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Constitutional Law--Civil Rights--Georgia's Bar Exam Does Not Unconstitutionally Discriminate on the Basis of Race

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CONSTITUTIONAL LAW—CIVIL RIGHTS—GEORGIA'S BAR EXAM DOES NOT UNCONSTITUTIONALLY DISCRIMINATE ON THE BASIS OF RACE

In *Tyler v. Vickery*[1] the Fifth Circuit Court of Appeals held that the Georgia bar examination does not discriminate against blacks in violation of the equal protection clause of the fourteenth amendment and that traditional constitutional tests, rather than EEOC guidelines promulgated under title VII of the Civil Rights Act of 1964,[2] are the appropriate standards by which the constitutionality of the examination must be judged. The court further held that the failure to provide for a review of a failing grade does not violate the due process clause of the fourteenth amendment because those who fail the bar exam have an unqualified right to retake it at the next regular administration.

Since February, 1972, the Georgia bar examination has been composed one-half of essay questions promulgated by a board appointed by the Georgia Supreme Court and one-half of multiple choice Multistate bar examination questions. Blacks, as a class, have traditionally experienced difficulty in passing the exam. In July, 1972, none of the forty black examinees passed, and in February and July, 1973, slightly more than 50% of the black examinees failed as compared to a failure rate of 25-33% among white examinees.[3]

A class action was instituted against the Georgia State Board of Bar Examiners in federal district court[4] on behalf of all black persons who had taken and failed the Georgia bar examination. The suit claimed unconstitutionality of the exam on due process and equal protection grounds.[5] Summary judgment was granted to the defendant and plaintiffs appealed.

Traditionally, constitutional attacks on "state action" racial discrimination have been launched under the equal protection clause of the fourteenth amendment. If a plaintiff could show that the law differentiated between members of a class on the basis of race, he had shown enough to trigger strict judicial scrutiny of the law, requiring a compelling state

1. 517 F.2d 1089 (5th Cir. 1975). Majority opinion by Dyer, Circuit Judge. Dissent filed by Adams, Circuit Judge, of the Third Circuit, sitting by designation.

2. Guidelines are found at 29 C.F.R. §1607 (1975). The pertinent section of title VII is found at 42 U.S.C.A. §2000e (Rev. 1974).

3. 517 F.2d at 1092.

4. The United States District Court for the Northern District of Georgia, William C. O'Kelley, J.

5. The alleged intentional and inherent discrimination of the examination was attacked on equal protection grounds. The due process charge was leveled at the absence of a procedure for review of a failing grade. 517 F.2d at 1093.

interest in maintaining the different treatment in order to sustain it.[6] If the plaintiff failed to show a suspect classification[7] or a threat to a fundamental interest,[8] then the appropriate test would be the more passive "rational basis" test that would generally allow differential treatment of members of a class if the state could show some rational connection between the classification and some proper state purpose.[9]

The Civil Rights Act of 1964[10] attacked private discrimination, prohibiting discrimination in several areas including employment in title VII. The power to reach private action was based on the federal government's power to regulate interstate commerce. Under this theory, the Government could prohibit discrimination if that discrimination had a substantial economic effect on interstate commerce.[11] The original act did not apply to Government agencies. The result was that they were ostensibly still ruled by fourteenth amendment equal protection requirements until the 1972 amendment included governmental employers.[12]

The Equal Employment Opportunity Commission (EEOC) was empowered to promulgate regulations in accordance with title VII.[13] The EEOC recognized the increasing reliance of employers on testing and a marked increase in doubtful testing practices that resulted in discrimination against groups protected by title VII. The guidelines in this area[14] were designed to give a workable set of standards for employers, employment agencies and unions to determine whether their selection methods met the requirements of title VII. Title VII precludes the use of testing procedures that adversely affect job opportunities of classes protected by title VII where such procedures have not been professionally validated, unless it is demonstrated that alternative procedures are unavailable.[15]

As mentioned above when title VII was originally passed it applied only to private employers, government agencies were not required to meet the EEOC guidelines concerning testing. To correct this anomaly several circuits applied title VII and EEOC guidelines through the fourteenth amendment to employment tests administered by various public agen-

6. Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

7. Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage); Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944) (race); Hirabayshi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943) (national origin); Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (sex).

8. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

9. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

10. 42 U.S.C.A. §2000e (Rev. 1974).

11. Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964).

12. 42 U.S.C.A. §2000e (Rev. 1974).

13. 42 U.S.C.A. §2000e-12 (Rev. 1974).

14. 29 C.F.R. §1607 (1975).

15. 29 C.F.R. §1607.3 (1975).

cies.[16] Title VII was amended in 1972 to include governmental employers.[17]

The Fifth Circuit, however, did not follow the lead of the other circuits, refusing to analogize the EEOC guidelines in *Allen v. City of Mobile*.[18] The court held that the proper test in determining the constitutionality of a promotion examination used by a city police department was whether it bore a rational relationship to the ability to perform the work required.[19] The passage of the 1972 amendment that included Government employers under title VII[20] essentially reversed this decision, since city police promotion tests now must meet title VII requirements.

In *Tyler v. Vickery*[21] the court dealt with three distinct charges by the appellants. The court found that the record disclosed ample proof that the mechanics of the administration and grading of the exam precluded intentional discrimination.

In answering the due process charge the court held that a hearing would not be significantly quicker or more effective than allowing an unqualified right to retake the exam at the next regularly scheduled administration which is provided in Georgia.

Appellant's allegations that the exam is inherently discriminatory against blacks was based on the statistical data set out above. They argued that since passing the bar exam is a prerequisite to practicing law in Georgia, it should be classified as an employment exam and subject to the requirements of title VII and the EEOC guidelines. They cited cases from other circuits[22] to support their proposition that, in the court's words, "Title VII and the equal protection clause should be read interchangeably whenever the goals to be served are the same and the subject matter is at least arguably related. . . ."[23]

The Fifth Circuit distinguished these cases saying that title VII and the fourteenth amendment had been equated in the other circuits only in the narrow context of employment tests administered by governmental agencies.[24] The cases arose only in response to the original failure of the Civil Rights Act of 1964 to require the same standards for private business and

16. Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975); Walston v. County School Bd., 492 F.2d 919 (4th Cir. 1974); United States v. Chesterfield County School Dist., 484 F.2d 70 (4th Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Bd. of Examiners, 458 F.2d 1167 (2d Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *modified* 452 F.2d 327 (8th Cir. 1972) (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L. Ed.2d 338 (1972).

17. 42 U.S.C.A. §2000e(a) (Rev. 1974).

18. 466 F.2d 122 (5th Cir. 1972).

19. The court adopted, per curiam, the decision and rationale of the district court, whose opinion is published at 331 F. Supp. 1134 (S.D. Ala. 1971).

20. 42 U.S.C.A. §2000e (Rev. 1974).

21. 517 F.2d 1089 (5th Cir. 1975).

22. *See* note 16, *supra*.

23. 517 F.2d at 1097.

24. *Id.* at 1096.

Government agencies. These cases merely bridged the gap until Congress could rectify the situation.

The circuit court further considered itself bound by its holding in *Allen v. City of Mobile*.[25] The majority held that the circuit court in *Allen* confronted and rejected the contention that title VII and EEOC guidelines were applicable to testing outside the scope of the act.[26]

The third basis for the decision was the U.S. Supreme Court's holding in *Geduldig v. Aiello*.[27] In *Geduldig* the Supreme Court held that the California Unemployment Compensation Disability Fund could constitutionally exclude payments for disabilities associated with normal pregnancy. Like the Georgia bar examination, this plan was outside the scope of title VII. Also, like the bar exam, there was an EEOC guideline that covered the precise issue in *Geduldig*. The regulation required that "payment under any temporary disability insurance or sick leave plan . . . shall be applied to disability due to pregnancy or child birth on the same terms and conditions as they are applied to other temporary disabilities."[28]

The Fifth Circuit viewed the analysis of the Supreme Court in *Geduldig* as the key to the instant case, saying that "a *constitutional* challenge to a method of classification must be decided by *constitutional* standards . . ."[29] and that EEOC guidelines were only to be applied to areas within the scope of title VII.

The reasoning against the strict application of the guidelines was that title VII went further than the equal protection clause in prohibiting a broad spectrum of discriminatory practices, and, therefore, many of the title VII prohibited practices could pass muster under the equal protection clause.[30] To turn the analysis around would be to judge all constitutional questions on discrimination by title VII rather than by constitutional tests which the court refused to do.

The court held that in order for the appellants to get the compelling state interest constitutionality test applied to the bar exam they would have to do more than present a naked statistical argument to show creation of a suspect racial classification.[31] The court said that when a prima facie case of racial discrimination can be made out with statistical evidence, courts have shifted the burden to the defendant to show that "invidious discrimination was not among the reasons for the actions."[32] In *Tyler* the court held that the appellees had met this burden by demonstrating the absence of any genuine issue of material fact regarding intentional discrimination.[33]

25. 466 F.2d 122 (5th Cir. 1972).
26. 517 F.2d at 1097.
27. 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974).
28. 29 C.F.R. §1604.10(b) (1975).
29. 517 F.2d at 1098 (emphasis in original).
30. *Id.* at 1098.
31. *Id.* at 1099.
32. *Id.* at 1100.
33. *Id.*

Failing to find a trigger for the compelling state interest test the circuit court determined that the district court had correctly read *Schware v. Board of Bar Examiners*[36] and applied its rationale as a source for the proper standard of review.[35] In *Schware* the Supreme Court said that the standards which a state requires an applicant to meet before admission to the bar must have a rational connection with the applicant's fitness or capacity to practice law.[36] The Fifth Circuit noted that a state has a legitimate interest in maintaining and enforcing a minimum standard of competency for those who wish to practice law. Since appellants conceded that the Georgia exam tested "skills and knowledge which have a 'logical apparent relationship' to those necessary to the practice of law,"[37] the *Schware* test had been met. The court further noted that the bar exam met the tests[38] for a rationally supportable examination, as set out in *Armstead v. Starkville Municipal Separate School District*.[39]

The Fifth Circuit's decision in *Tyler* rests on three foundations, any one of which, if sound, is sufficient to sustain its holding.

First, the court distinguished the cases the appellants proffered in support of their contention that title VII and the fourteenth amendment should be equated.[40] Without the support of these cases,[41] the court rightly concluded that title VII should apply only to the areas that it specifically covers. The very fact that Congress chose not to include bar examinations when it amended the 1964 Civil Rights Act in 1972 is an indication that it intended the law to apply only to the stated categories.

Secondly, the court relied on its previous holding in *Allen v. City of Mobile*.[42] There is a question as to whether that case is viable since the 1972 amendments specifically included governmental agencies such as the city police department in Mobile. Furthermore, the decision of the trial court in *Allen v. City of Mobile*[43] did not address the title VII problem in any detail.

It is doubtful that the single paragraph of the majority opinion in *Allen* adopting the district court's reasoning coupled with the dissent is sufficient as authority to say, as the circuit court did, that "we [the Fifth Circuit] squarely confronted and rejected [in *Allen*] the contention that Title VII and its implementing EEOC guidelines were applicable to testing outside

34. 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957).

35. 517 F.2d at 1101.

36. 353 U.S. at 239, 77 S.Ct. at 756, 1 L.Ed.2d at 801-02.

37. 517 F.2d at 1101.

38. "1) [the test should] be designed for the purpose for which it is being used, and 2) utilize a cut off score related to the quality of exam purports to measure." 517 F.2d at 1102.

39. 461 F.2d 276 (5th Cir. 1972).

40. 517 F.2d at 1096.

41. *See* note 16 *supra*.

42. 466 F.2d 122 (5th Cir. 1972).

43. 331 F.Supp. 1134 (S.D. Ala. 1971).

the scope of the Act."[44]

Lastly, the use of *Geduldig* is similarly suspect. While that case may very well stand for the proposition that a constitutional challenge must be decided by constitutional standards,[45] there is no explicit rejection of the application of title VII in the opinion. Further, the case is distinguishable on the facts in that a social welfare program is involved. The Supreme Court has held that a legislature may address social and economic problems one step at a time.[46] *Tyler* does not fall into the social or economic category.

The decision reached in *Tyler* is sound when based on the first foundation discussed above as a logical construction of the statute. The logic is further buttressed by the proposition that a constitutional challenge must be decided by constitutional standards.[47] The reliance on *Allen* and *Geduldig* is misplaced and not necessary to the opinion.

With this decision, the Fifth Circuit Court of Appeals has announced a policy that it will not extend the strict standards of title VII beyond the explicit commands of Congress. Constitutional attacks on discrimination outside the explicitly protected areas covered by title VII must meet traditional constitutional requirements.

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44. 517 F.2d at 1097.
45. *Id.* at 1098.
46. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).
47. 517 F.2d at 1098.