courts normally give considerable weight to administrative determinations. Some private litigation to remedy employment discrimination in federal, state, and local governments was conducted under the Fifth and Fourteenth Amendments, but the constitutional equal protection ban on discrimination is not applicable to private parties absent a showing of state action.

Although claims of discrimination under Title VII can be, and often are, brought by individuals without the assistance of a private civil rights organization like the LDF, litigation, including civil rights litigation, is costly. Even though some courts have deemed employment discrimination litigation to be tort-type cases, and this became particularly true after Congress made compensatory and punitive damages available in the Civil Rights Act of 1991, immediately after Title VII's enactment only a few attorneys in private practice were willing to accept these kinds of cases on a contingency-fee basis as they regularly did in the more traditional tort cases. Costs, litigation expenses, and attorney's fees were, and continue to be, major factors imposing a general limitation on private enforcement to remedy employment discrimination through individual cases precisely because victims of such discrimination rarely have the resources to finance the costs of litigation. The plaintiffs' costs, expenses, and attorney's fees in *Griggs* were over $65,000[18] and the plaintiffs, who were employees paid low hourly wages, simply were not financially able to shoulder these costs of the litigation.

Another factor limiting private enforcement of laws prohibiting discrimination in employment is that civil rights cases, particularly ones involving claims of race discrimination, generally top the list of unpopular cases among attorneys. Thus, even assuming that costs were not a barrier, the probability of finding a private attorney willing to represent African American victims of employment discrimination was severely limited in the early stages of the enforcement of Title VII. Cognizant of these economic disparities between the plaintiffs and defendants, the United States Court of Appeals for the Fifth Circuit characterized employment discrimination cases as David and Goliath confrontations.[19]

The LDF Campaign

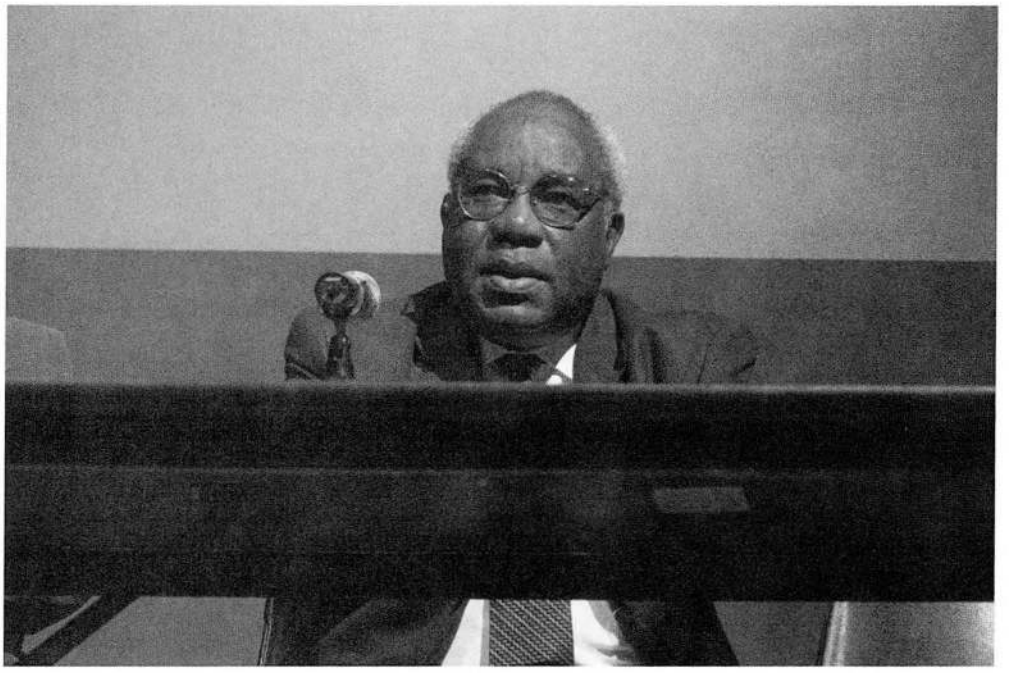
Other civil rights organizations, for example, the NAACP; the Lawyers Committee for Civil Rights Under Law (LCCRUL); the Women's Legal Defense Fund; the ACLU-sponsored Lawyers Constitutional Defense Committee (LCDC); the National Employment Law Project; and the Employment Rights Project of Columbia Law School, also played important roles in the development of the law during Title VII's first decade. However, for years after Title VII became law, no other organization, including the Department of Justice, had a docket of employment discrimination cases approaching the number of active cases the LDF had.[20] The LDF's objective was to establish a body of Title VII law that would provide the most

effective relief possible to African Americans. The LDF could not easily have undertaken its program earlier, but some important changes took place between the LDF's more well-known campaign in *Brown v. Board of Education* and the beginning of its employment discrimination litigation campaign in 1965, including an increase in the size of its staff, which was necessary to handle the "massive workload of employment discrimination grievances required a substantial number of attorneys, and, concomitantly, the additional resources to handle trials involving questions of fact."[21]

In June 1965, the LDF launched the employment discrimination enforcement campaign out of which *Griggs* arose. Although Congress emphasized cooperation and voluntary compliance as the preferred means of eliminating unlawful employment discrimination, it was highly unlikely that this "preferred means" would have any teeth until there was a body of substantive and procedural law that established the legal rights of members of the protected classes and the scope of the obligations imposed on employers and unions. Because Congress gave the federal courts the final responsibility for the enforcement of Title VII and authorized private enforcement, the employment discrimination litigation campaign became a major part of the LDF's work.

The Educational and Outreach Phase

The initial phase of the litigation campaign was a massive education and outreach program launched in late June 1965, even before the EEOC first officially opened its doors for business. The purposes of the LDF's education and outreach phase were to inform African American applicants and employees of their newly created rights under Title VII; to assist them in filing charges of unlawful employment discrimination with the EEOC; and to encourage individuals and organizations in the African American



Julius Chambers (above) and Robert Belton were the lead attorneys in *Griggs v. Duke Power Co.* (1971). In 1964, Chambers had graduated from Columbia University Law School and served as the first intern at the NAACP Legal Defense Fund (LDF). He then set up a law practice in Charlotte, which eventually became the first integrated firm in North Carolina history. Chambers would later become Director-Counsel of the LDF.

communities in southern states to become activists in the enforcement of Title VII.

Since the South has historically been one of the testing grounds for the development of civil rights law, ten southern states were targeted. Private employers' racially discriminatory practices were easier to document in southern states because the discrimination was rather blatant, as seen through official acts and long-standing customs and practices. The LDF hired eight African-American law students as field workers for the summer of 1965 to work in eight of the ten states under the supervision of Ruth Abram, a seventeen-year-old Sarah Lawrence College student who worked out of the LDF's headquarters in New York and whom Jack Greenberg, the LDF's Director-Counsel, had hired to coordinate the education and charge-gathering phase.

Before leaving for their assignments, the students were briefed on Title VII by the LDF attorneys and given written guidelines on assisting individuals in filing discrimination charges with the EEOC. The students then went to their assigned states, where they met with local leaders; made presentations to African American churches and business groups; worked with civil rights and social groups to establish community-based fair employment committees; set up speaking engagements; contacted newspapers to do articles on their activities;[22] held press conferences; conducted workshops on Title VII; identified industries that warranted study by the EEOC; contacted and worked with other civil rights groups such as the NAACP, Congress of Racial Equality (CORE), and Southern Christian Leadership Conference (SCLC); reviewed help wanted ads in newspapers for race-designated employment opportunities; used African American and white testers to audit employers' compliance with Title VII; made use of television and radio to explain the LDF's program; undertook publicity campaigns to spread the word about Title VII; and distributed fliers about Title VII in African American communities. The students also took steps to stimulate and train local leaders to continue the educational work and the preparation of charges after they returned to their colleges and universities at the end of the summer. Notably, one of the major problems students encountered was the reluctance of some African Americans to fill out charges of discrimination for fear of losing their job if their names were disclosed.

The students sent all employment discrimination charges to Abram, who then bundled the charges to be filed with the EEOC. Working with Herbert Hill, National Labor Secretary for the NAACP, the LDF and the NAACP submitted 475 charges of racial discrimination to the EEOC shortly after the EEOC officially opened for business. Another 374 racial discrimination charges arising out of the summer project were filed with the EEOC soon thereafter.[23] The initial phase of the litigation campaign was very successful because the LDF and the NAACP assisted African Americans in filing 1800 charges with the EEOC during the agency's first eighteen months of existence.[24] The EEOC expected no more than 2,000 charges during its first year of operation, and its initial budget of $3.25 million and staffing requirements had been geared to that expectation. The agency, however, received 8,854 charges during its first fiscal year, most of which were claims of race discrimination and a substantial number of which were filed as a result of joint effort between the LDF and the NAACP. Eleven southern states accounted for almost half of the charges filed with the EEOC during its first fiscal year, with the most coming from North Carolina, Alabama, and Tennessee, which were three of the states to which the LDF summer interns had been assigned.[25]

In the fall of 1965, Greenberg created the LDF Division of Legal Information and Community and hired Jean Fairfax as its director of community services. She and her field workers were instrumental in identifying major industries, such as steel, railroads, tobacco, trucking, pulp and paper,

shipbuilding, and southern textile, that generated a substantial number of charges of racial discrimination filed with the EEOC.[26] Many of the charges involving these industries ultimately became cases in the litigation campaign out of which some of the most important LDF landmark employment discrimination decisions arose.

The Litigation Team

Michael Meltsner, later dean at Northeastern University School of Law, and Leroy Clark, later EEOC general counsel and a law professor, were the two LDF attorneys who had the initial responsibility in the very early stages of the campaign. When I joined the LDF in December 1965, I joined Clark, who had assumed most of the responsibility for the campaign, and Al Feinberg, but he soon left. Around March 1966, Clark recommended to Greenberg that I should be assigned the lead role in the litigation campaign.

As an African American, I personally had experienced racial discrimination in all of its manifestations. I was born and raised in High Point, North Carolina, the fourth oldest of eighteen children of Daniel and Mary Lendon Belton. I grew up in the segregated South. Racial segregation was the order of the day in all aspects of my life growing up in High Point, not only in public education but also in access to restaurants, hotels, theaters, employment, parks, cemeteries, buses, trains, drinking fountains, hospitals, lunch counters, retails stores, recreational and sporting events, barber shops, churches, rest rooms, housing, and transportation. I graduated from the state law-mandated racially segregated William Penn High School in 1953, a year before the Supreme Court's May 1954 decision in *Brown v. Board of Education*. Many of my high school teachers, all of whom were African Americans, had Ph.D.s and some were unable to pursue their career aspirations to teach on a college level because racially discriminatory hiring practices prevented them from even entering the applicant pool of those seeking appointments at historically white colleges and universities and because there were a limited number of jobs as professors at historically African American colleges and universities.

I still have vivid recollections of African American men and women, including my father, who, if hired at all, were employed only in low-paying, physically demanding, dirty, and dead-end jobs in many of the furniture manufacturing businesses in High Point, a city that is known as the "Furniture Capital of the World." I also recall the help-wanted ads in the local newspapers under the heading of "Help Wanted—Colored," "Help Wanted—White," or "jobs for colored man," "colored boy," or "colored woman."[27] Many of these African American workers rode to work in the back of segregated buses, as I did, operated by Duke Power Company, the same Duke Power Company that was the defendant in *Griggs*. I witnessed firsthand the discrimination my father endured on his job because of his race, and on two occasions my oldest brother, Dan, and I were with him when his life was threatened by mobs of angry white men. My firsthand, day-to-day experience with racial segregation and particularly the two episodes with my father were major factors that ultimately informed my decision to be a civil rights lawyer. Another factor that shaped my decision was the opportunity to study the contributions that African Americans such as Charles Hamilton Houston and Thurgood Marshall had made in the field of civil rights and the history of the long struggle to gain equality for African Americans.

My civil rights activism began when I was in undergraduate school at the University of Connecticut (UConn) where, among other things, I was a founding member of the campus chapter of the NAACP. There were only a few African American students at UConn at that time in the mid- and late-1950s. On one occasion while attending UConn, I made a trip by car from Connecticut to North Carolina with a white female

professor to visit with my family. Because of racial segregation, I sat in the back seat of the car from Washington, D.C., to North Carolina to avoid the risk of harm to either of us at the hands of whites because I was driving with a sole white female through the South. That leg of the trip was a harrowing experience, and I decided to return to UConn by a different mode of transportation. Later, after graduating from Boston University Law School in 1965, I began working at the LDF in December 1965 and in 1970 joined the racially integrated law firm Chambers, Stein, Ferguson and Lanning in Charlotte, North Carolina. Pursuant to an arrangement with Greenberg I remained on the payroll of the LDF in order to litigate a number of employment discrimination cases in which I served as counsel for plaintiffs while engaged in the process for admission to the North Carolina bar. I left private practice in 1975 to join the faculty at Vanderbilt University Law School.

The two other persons who formed the core of the LDF's employment discrimination litigation team were Gabrielle Kirk McDonald, who joined the LDF in June 1966 and later became a U.S. district judge and, still later, a judge of the International Criminal Tribunal for the former Yugoslavia (ICTY), and Albert J. Rosenthal, a member of the Columbia Law faculty who served as a consultant to the employment discrimination litigation campaign for about ten years. In addition to serving as counsel in a number of landmark employment discrimination cases on the LDF's docket, including *Griggs*, Al brought together a consultative group of distinguished labor law practitioners and scholars as well as labor economists to meet periodically with members of the employment discrimination litigation team to discuss critically some of the thorny substantive and procedural issues that had to be litigated. Al also recruited an amazing and energetic group of bright young lawyers, many of whom were employed at major New York City law firms, to assist pro bono in legal research, drafting pleadings and discovery documents and writing briefs and other legal memoranda on new or novel issues.

Some of the law professors Rosenthal recruited also wrote briefs, particularly appellate briefs, involving novel substantive and procedural issues arising under Title VII. Professor George Cooper of Columbia Law School, for example, drafted the court of appeals brief in *Griggs* and also wrote the petition for certiorari and the plaintiffs' briefs the LDF filed in the Supreme Court in the case. Another professor, Sandy J. Rosen, then at the University of Maryland Law School, took a lead role with the LDF's consultative group of lawyers and professors to develop litigation strategies in the Fund's seniority discrimination cases. Other law professors served as "sounding boards" on procedural and substantive issues that we expected to be raised or supervised law students who researched novel issues or drafted legal memoranda or discovery demands. The LDF's use of academics in its employment discrimination litigation campaign was similar to the assistance it received from academics in some of its other major litigation campaigns including *Brown v. Board of Education* and the death penalty project.

Gaby, Al, and I worked closely together developing and implementing the various litigation strategies for the campaign. We compiled an extensive bank of complaints, legal memoranda, discovery documents such as interrogatories, and briefs on many issues that provided a ready resource for other LDF attorneys who handled a few employment discrimination cases, cooperating attorneys, and other attorneys in private practice who represented plaintiffs in employment discrimination cases. These litigation documents served as a model for many years not only for the LDF and its cooperating attorneys but for other lawyers as well. We also had the first line of responsibility for evaluating cases to be litigated, and we requested Greenberg's input about any cases in which there was any doubt

as to whether we should proceed. I cannot recall any instance in which he rejected our litigation recommendations, but it was rare indeed for us not to recommend assistance for cooperating attorneys, particularly with respect to charges that had been filed with the EEOC with some assistance from the LDF.

The Role of the Cooperating Attorneys

Although the core LDF litigation team consisted of Gaby, Al, and me, it is important to note that the litigation team of necessity in particular cases included cooperating attorneys. Cooperating attorneys, as used in public interest litigation, generally are lawyers in private practice who represent plaintiffs on either a pro bono basis or for a significantly lower attorney's fee. The success the LDF had in its employment discrimination litigation campaign could not have been achieved without their participation; the staff worked with about 200 of them.[28] Most of the LDF's cooperating attorneys in the early years of the employment discrimination litigation campaign were African Americans, many of whom practiced law in southern states and had graduated from historically black law schools, such as Howard University, Northern Carolina Central, Southern University, Florida A&M, and Texas Southern. Many of the cooperating attorneys assisted African Americans with the filing of charges with the EEOC, with charges often becoming the basis of lawsuits on the LDF docket. The LDF established a Civil Rights Institute to provide a form of continuing legal education on civil rights developments and to provide the opportunity for the cooperating attorneys and staff attorneys to have a bit of respite from the trench warfare of civil rights litigation. As Meltsner described it:

> The Fund had an enormous interest in keeping the Southern black lawyers who were a source of its cases, and ultimately its power, well informed of the dizzying developments in civil rights, a legal specialty with its own technicalities, as complex as tax or copyrights law. One means of doing this was periodic Civil Rights Institutes, held at Howard Law School in Washington. The front-line troops, most of them Howard graduates, were invited from the battle zone to hear three days of lectures and not incidentally, to bivouac in the District's watering places. By 1963 these conferences had acquired a prestige as the birthplace of many a civil rights strategy, but the assorted pleasures of liberty were a constant distraction, and so they were moved first to New Orleans, then to Atlanta, and finally to Airlie House, a pleasant and relatively isolated conference center in the Virginia hunt Country.[29]

The LDF Airlie House Civil Rights Institute and its previous iterations had become an integral part of the culture of civil rights and related educational mission of the LDF when I joined in 1965. After the employment discrimination litigation campaign was initiated, developments in employment discrimination law, legal theory, trial strategy, and remedies became an important part of the curricula. Representatives from other civil rights groups and the EEOC often attended the Airlie House conferences as either speakers or participants, and the litigation team maintained regular communication with other organizations, such as the NAACP, that were engaged in the Title VII enforcement process in order to coordinate the various strategies of enforcement when advisable.

The employment litigation campaign also benefited from other LDF initiatives. Beginning in 1962, the Field Foundation provided funding for what later became the Earl Warren Legal Training Program to alleviate the shortage of African American lawyers in southern states, under which some

recent African American law school graduates participated in a post-graduate fellowship program that included a year of internship with the LDF at its headquarters in New York or in the office of one of the LDF's cooperating attorneys. After the year, the fellows began to practice law in a mutually agreed upon location, primarily in the South, where few or no black lawyers were available to serve black citizens. They were paid a diminishing subsidy for three years, and one of the most important benefits of this subsidy served to help these new lawyers establish a law library for their newly opened offices.[30] Some white law graduates were also beneficiaries of the Legal Training Program, and the inclusion of white law graduates led to some of the first integrated law firms in the South. A number of the cooperating lawyers who were the beneficiaries of the training program carried a substantial load of employment discrimination cases; one of the program's first beneficiaries, Julius Chambers, returned to his native state of North Carolina and opened one of the first integrated law firms in Charlotte.[31] Chambers and I were the lead attorneys in *Griggs*.

A Litigation Strategy Emerges: Representing Private Attorneys General

In order for the courts to decide the many issues related to Title VII that had to be decided, they had to be raised by one of the two instrumentalities Congress had authorized to seek judicial enforcement: the Department of Justice, under its authority to litigate "pattern and practice" cases, or individually aggrieved "private attorneys general," through private litigation. The private plaintiffs the LDF represented in its litigation campaign were "private attorneys general." The private attorney general philosophy is based on the view that private individuals have important roles to play in vindicating the public policy of civil rights legislation because the goals of civil rights legislation cannot be achieved solely by enforcement initiatives undertaken by the Attorney General and the Department of Justice. In *Newman v. Piggie Park Enterprises, Inc.*, an early 1968 LDF case that arose under the public accommodations provision of the Civil Rights Act of 1964 (Title II) and in which LDF had advanced the private attorney general theory in its brief, the Supreme Court endorsed the view that Congress, by allowing private suits under the Civil Rights Act of 1964, had empowered private individuals to become private attorneys general to vindicate the civil rights policy objectives of the statute.[32]

As the first steps in devising its litigation strategy in the fall and winter of 1965, the LDF litigation team analyzed and tabulated the large number of charges it and the NAACP had helped African Americans file with the EEOC. The analysis also showed that seniority systems and pen-and-paper tests that seemed neutral on their face were among the most discriminatory practices engaged in by employers and labor unions. These findings from the analysis about the discriminatory effects of seemingly neutral practices were shared with a number of historians, sociologists, and labor law and civil rights professors, who generally confirmed the LDF's preliminary analyses. The analysis of the charges also identified several industries that should be examined closely as targets of litigation. The litigation team targeted industries where African American unemployment and economic growth were high and focused on semi-skilled and skilled blue-collar jobs, which paid well but did not require much formal education.[33] These industries included railroads,[34] pulp and paper,[35] steel,[36] tobacco, [37] textile,[38] trucking,[39] and public utilities.[40] Many of the employers in these industries used tests in making employment decisions, and practically all of them were unionized and had a history of using facially neutral seniority practices to make employment decisions that adversely affected the employment opportunities of African Americans because of race.

The railroad industry, for example, had a long history of excluding blacks from jobs that paid well or blatantly segregating them into all-black seniority units. This blatant segregation by employers and unions in highly visible and closely related jobs, such as porters and conductors, made the railroad industry such a symbol of discrimination that its inclusion as a target was required despite its general economic decline. A positive aspect of focusing on the railroad industry was that there were a large number of black employees who were willing to assert their rights and had done so historically while the segregated black unions gave them an organizational base for support.

The paper industry, meanwhile, was a high-paying growth industry with plants located throughout the southeastern part of the United States, where a large number of blacks were available for work and the plants were often a primary employer in the community. Blacks in the paper industry were relegated to menial, lower-paying jobs and pen-and-paper tests were used to screen applicants for jobs traditionally reserved for whites. More often than not, many of the big unions were named as defendants because the seniority agreements in the LDF's seniority discrimination cases were the product of collective bargaining between unions and employers. As with the railroad industry, international unions had sanctioned and charted separate racially segregated unions.

The EEOC conducted its first-ever hearings on January 12 and 13, 1967, in Charlotte, North Carolina, and focused on racial discrimination in employment in the textile industry.[41] The textile industry in the South then became another potential target of opportunity in the campaign.

One of the major problems in deciding upon a litigation strategy was that employment discrimination litigation did not fit neatly into the traditional civil rights law reform model that the LDF had honed to a fine art in the campaign leading to *Brown v. Board of Education*. Under the *Brown* model, organizational control over the sequence and pace of the litigation was the cornerstone of the successful implementation of the LDF's goals.[42] Leroy Clark, a participant in the early phase of the employment discrimination litigation strategies, described the differences in the two classes of cases:

> The attorney must have sufficient facts about the internal operation of the plant in order to judge whether a violation of [Title VII] has occurred. Such information is difficult to ascertain; whereas in school desegregation suits the discriminatory pattern in one school district resembled the pattern in another, employment discrimination patterns differ from industry to industry. Also, the typical voting rights suit involved a Southern state agency with mediocre attorneys; the defendants in employment cases were the largest companies in the country, retaining highly paid, competent counsel who offered vigorous opposition and were extremely adept at delay. With the added ingredient of a hostile federal Southern judiciary, a single suit could last two years or more. In the interim, the plaintiffs may have lost faith in the efficacy of litigation, moved to other jobs, or accepted inadequate settlements. It is in this kind of trench warfare, with limited staff, limited financial resources, and the inherent capacity in the law for delay, that civil rights attorneys will face serious difficulties in having a major impact on employment discrimination.[43]

Another problem in thinking about a litigation strategy was that employment discrimination litigation prior to Title VII presented easy and obvious targets, such as explicit policies or union contracts excluding

African Americans from desirable jobs, segregated departments and facilities, or discriminatory pay scales. Much of the more blatant and overt racial discrimination was eliminated by the federal Plans for Progress and state FEPC activities. After July 1, 1965, overt discrimination on the basis of race became unlawful and employers and unions began to abandon obvious and blatant racially discriminatory policies and practices. However, the effects of those earlier obvious and blatant racially discriminatory polices and practices were carried forward into the post-July 2, 1965, period. Discriminatory employment practices became more subtle, although, unlike with racial discrimination, many overt manifestations of sex discrimination continued after 1965 because employers believed that the "bona fide occupational qualification" exception exempted some sex-based employment practices from the prohibitions of Title VII. Major employers and unions began to adopt testing and educational devices and seniority systems that appeared facially neutral or colorblind but that operated to perpetuate the effects of past and societal discrimination.

With many of the overt incidents of racial discrimination abandoned or about to be abandoned by employers and unions, what was left was systemic and institutional discrimination imbedded in basic personnel policies or organizational structures of companies and unions. This more subtle brand of racial discrimination did not constitute the easiest target for an effective litigation campaign to eradicate job discrimination. Consequently, it soon became obvious that Title VII litigation would require substantial manpower in pre-trial preparation, including an analysis of voluminous records and extremely technical factual and legal questions. Proving the existence of discrimination in hiring, testing, seniority, and promotion practices would be demanding. One can see this from the fact that over 1,000 lawyer hours were devoted to litigating *Griggs* through the Supreme Court, and *Griggs* was a relatively easy case to prepare for trial compared to most cases tried during the early stages of Title VII enforcement. The great effort required to litigate a class action Title VII case would severely strain the limited resources of the private plaintiffs' bar, while defendants would be able to bear the demands and costs of litigation with less difficulty.

While some federal and state case law on employment discrimination existed at the time of Title VII's enactment, a coherent body of law on the subject did not exist. The existing case law did not become useful until efforts were devoted to the development of legal concepts of discrimination that could be applied to private employers. There were, however, three overarching, simply-stated but difficult, issues that informed the LDF's litigation campaign. The first and most critically important issue was defining a theory or theories of discrimination. The second was deciding what kind of evidence would be relevant to proving a claim of unlawful discrimination in light of the fact that no defendant was likely to readily admit that it practiced racial discrimination. The third issue was determining the specific kinds of relief that would be appropriate to remedy proven claims of unlawful employment discrimination.

For several reasons, a litigation strategy patterned primarily on the *Brown* campaign to develop a body of employment discrimination law on these simply stated but difficult issues would not have been feasible. First, the LDF could not ethically put some cases on the back burner while more forcefully pressing other and perhaps more favorable cases. Second, unlike in the *Brown* campaign, where there was some possibility of controlling the manner in which issues should be raised and the kinds of cases that would be most helpful in raising them, it was literally impossible to exercise control over issues and cases in the employment discrimination litigation campaign because other entities

such as the Department of Justice and other law reform organizations also had an interest in developing the law under Title VII. Third, the *Brown* paradigm was ill-suited for the more subtle discriminatory tactics that had replaced the earlier more blatant forms of discrimination. In most of the pre- and early post-*Brown* cases, the real issue was not so much whether a school board had, in fact, engaged in racial discrimination but rather what the remedy should be. Overt racial discrimination in employment was less prevalent in 1965 than in earlier years, but the effects of the pre-1965 overt discrimination continued pervasively. Fourth, the requirement of exhaustion of administrative remedies before the EEOC made it a possibility that ideal "test cases" would be settled or conciliated in an unsatisfactory way, and conciliation is not a process for establishing judicial precedents. Finally, Title VII presented procedural technicalities to private enforcement that required judicial clarification before substantive interpretations could be reached.

Lawyering skills and law development techniques could have been devoted to trying to make the EEOC administrative process a more responsive conflict resolution device for employment discrimination claims, but the experience under older administrative enforcement procedures and the uncertain start of the EEOC suggested that the limited private resources could better be used in the judicial enforcement process. A major factor that ultimately determined the LDF's strategy in the litigation phase was the reality of the difficulty in identifying the constellation of facts that would best raise the issues considered critical to programmatic law development. Because of the difficulty of making an informed decision about which issues should be raised first and in what kinds of factual paradigms, the LDF finally settled upon an initial litigation strategy that involved filing suit in any and all cases in which cooperating attorneys had been retained and the attorneys had requested the assistance of the LDF and dealing with substantive and procedural issues as they arose. Specific industries were targeted later, but two of the most important categories of cases that bubbled to the surface early were seniority discrimination and testing cases. And, as it happened, those were the issues that predominated in *Griggs*, because of Duke Power's use of a battery of tests and those and other obstacles to racial minorities' achieving their seniority rights.

* * *

Outcome of the *Griggs* Case, by Stephen L. Wasby

What, then, happened with the *Griggs* case itself? In the district court, Judge Eugene Gordon ruled against the plaintiffs, saying they had failed to prove intentional violation of Title VII, that the high school educational requirement did not discriminate on the basis of race, and that Duke Power's test battery was professionally developed. The judge also rejected the "present effects of past discrimination" theory, the idea that there could be a remedy for continuing effects of pre-Act discrimination.[44] On appeal to the Fourth Circuit, a majority of the three-judge panel hearing the case, with Judge Herbert Boreman writing for himself and Judge Albert Bryan, reversed Judge Gordon on the "present effects of past discrimination" theory but rejected all the LDF's arguments about the legality of the education and testing requirements.[45] However, Judge Simon Sobeloff wrote a strong partial dissent that was to influence the outcome in the Supreme Court. He found no need to prove intentional discrimination in a challenge to facially neutral employment discrimination policies and practices and, more important, he argued for the disparate impact theory of discrimination.

Then came the Supreme Court's unanimous (eight–zero) ruling reversing the Fourth Circuit. Through Chief Justice Burger, in a short opinion the Court upheld the disparate impact theory; ruled that proof of intentional



Robert Belton (left) grew up in High Point, North Carolina, and received his law degree from Boston University Law School in 1965. He, along with Gabrielle Kirk McDonald and Albert J. Rosenthal, formed the core of the LDF's employment discrimination litigation team litigating the *Griggs* case. McDonald (middle) became a district judge and then a judge of the International Criminal Tribunal for the former Yugoslavia; Rosenthal (right) served as Dean of Columbia University Law School from 1979 to 1984; and Belton became the first tenured African-American professor at Vanderbilt Law School, having joined the faculty in 1975.

discrimination was unnecessary and Congress had meant to deal with consequences of employment practices; and said that tests must be job-related, with the defendant having the burden of proving business necessity for and job-relatedness of tests used. Asked about the cases from that Term of the Court, the Chief Justice took notice of *Griggs*'s importance, even if he did so somewhat back-handedly: "I wouldn't want to say that was one of the terribly important cases but experts in that field of law considered it so, but it is not the kind of case that received any public attention."[46] In hindsight, we can say that was "clear understatement."

ENDNOTES

[1] 401 U.S. 424 (1971).

[2] Paul Burstein and Susan Pitchford, "Social-Scientific and Legal Challenges to Education and Testing Requirements in Employment," 37 *Soc. Probs.* 243, 244 (1990).

[3] David Goslin, **The Search for Ability: Standardized Testing in Social Perspective** (New York: Russell Sage, 1963) 96–98.

[4] For one version of the history of Duke Power, *see* Robert F. Durden, **Electrifying the Piedmont Carolinas: The Duke Power Company, 1904–1977** (Durham, N.C.: Carolina Academic Press, 2001).

[5] Interview with plaintiff Willie Boyd, August 6, 2004.

[6] These data were compiled from Duke's answers to the plaintiffs' interrogatories. Exhibit Volume, 105b-109b, *Griggs*, 401 U.S. 424 (1971) (No. 124).

[7] *Griggs*, 401 U.S. at 428 n. 3.

[8] Barry Bearak and David Lauter, "Tense Steps to Ending Racial Bias," *Los Angeles Times*, November 3, 1991, A1.

[9] The facts leading to the plaintiffs' decision to file a charge with the EEOC are based on an interview with Boyd.

[10] Interview with Willie Boyd. The LDF litigation team represented the plaintiff in the American Tobacco Co. case, *Russell v. American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

[11] Interview with Willie Boyd; Bearak and Lauter, "Tense Steps to Ending Racial Bias," A1.

[12] Reported in Bearak and Lauter, "Tense Steps to Ending Racial Bias," A1.

[13] A.C. Thies, memoranda to the file in the Duke Power materials received from Joseph Mosnier.

[14] A.C. Thies, letter to Duke Power superintendents, September 22, 1965.

[15] A.C. Thies, letter to Duke Power superintendents, April 28, 1966.

[16] Interview with Willie Boyd.

[17] *Brinkley v. The Great Atlantic and Pacific Tea Co.*, No. 1107 (complaint, E.D.N.C.).

[18] In 1964, it was estimated that a suit involving a trial in a district court, an appeal to a circuit court, and a petition for certiorari to the Supreme Court cost between $15,000 and $18,000. Litigation in *Brown v. Board of Education*, 349 U.S. 294 (1954), cost over $200,000. 110 Cong. Rec. 6541 (1964) (remarks of Senator Humphrey in the debate over Title VII).

[19] *Pettway v. American Cast Iron Pipe* Co., 411 F.2d 998, 1005 (5th Cir. 1969); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968).

[20] **Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution** (New York: Basic Books, 1994), 413.

[21] Robert L. Rabin, "Lawyers for Social Change: Perspectives on Public Interest Law," 28 *Stanford L. Rev.* 207, 217 (1976).

[22] *E.g.*, "Workshop Planned to Explain Negro Job Rights," *St. Petersburg Times*, July 7, 1965, Section A; Ray Boone, "My Job Is to Get People to Complain," *The Richmond Afro-American*, June 19, 1965; "N.C. Compliance Studied," *The Charlotte Observer*, August 3, 1965, A5.

[23] Greenberg, **Crusaders in the Courts**, 4; "Complaints Filed Under Rights Act," *New York Times*, July 30, 1965.

[24] NAACP Legal Defense Fund, **30 Years of Law Which Changed America** (1970).

[25] EEOC First Annual Report. 5 (1967). *See also* EEOC, **Employment Patterns in the Textile Industry** 10 (1967).

[26] Greenberg, **Crusaders in the Courts,** 382–383, 415.

[27] These race-designated help-wanted ads were published in the local newspapers the *High Point Enterprise* and the *Greensboro Daily News.*

[28] Greenberg, **Crusaders in the Courts**, 366.

[29] Meltsner, **Cruel and Unusual: The Supreme Court and Capital Punishment** (New York: Random House, 1973), 78; *see also* Greenberg, **Crusaders in the Courts**, 377–378.

[30] Annual Report 1976/77, NAACP Legal Defense and Educational Fund, Inc., 9.

[31] Chambers later became Director-Counsel of the NAACP Legal Defense Fund.

[32] 390 U.S. 400 (1968) (per curiam).

[33] Greenberg, **Crusaders in the Courts**, 414.

[34] Railroad: *Rock v. Norfolk & W.R.R.*, 473 F.2d 1344 (4th Cir.), *cert denied*, 412 U.S. 933 (1973); *English v. Seaboard Coastline R.R.*, 10 Empl. Prac. Dec. ¶ 10,476 (S.D. Ga. 1975).

[35] Pulp and Paper: *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975); *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Gatlin v. West Virginia Pulp and Paper Co.*, 734 F.2d 980 (4th Cir. 1984); *Jones v. International Paper Co.*, 720 F.2d 496 (8th Cir. 1983); *Myers v. Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976); *Roger v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975), *vacated and remanded*, 423 U.S. 809 (1975); *Stevenson v. International Paper Co.*, 516 F.2d 103 (5th Cir. 1975); *Long v. Georgia Kraft Co.*, 450 F.2d 557 (5th Cir. 1971); *Powell v. Georgia Pacific Corp.*, 535 F. Supp. 713 (W.D. Ark. 1982); *Miller v. Continental Can Co.*, 544 F. Supp. 210, 211 n. 2 (S.D. Ga. 1981) (noting long history of employment discrimination litigation involving the paper industry). *See* Timothy J. Minchin, **The Color of Work: The Struggle for Civil Rights in the Southern Paper Industry, 1960–1980** (Chapel Hill: University of North Carolina Press, 2001).

[36] Steel: *Hardy v. United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973).

[37] Tobacco: *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert denied*, 429 U.S. 920 (1976); *Russell v. American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert dismissed*, 404 U.S. 1006 (1971); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

[38] Textile: *Lea v. Cone Mills*, 438 F.2d. 86 (4th Cir. 1971).

[39] Trucking: *Franks v. Bowman Transportation Corp.*, 424 U.S. 747 (1976); *Hairston v. McLean Trucking Co.*, 520 F.2d 226 (4th Cir. 1975).

[40] Public Utilities: *Griggs v Duke Power Co.*, 401 U.S. 424 (1971); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

[41] United States Civil Rights Commission, *Civil Rights Enforcement Efforts*, 116 (1971).

[42] *See* Jack Greenberg, "Litigation for Social Change: Methods, Limits, and Role in Democracy," 29 *Rec. N.Y. C.B.A.* 320 (1974).

[43] Leroy D. Clark, "The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter Revolutionary?" 19 *Kan. L. Rev.* 459, 468 (1971).

[44] *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (M.D.N. C. 1968).

[45] *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970).

[46] Conversation with the Chief Justice, ABC News, July 5, 1971 (TV interview of Chief Justice Warren Burger by Bill Lawrence).