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When Job-Testing 'Fairness' Is Nothing but a Quota

By Linda S. Gottfredson

Supporters of the recently vetoed 1990 civil rights bill indignantly deny it was a quota bill. But the legislation would, in fact, have imposed quotas to a far greater extent than even its most ardent critics realized.

The problem is a redefinition of "test fairness" embedded not in the bill itself, but in its legislative history. This radical redefinition in the Senate Labor Committee's "Explanation of the Legislation," written in June, is the same one used earlier this year when the Equal Employment Opportunity Commission quietly filed suit against at least five Fortune 500 companies for *not* using disguised quotas for test results.

In internal memos, the EEOC acknowledged that the employment tests it challenged are not biased against blacks. It also acknowledged that they are job-related. The employers had thus met the EEOC's first requirement for demonstrating business necessity, as codified in its Uniform Guidelines on Employee Selection Procedures. The commission charged, instead, that the employers had failed a second requirement of the guidelines: Companies will fail the business necessity test if plaintiffs can show that an "alternative" procedure is available that is comparably job-related but has less adverse impact on minority hiring.

What "alternative" had these Fortune 500 companies overlooked? The EEOC pointed not to a different test, but to a race-conscious procedure for scoring the challenged tests.

Specifically, the test scores of black and Hispanic job applicants would be raised according to a formula that gives them bonus points based largely on the size of the average test score difference between black (or Hispanic) applicants and "others" (mostly whites and Asians). By this formula, the *worse* the black (and Hispanic) applicants perform as a group, the *more* bonus points they all individually receive. Typically, blacks scoring at the 16th and 50th percentiles, for example, would be boosted to the 46th and 82nd, respectively.

Such race-conscious "performance-based score adjustments"—which violate, rather than honor, the principle of merit—come disguised by a pseudo-scientific rationale: On any existing test, some job applicants whose low test scores predict they will be poor workers would, if hired, actually turn out to be good workers (defined as performing above some minimally acceptable level on the job). When these prediction errors occur disproportionately among blacks and Hispanics as a group, the rationale continues, race-based score adjustments are needed.

No test can predict job performance perfectly (though job-related tests generally produce fewer errors than other selection procedures do). Individual applicants of any race with the same low test scores have the same risk of being mispredicted as poor workers. No one, of course, has suggested that the scores of low-scoring whites or Asians be adjusted.

The EEOC's chief psychologist, Donald Schwartz, claims in a memo that "the Uniform Guidelines . . . address only the need to ensure the fair use of selection procedures, not the unbiased use of these procedures." What matters now, in other words, are equal results, not race-neutral treatment.

This radical redefinition of fairness turns the traditional definition on its head, because it requires bias against whites in order to achieve "fairness" toward minorities. By the "performance-based score adjustment" standard, an unbiased test will *always* be "unfair" whenever racial groups differ in average test scores. More to the point, because racial differences show up on most unbiased job-related tests, virtually all unbiased job-related tests will be "unfair" by the new definition. Procedures that passed the old standard can be guaranteed to flunk the new standard whenever they have adverse impact—which they usually do.

In one sense the EEOC's "new" definition is not new. Many test experts rejected it more than a decade ago for being a quota system as well as technically flawed. When the theory was resurrected a year ago by a committee of the National Academy of Sciences to justify the use of race-based score adjustments by state employment agencies for making job referrals, leading test experts labeled it "rhetorical camouflage," "statistical legerdemain," "race-norming" and an "intellectually dishonest" effort to support racial preferences in hiring.

The EEOC has seized upon this discredited definition of fairness to create the illusion that unbiased job-related tests are unfair whenever a minority group performs more poorly on them ("without appropriate adjustments" such tests fail to meet "the requirements of . . . the Uniform Guidelines," is how it's phrased in one memo). Moreover, it claims that such tests can be transformed into an acceptable "alternative" by simply changing the test results for job candidates from EEOC-endorsed racial subgroups ("the use of adjusted test battery scores is . . . an acceptable alternative selection procedure to the use of unadjusted test battery scores").

This sounds a lot like the Senate Committee's June report on the 1990 civil rights bill, which states that a "demonstration of business necessity must deal not only with the subject matter of the test or job requirement, but also with the manner in which it is used." Echoing the EEOC's definition of fairness, the Senate report states that "where qualified black workers fail a test at a higher rate than whites who are equally good workers . . . such a test is not required [justified] by business necessity."

A job-related test would no longer be defensible if its color-blind use results in proportionately more such mispredictions for "poor" workers among blacks and Hispanics. While the Senate report does not explicitly say so, under the new definition the only way to make such tests—virtually all job-related tests—defensible would be to score them in a race-conscious manner.

Courts often are urged to read the legislative intent embedded in the history of a law. They will certainly be asked to do so with any new civil rights act. Should the redefinition of fairness be retained in the legislative history of the next bill, the bill's passage would codify the license the EEOC is already taking to mandate quotas for employment test results.

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Letters to the Editor

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'Race-Norming' Is Against Our Policy

Linda S. Gottfredson's Dec. 6 editorial-page article, "When Job-Testing 'Fairness' Is Nothing but a Quota," is a useful reminder of the extreme attempts made to justify racial preferences. Ms. Gottfredson errs, however, in implying that the U.S. Equal Employment Opportunity Commission (EEOC) endorses such divisive, condescending and inequitable policies. We are well aware of "race-norming" advocacy that both scholarly psychometric studies and common-sense observations justifiably denounce.

Unlike the police chief in "Casablanca" who professed to be shocked to learn about gambling at Rick's, we do know that policies promoting race and gender preferences have come about in the 25 years that EEOC has enforced Title VII. In the course of the search for justice, governmental policies clearly have gone awry; de facto quotas exist now, and the 1990 Civil Rights Act would have touched off a quota explosion, forever embedding them in our employment practices and other spheres of life.

Ms. Gottfredson errs in maintaining that the EEOC has "quietly filed suit against at least five Fortune 500 companies for *not* using disguised quotas for test results." The EEOC has not filed suit and is now investigating certain employment practices in these companies. We have, for some time now, been reviewing our settlements and conciliations to ensure that the relief provided is free of preferential treatment. We wish to make clear that altering test scores to favor a particular group is not a legal or "less discriminatory alternative." Of course, this would be unfair to everyone involved—employees as well as employers. The radical redefinition of fairness that Ms. Gottfredson describes is in no way agency policy.

This commission stands for aggressive law enforcement that protects individuals from illegal discrimination. The vitality of civil-rights enforcement should not be measured by the preferences given different groups.

Evan J. Kemp Jr.
Chairman
Equal Employment
Opportunity Commission
Washington

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EEOC Is Too Evasive On Minority Test Issue

Does the buck stop anywhere anymore? Equal Employment Opportunity Commission Chairman Evan J. Kemp Jr.'s Dec. 20 letter to the editor responding to Linda S. Gottfredson's Dec. 6 editorial-page article on job-testing and fairness is to be applauded for reasserting colorblind principles and emphatically rejecting quotas. But it left hanging the question of how, if inflating minority test scores via "race-norming" is so contrary to EEOC policy, as he claims, EEOC memos came to be written laying the groundwork for such a policy. For that matter, it also failed to account for the history of promoting quotas that Mr. Kemp conceded has led, under EEOC enforcement, to the de facto quotas that now exist. Does this history, right up until the present, stem from the fact that announced EEOC policy has little relation to actual EEOC practice? One wonders if EEOC commissioners tacitly condone endless pseudoscientific and pseudolegalistic probing for weaknesses in our resistance to quotas.

Mr. Kemp's letter would have been more reassuring if it had been signed by all five EEOC commissioners, and if it had not taken refuge behind the technical distinction between "fil[ing] suit against" (as Ms. Gottfredson misstated) and "investigating" the five Fortune 500 companies in question. Companies rightly regard such investigations, which entail a discovery process that apparently confused Ms. Gottfredson's informants, as a prelude to a suit unless settled, as they usually are, out of court. Mr. Kemp was, therefore, less than forthcoming by failing to account for such actions and by dodging Ms. Gottfredson's criticism by not using "but" instead of "and" in the peculiar sentence: "The EEOC has not filed suit and is now investigating certain employment practices in these companies."

The chairman's letter lacks the forthrightness of EEOC spokesman Jim Lafferty's response, reported by Peter A. Brown on Dec. 7 in the Washington Times: "Much of what she [Ms. Gottfredson] says is true," and therefore it leaves those of us uneasy who recall the similar 10-year "race-norming" of employment tests by the U.S. Employment Service. Rather than return to colorblind scoring of the well-researched and useful General Aptitude Test Battery after "race-norming" was challenged by the Justice Department, the Labor Department, under the urging of its deputy assistant secretary, John Flores, found an excuse to suspend the battery altogether. One must ask where this administration stands when such fundamental questions are dealt with so evasively.

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