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Constitutional Law: Fourteenth Amendment: Challenging the South Carolina Bar Exam. (Richardson v. McFadden)

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RECENT DECISIONS

Constitutional Law — Fourteenth Amendment — Challenging the South Carolina Bar Exam — The bar examination, in most jurisdictions, is the final hurdle to overcome before one is licensed to practice law.[1] The examination as a means of screening candidates for the bar has received its share of praise in that it protects the public interest. A license to practice law represents to the public that a person so endowed has the skills necessary to deal with various aspects of the law.[2] Such a system has also been subject to a fair share of criticism, most notably that the successful completion of a three year law school program is a better measure of competency than the memorization required to pass a three day bar examination.[3]

When disproportionate numbers of blacks failed the South Carolina bar examination, four of the examinees challenged its constitutionality in *Richardson v. McFadden.*[4] Both the equal protection and due process clauses of the fourteenth amendment were the bases for the claims set forth by the examinees. Three challenges to the examination were brought up on appeal to the Fourth Circuit Court of Appeals, two of which were brought by the examinees and one by the bar examiners. The examinees maintained first, that the exam was not sufficiently job related to satisfy the standards of either Title VII of the Civil Rights Act of 1964[5] or the equal protection clause of the fourteenth amendment. Secondly, two of the examinees claimed to have been denied their right to due process under the fourteenth amendment, since they had been refused passing scores on the exam due to the alleged arbitrariness of the bar examiners' grading standards. The third challenge was brought by the examiners themselves on cross-appeal, in which they raised the question of whether the review procedure avail-

1. Wisconsin, Mississippi, West Virginia, and Montana maintain a "diploma privilege," granting license to students who successfully complete the legal curriculum at schools so recognized in these states.

2. Petition of DeOrsey, 112 R.I. 536, 312 A.2d 720, 724-25 (1973).

3. *See* E. Bell, *Do Bar Examinations Serve a Useful Purpose?*, 57 A.B.A.J. 1215 (1971). *See also* Comment, *Admission To The Pennsylvania Bar: The Need For Sweeping Change*, 118 U. PA. L. REV. 945 (1970).

4. 540 F.2d 744 (4th Cir. 1976).

5. 42 U.S.C. §§ 2000e *et seq.* (1974).

able upon failure of the exam was sufficient to satisfy due process.[6]

The first challenge was to the job relatedness of the bar examination. The controversy centered on which standards the court should apply. The examinees conceded that Title VII by its own terms did not apply to the bar exam, presumably because the bar examiners were not thought to be an employment agency under Title VII's definition.[8] The examinees' efforts, however, were concentrated on convincing the court to utilize Title VII standards, even though the challenge was brought on constitutional grounds.[9] Generally, such standards would require that a validation study of the examination be conducted, as pointed out in *Douglas v. Hampton.*[10] Three specific techniques are commonly employed to prove the validity of testing procedures: criterion-related, construct, and content.[11] The *Richardson* court found that the bar examiners had failed to validate the examination by criterion-related procedures.[12] The

6. 540 F.2d at 746. The district court had abstained from deciding this issue, maintaining that such an issue should most properly be decided by the South Carolina Supreme Court.

7. 540 F.2d at 747.

8. 42 U.S.C. § 2000e(c) (1974). *See also* note 47 *infra.*

9. Title VII is used to enforce claims of employment discrimination brought under it. Between 1964 and 1972, public employers were not covered by Title VII requirements. This inequity was resolved when Congress enacted the Equal Opportunity Employment Act of 1972, Pub. L. No. 92-261, 86 Stat. 102 (1972). Due to the fact that some claims against public employers were filed prior to this amendment, thereby foreclosing such plaintiffs from direct Title VII relief, some courts utilized Title VII standards in dealing with constitutional claims. Simply put, upon the showing of disproportionate racial impact resulting from an employment exam, Title VII standards would go into effect.

10. 512 F.2d 976 (D.C. Cir. 1975).

11. *Id.* at 984. The *Douglas* court defines such techniques as follows:

> "Empirical" [or "criterion-related"] validity is demonstrated by identifying criteria that indicate successful job performance and then showing a correlation between test scores and those criteria. "Construct" validity is proven when an examination is structured to determine the degree to which applicants possess identifiable characteristics that have been determined to be important to successful job performance. "Content" validity is established when the content of the test closely approximates the tasks to be performed on the job by the applicant.

Studies developed by the American Psychological Association were used by the Equal Employment Opportunity Council (EEOC) in drawing up its guidelines for the review of such examinations. 29 C.F.R. §§ 1607.1 *et seq.* (1973). These guidelines are widely used and were approved by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

12. 540 F.2d at 746-47. As pointed out in the EEOC guidelines, criterion-related

question remaining was whether the examinees would be allowed to invoke the more probing Title VII standards in an equal protection challenge in order to invalidate the South Carolina bar examination.

The examinees relied on the Title VII requirements as set forth in *Walston v. County School Board.*[13] In that case a desegregation plan had been ordered for the county, to begin in the 1970-71 school year. Teachers were required to pass a certain test put out by the Educational Testing Service (ETS), even though ETS would not recommend that such a test be used as the sole determining factor for granting employment.[14] The *Walston* court decided that the school district's history of discrimination, together with an exam that disproportionately excluded blacks from teaching, allowed teachers to employ Title VII standards in challenging such an exam. The school board subsequently was unable to fulfill the criterion-related validity required in the use of such an exam.[15]

The *Richardson* court instead chose to rely on the requirements handed down recently by the Supreme Court in *Washington v. Davis.*[16] A fifth amendment due process challenge had been brought when a disproportionate number of blacks failed an exam that would have granted them participation in a District of Columbia police training course. The Court held that the invidious discrimination forbidden by the Constitution is not proven merely by a showing of disproportionate racial impact.[17] A racially discriminatory purpose must also be shown.[18] This more probing judicial review that is triggered in Title VII challenges by showing discriminatory racial impact was not required by the Court in constitutional challenges, absent a showing of discriminatory purpose in addition to discriminatory impact.[19] Since there was no proof that the test reflected such a discriminatory purpose in *Davis,* the constitu-

validity is to be utilized unless shown to be an infeasible undertaking, in which case construct validity is to be used. *See* 29 C.F.R. § 1607.5(a) (1973).

13. 492 F.2d 919 (4th Cir. 1974).

14. *Id.* at 921.

15. *Id.* at 924.

16. 426 U.S. 229 (1976).

17. *Id.* at 242. The Court qualified such an impact as follows: "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."

18. *Id.* at 239.

19. *Id.* at 247.

tional challenge failed. Although the *Richardson* examinees had shown the existence of a disproportionate racial impact,[20] the problem came when they attempted to prove purposeful discrimination. The examinees claimed that the untimely elimination of the diploma privilege, the reciprocity rule, and reading law[21] was purposefully brought about to prevent blacks from practicing law in South Carolina. The court viewed such evidence as merely circumstantial, accepting instead the bar examiners' contention that such measures had been taken to upgrade the quality of applicants accepted by the South Carolina State Bar.[22] Most importantly, the court acknowledged that there had been no contention by the examinees of prohibitive state laws or standards with respect to the practice of law by blacks.[23] Since the examinees could not show discriminatory purpose, the more probing judicial review of Title VII was unavailable to them. They were thereby relegated to attacking the constitutionality of the bar examination within the confines of the fourteenth amendment equal protection standard for job relatedness.

A fourteenth amendment equal protection analysis of a state's discriminatory conduct is performed by the use of either a strict scrutiny or a rational basis review.[24] Where suspect classifications are created or fundamental interests have been infringed upon, a strict scrutiny review is applied, whereby the state must show a compelling interest before its conduct will be upheld. Absent the creation of suspect classifications or infringement of fundamental interests, the proper standard of review is rational basis. Such review requires only that the classification proposed by the state bear a fair and substantial relationship to the legitimate purpose being effectuated.

Richardson looked to *Tyler v. Vickery*,[25] a bar examination

20. Taking all of the South Carolina bar examination applicants from 1968 to 1972, 95.4% of the whites passed, while only 55.6% of the blacks passed. Brief for Appellants at 3, Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976).

21. Each of these methods serves to avoid the taking of the bar exam. The diploma privilege grants admission to the bar upon successful completion of the school's legal curriculum. Reciprocity between participating states allows one state to accept another's attorneys into its own bar. Reading law under the supervision of an attorney would qualify the student, where permitted, to practice law.

22. 540 F.2d at 748 n.7.

23. *Id.* at 747.

24. *See, e.g.*, 60 MARQ. L. REV. 129, 131 n.15 (1976).

25. 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976). Even more

equal protection challenge in the fifth circuit, to determine which basis of review to apply. *Tyler* pointed out that the mere showing of disproportionate impact of the bar exam upon blacks was not enough to create a suspect classification.[26] Since discriminatory intent was not proven, strict judicial scrutiny was not appropriate. The *Tyler* court applied the rational basis review and found a rational relationship between the bar exam and the state's regulation of bar admissions.[27] Such a basis of review was adopted by the court in *Richardson.*

In *Richardson,* the bar examiners' attempts to relate exam questions to minimal legal competency helped to fulfill the requirements of the rational basis review. The court, however, placed substantial reliance on the testimony of two experts that content validity existed in the bar examination, thus satisfying the rational basis review. A claim of content validity must be viewed carefully in order to determine what tasks a test is said to be approximating. The professional standards employed by the American Psychological Association indicate that content validity can be "demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant."[28] The experts in *Richardson* claimed that the content validity of the bar exam was to be found in its approximation of tasks already performed in law school. However, the *Richardson* court indicated that the logic of such an interpretation of content validity, if carried too far, could result in looking merely to a student's performance in school as an adequate

recently, in Pettit v. Gingerich, 45 U.S.L.W. 2421 (D.C. Md. Feb. 22, 1977), the U.S. District Court for Maryland decided that an equal protection challenge to the bar exam, when there is shown to be a disproportionate impact on blacks, but no proof of discriminatory intent, will be subjected merely to a rational basis review.

26. 517 F.2d at 1099.

27. In Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S. Ct. 555 (1977), as in *Davis, supra* note 16, the Court stated that in an equal protection challenge, absent a showing of discriminatory intent, there can be no equal protection violation. In neither case did the Court explicitly state whether a rational basis review would still be available after the finding of no intent to discriminate and no consequent strict scrutiny review. But language in both cases can be construed to imply either a rational basis review or an examination to determine whether an inference of discriminatory intent can be drawn. *Tyler* and *Richardson,* on the other hand, clearly set out the entitlement of claimants to a rational basis review, despite a failure to show discriminatory intent. Whether such a distinction makes a practical difference in result remains to be seen.

28. 426 U.S. at 247 n.13. *See also* Douglas v. Hampton, 512 F.2d 976, 984 (D.C. Cir. 1975).

measure of tasks performed. At that point, the value of any bar exam might well become questionable.[29]

In its adherence to the rational basis review, *Richardson* could be said to have adopted the disapproving attitude of *Davis*[30] toward cases that called for a "demonstrably job related basis" of review.[31] Had such a basis of review been recognized and accepted, the bar examiners in *Richardson* would have had the heavy burden of coming forward "with convincing facts establishing a fit between the qualification and the job."[32] *Richardson* required only the minimum, the rational basis review; satisfaction of this review resulted in the successful defense of the bar exam from fourteenth amendment attack.

Richardson further acknowledged that to meet the demands of the fourteenth amendment's equal protection clause, a reasonable relationship between the passing score of 70 and minimal legal competency had to exist.[33] The bar examiners employed varied methods to assign scores to the exams. The court admitted that such subjectivity constituted an "unprofessional approach."[34] Yet, because the bar examiners did design their own questions and assigned their own judgmental scoring of minimal legal competency, the court said that the demands of equal protection had been satisfied.

Two of the examinees next contended that the bar examiners had arbitrarily applied their own standards in determining which of the examinees had actually passed or failed. Each examinee was graded by six bar examiners. A cumulative average was then determined, with the grade being rounded up to the next whole number if the grade was .5 or better. Following such standards, the two examinees should have passed, yet both of them failed. The reason presented was that despite

29. 540 F.2d at 749 n.11.

30. 426 U.S. at 44-45.

31. *See, e.g.*, Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). *See also* Comment, *Equal Protection Challenges to the Bar Examination*, 1975 ARIZ. ST. L.J. 531, wherein the author develops an argument for such a "demonstrably job related basis" of review, which he refers to as the "active rational basis" review. This third basis of review, utilized in some of the lower courts, is somewhat stronger than the rational basis of review. There may be legitimate state interests allegedly prompted by an exam, but if personal rights are in danger, courts which employ this third basis will put the burden on the state to prove demonstrably that such an exam is job related.

32. 459 F.2d at 732.

33. 540 F.2d at 749.

34. *Id.* at 750 n.14.

their "passing" cumulative scores, each examinee had failed in the grading by three or more examiners. When it was pointed out that certain examinees had failed only two examiners and were therefore deemed to have failed overall, the *Richardson* court decided that consistency was lacking.[35] Although the bar examiners contended that brief written comments from each examiner helped to explain these inconsistencies, the court concluded that the objectivity strived for with numerical grading had been undermined. The actions by the bar examiners were found to have been arbitrary and capricious.[36] The two examinees were ordered admitted to the South Carolina bar, for such actions violated their rights under the due process and equal protection clauses of the fourteenth amendment.

The court suggested that one method of dealing with such arbitrary applications of standards has been employed by North Carolina. Recent legislation has created statutory laws requiring most agencies in North Carolina to establish minimum procedural requirements in adopting, amending or repealing administrative rules.[37] If the bar examiners qualify as one of these agencies, then the standard the examiners would employ in their determination of passing grades would have to be filed with the Attorney General of North Carolina.[38] Not only would students then know what constitutes a passing grade, but they also would be informed by an announcement, should any change in the standard be forthcoming.

The third challenge in *Richardson* was brought before the fourth circuit by the examiners themselves, the district court having abstained with respect to this issue.[39] A determination was requested as to whether the lack of an "express provision

35. *Id.* at 751.

36. Attacking arbitrarily applied standards sometimes has strange results. *See* Petition of DeOrsey, 112 R.I. 536, 312 A.2d 720, 723 (1973), where one of the unsuccessful examinees pointed out to the court that eight previously unsuccessful examinees were admitted when the court allowed July 1972 exam standards to be applied to the February 1973 exam. Still, the court refused this examinee's request that the February 1973 exam standards be applied to the July 1972 exam, thereby denying him admission to the State Bar. *See also* Note, *Recourse of an Examinee Upon Failing the Bar Examination: A Bleak Affair*, 18 How. L.J. 808 (1975).

37. N.C. Administrative Procedure Act; N.C. GEN. STAT. ch. 150A (Cum. Supp. 1975).

38. *See* Comment, *The North Carolina Administrative Procedure Act — The Effect on the North Carolina Board of Law Examiners*, 7 N.C. CENT. L.J. 109 (1975).

39. 540 F.2d at 752.

for review"[40] was violative of the examinees' due process rights. Information gathered from bar examination procedures in forty-eight jurisdictions indicated that thirty-four of them made only a vague reference, if any, to review procedures.[41] The *Richardson* court recognized this paucity of information with respect to review procedures. Despite the examiners' claim that the state supreme court's inherent powers of review satisfied due process, *Richardson* also refrained from deciding the issue. Such a decision was left for the South Carolina Supreme Court, with the implication that such powers of review might be found to be insufficient to satisfy due process.[42]

The examiners further argued that the examinees' right to reexamination satisfied due process. In *Whitfield v. Illinois Board of Law Examiners,*[43] despite an examinee's failing the bar examination five times, his request to be allowed to review his exam paper and to compare it with model answers was rejected. Reexamination alone was held to be sufficient to satisfy due process requirements. Despite such advocacy of reexamination in *Whitfield, Richardson* maintained that "once is enough"[44] with respect to taking the bar exam. The court also took it upon itself to first bring up and then reject the argument that allowing examinees the opportunity for review would be burdensome for the bar examiners.[45] Perhaps in anticipation of adverse rulings on the issue of review, after the initiation of this suit the state had voluntarily established procedures for the review of failing papers.[46]

The barriers to a successful challenge of the bar examination are many. Unless such an attack can qualify under the requirements of a Title VII employment claim,[47] a regulation

40. *Id.*

41. *See* Comment, *Review of Failing Bar Examinations: Does Reexamination Satisfy Due Process?*, 52 B.U.L. REV. 286 (1972).

42. 540 F.2d at 752.

43. 504 F.2d 474 (7th Cir. 1974).

44. 540 F.2d at 752.

45. *But see* 504 F.2d at 478.

46. 540 F.2d at 752.

47. An argument can be made that the *Tyler* court gave too narrow an interpretation to the Title VII definition of "employment agency," thereby excluding bar examiners from Title VII challenges. The applicable section, 42 U.S.C. § 2000e(c) (1974) reads as follows:

> The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure employees opportunities to work for an employer and includes an agent of such a person.

which has a disproportionate racial impact must also be shown to have a discriminatory purpose to sustain an equal protection challenge. If purposeful discrimination cannot be shown, then disproportionate racial impact alone will, at best, trigger a rational basis standard of review, easily satisfied by bar examiners. Depending on the amount of inconsistency and subjectivity exhibited by the examiners in passing or failing examinees, there may be sufficient arbitrariness displayed to overturn a decision on individuals' entrance to the state bar. With respect to review procedures, personal review by the examinees themselves might well be required to satisfy due process, unless the state supreme court determines that its own inherent powers of review are sufficient.

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Labor Law—Collective Bargaining Agreements—Arbitration Required After Expiration of Contract—In the recent case of *Nolde Bros., Inc. v. Local 358, Bakery & Confectionary Workers Union,*[1] the Supreme Court held that a party to a collective bargaining agreement may be required to arbitrate a dispute concerning severance pay pursuant to the arbitration clause of the agreement, even though the dispute arose after the agreement terminated and after the employer went out of business at the plant employing the disputing employees. The Court decided that the employer's duty to arbitrate survived the termination of the agreement and extended to disputes which first arise after the employer-employee relationship had been completely severed.

However, *Nolde* leaves a major question unanswered: The majority opinion never states how the employer's legally enforceable obligation to arbitrate beyond the term of the contract arises. The Court has previously held that the duty imposed on parties to submit disputes to arbitration is founded in a collective bargaining agreement.[2] But in *Nolde* the dispute arose after the agreement had been terminated. Therefore, the

1. 97 S. Ct. 1067 (1977).

2. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); *see also* Hilton Davis Chem. Co., 185 N.L.R.B. 58 (1970), wherein the NLRB also states that a party's obligation to arbitrate arises out of a contract.