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CIVIL RIGHTS LEGISLATION: GETTING BLACK EXECUTIVES OFF FIRST BASE IN PROFESSIONAL TEAM-SPORTS

INTRODUCTION

In the twenty-two years since the passage of the Civil Rights Act of 1964\(^1\) most major industries have opened their doors to Black executives.\(^2\) Not only are Black executives being hired, but many major corporations actively recruit\(^3\) Blacks to fill meaningful positions in corporate America. It is no longer surprising to find Black executives filling positions such as president, vice-president, or general counsel of major corporations and firms. It would be unrealistic, however, to believe that this social phenomenon would have occurred in the absence of civil rights legislation.\(^4\)

Issues in executive and professional employment cases differ in certain important respects from those confronted in lower level employment cases. There is judicial concern for the close working relationships required between executive employees and employers. Over the past two decades, courts have gone far in their interpretations of civil rights legislation to ensure Black participation throughout the work force. As a result, Blacks have gained access to businesses, industries and crafts traditionally closed to them. Black

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\(^2\) For simplicity, this Note refers primarily to Black executives. The discussion, however, is intended to apply to all racial and ethnic groups historically subjected to extreme intentional discrimination. The terms "executive" denotes that the minority person is qualified on the basis of education and experience.

\(^3\) Firms which recruit Black executives may be doing so pursuant to an affirmative action program.

\(^4\) See U.S. Const. amend. XIV (states can not deny their citizen's equal protection of the laws); 42 U.S.C. § 1981 (1982). This section was a part of the Civil Rights Act of 1866, and has been used to redress employment discrimination based on race, alienage, and national origin. It serves to assure all persons equal contractual rights. Section 1981 is not applicable to discrimination based on sex. See also 42 U.S.C. § 1983 (1982). This section was a part of the Civil Rights Act of 1871, applicable to persons acting "under color of state law" to deprive others of federal rights including employment opportunities.
executives, however, have made only limited progress in gaining access to meaningful positions\(^5\) in certain industries, notably professional team-sports.\(^6\)

It is surprising to find relatively few Black executives\(^7\) in an industry whose work force consists primarily of Black athletes.\(^8\) This absence of Black executives in professional sports should concern many people. Questions are being posed, as to whether general employment principles are properly applicable to the sports business, or whether the sports industry in fact enjoys a special status similar to baseball's antitrust exemption. With the growing number of Blacks achieving the educational standards as well as the practical experience required for executive positions, it is foreseeable that the professional team-sport industry will soon face challenges to its executive employment decisions.

This Note addresses inherent problems in applying traditional Title VII standards to executive employment discrimination cases. Part I discusses organizational similarities that exist among the various team-sport leagues. Part II examines the scope and application of Title VII as enunciated by Congress and the Supreme Court. Part III illustrates how the traditional standards, developed in lower level employment cases, have been construed and applied in executive discrimination cases. Part IV concludes that although important standards of Title VII have been distorted, and leniently applied in upper level employment cases because of the subjectivity of the criteria, the Civil Rights Act of 1964 remains viable for redressing employment discrimination, even against executives.

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\(^5\) Although no attempt is made to define the term "meaningful positions" as used here, it represents a job which combines an above average salary and the authority to make important decisions having some effect on the business or industry.

\(^6\) This Note focuses on the three major professional team-sports, football, baseball, and basketball. The discussion in general is applicable to all professional team-sports as well as other businesses or industries, which employ executive or professional employees.

\(^7\) Burwell, Scoring in the Front Office, BLACK ENTERPRISE, July 1985, at 43. Black executives in the professional team-sports industry include: Hank Aaron, Manager of the Atlanta Braves minor league teams; Gene Burrough, general manager of the now defunct USFL Houston Gamblers; Paul "Jack" Younger, Assistant General Manager, Washington Redskins; Wayne Embry, vice president and board member, Milwaukee Bucks; Al Attles, general manager, Golden State Warriors.

\(^8\) Id. at 44. Of the three major team sports, 30% of the professional baseball players of the 26 major league baseball teams are Black; Of the 28 professional football teams, more than 57% of their players are Black; more than 80% of the players on the 23 National Basketball Association teams are Black.
I. THE PROFESSIONAL SPORTS INDUSTRY

Before proceeding to analyze the extent and applicability of Title VII to Black sports executives, a general review of the characteristics of the leagues comprising the professional sports industry is appropriate.

The professional team-sports industry is composed of various individual leagues. The structure of professional sport leagues is difficult to generalize. The most interested observer only vaguely understands how they work, while courts of law struggle to define them in legal terms. The terms monopoly, cartel, joint venture, partnership, or a group of competitors have all been attempted. The leagues comprising the sports industry have some distinct organizational similarities, but also there exist subtle differences.

A good starting point is the owners and players. Their collective interests are generally asserted through leagues or associations, clubs, player associations or unions. Another major similarity prevalent throughout the sports industry is the commissioner or president.

Individual leagues and associations characterize the basic corporate structure. This component of the professional sports industry divides up territories, allocates exclusive franchises and shares revenues, to varying extents. Usually the major resource shared within a league or association is its players. The leagues depend upon television rights and gate receipts as their major source of revenues.

The relationship between a league and the clubs within that league is an uneasy one to say the least. The league is presented as the unifying and authoritative organization for the various clubs. Each club within a league has one vote. Nevertheless, it must be remembered that the clubs are individual business entities. They take risks and are ultimately responsible only to themselves for turning a profit or incurring a loss. This has caused both business and legal problems for the leagues.

The organizational structures of clubs and leagues are similar to other large corporations or businesses. It is within these two organizations that the absence of Black executives is most noticeable. Some professional club owners justify the absence of Black executives at these levels by alluding to clubs' and leagues' organizational structure as being familial in nature. Whether this characterization

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* The leagues considered here are: the National Basketball Association; Major League Baseball, American and National Leagues; the National Football League and the former United States Football League.
justifies the exclusion of Black executives is questionable at best.

Clubs and leagues generally reflect the owners’ interests. Professional athletes, however, rely primarily on unions and player associations to protect their rights. These organizations have received much attention because of their collective bargaining power, but neither the player associations nor the unions have made any significant effort to bring to the forefront the issue of the absence of Black executives in the sporting industry. The last major similarity among the various sports leagues is the commissioner or president. The power and status of this individual varies from league to league. Some observers see the commissioner as a buffer between players and owners, while others view him as a part of management.

Despite the similarities and differences existing throughout the professional sports industry, it is commonly accepted that professional team-sports is big business. Although no individual club would qualify as a member of the “Fortune 500,” the industry as a whole fits well within this group, and the professional team-sports industry ranks among the major businesses in America today. The sports industry is within the purview of Title VII of the Civil Rights Act of 1964. The general posits of Title VII ban intentional discrimination on all job levels. However, recent legal developments call into question whether the principles applied to assure lower level jobs will be applied to protect Black executives from discrimination while seeking upper level positions.

II. A GENERAL TITLE VII FRAMEWORK

Aggressive efforts to combat discrimination in employment did not begin until the passage of Title VII of the Civil Rights Act of 1964. At first, these efforts were usually aimed at lower level jobs, which represented the great bulk of employment opportunity. Nevertheless, Congress in 1972 expanded Title VII to include both academic institutions and public, as well as private, employment.

Today, the coverage of Title VII of the Civil Rights Act of 1964, as amended, extends as far as Congress’ possible reach under its authority to regulate commerce. This coverage, however, depends

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11 Id.
12 See supra note 1.
16 U.S. Const. art. I, § 8 cl. 3. Since the early 19th century the Supreme Court has
on a statutory definition given to “an industry affecting commerce,”\textsuperscript{17} and the responsibility for defining this term ultimately rests with the courts. This responsibility gives the courts much greater latitude in determining under what circumstances Title VII will be applicable.

The Civil Rights Act defines the term “employer” broadly.\textsuperscript{18} The statute however, is applicable only to employers who have fifteen or more employees on each working day of twenty or more calendar weeks in the current or preceding calendar year.\textsuperscript{19} In drafting Title VII, Congress did provide exemptions\textsuperscript{20} for certain employers. Consequently, the law allows employers to impose hiring restrictions based on sex, national origin, or religion, but not on race, if such characteristics are bona fide occupational qualifications.\textsuperscript{21}

Since the enactment of Title VII, individuals have relied extensively on it to challenge allegedly discriminatory employment practices. Under Title VII a claimant must meet certain procedural requirements to file charges and must also have pursued appropriate state and federal administrative remedies before initiating a federal lawsuit.\textsuperscript{22} Furthermore, there is no absolute right to a federal trial under Title VII.\textsuperscript{23} Assuming that a plaintiff satisfies the procedural requisites, there still remains the difficult task of proving that specific employment practices have violated the statute. Thereafter, the plaintiff has the burden of establishing an initial or prima facie case defined and redefined Congress’ power to regulate commerce. At the present the power to regulate commerce is extremely broad, although not limitless.

\textsuperscript{17} 42 U.S.C. § 2000e(g)-(h) (1982). Courts have defined industry affecting commerce in two parts: commerce is defined broadly to include trade, transportation or communication among or between the states and a point outside it. It also includes any activity that would hinder or obstruct commerce.

\textsuperscript{18} 42 U.S.C. § 2000e(b) (1982).

\textsuperscript{19} 42 U.S.C. § 2000e(b),(f)-2 (1982). The term “employee” is defined as an individual employed by an employer. This would appear to exclude applicants for employment; nevertheless, this omission is insignificant, since under Title VII it is unlawful to refuse to hire “any individual” on the basis of race, color, religion, sex, or national origin.


\textsuperscript{22} 42 U.S.C. § 2000e-5(b) (1982).

\textsuperscript{23} Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982). Courts have relied on the doctrine of res judicata in holding that an individual cannot maintain a federal civil rights action when the claim has been reviewed by the state judiciary. See also Gonzales v. Alpine Country Club, 727 F.2d 27 (1st Cir. 1984). The full faith and credit clause precludes de novo consideration of Title VII cases where decision on questions has been reached in state court.
of discrimination.\textsuperscript{24}

The courts have developed two theories for assessing the merits of employment discrimination cases. When a plaintiff asserts discriminatory treatment\textsuperscript{25} because of race, sex, national origin, or religion, proof of the employer's discriminatory motive is required. However, where neutral policies with a "disparate impact"\textsuperscript{26} on Blacks are challenged, no proof of discriminatory intent is required.

For purposes of this Note, the assumption will be made that the sports industry employs neutral policies that have a disparate impact on Black executives. Pursuing this doctrine, the Supreme Court in \textit{Griggs v. Duke Power Co.}\textsuperscript{27} ruled that employment policies having a disparate impact on Blacks were unlawful unless the employer could show that those policies were job-related and justified by "business necessity."\textsuperscript{28}

It would be difficult for the sports industry to satisfy the \textit{Griggs} standards. Under \textit{Griggs} an employer may not rely on proof that the selection practices employed reflect a legitimate business purpose and are consistent with general practices within the industry. The business necessity doctrine requires the employer to demonstrate "that the practice was necessary to the safe and efficient operation of the business."\textsuperscript{29} Even if the employer satisfies the burden of demonstrating a compelling business necessity for the discriminatory practice, the plaintiff may still prevail by showing that the employer's legitimate interest could be served by less discriminatory means.\textsuperscript{30}

Another approach used in Title VII litigation is a claim of "disparate treatment."\textsuperscript{31} This approach differs substantially from disparate impact cases. In order to establish a prima facie case in connection

\textsuperscript{24} Prima facie case raises an inference of discrimination, which if unexplained, is "more likely than not based on the consideration of impermissible factors." \textit{Furnco Constr. Corp. v. Waters}, 438 U.S. 567, 577 (1978).


\textsuperscript{26} A "disparate impact" case is one in which the plaintiff alleges that a facially neutral test or employment criterion which disproportionally disqualifies a protected class from employment, promotion, or other opportunity is not job-related. \textit{See id. at 432} (Congress was concerned with the consequences of employment practices, not just motivation).

\textsuperscript{27} 401 U.S. 424 (1971).

\textsuperscript{28} \textit{id.} at 431.

\textsuperscript{29} \textit{Robinson v. Lorillard Corp.}, 444 F.2d. 791, 798 (4th Cir.), cert. denied, 404 U.S. 1006 (1971).


\textsuperscript{31} \textit{Jones v. International Paper Co.}, 720 F.2d 496 (1983) ("disparate treatment" occurs where employer simply treats some people less favorably than others because of their race). \textit{See also} \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792 (1977).
with hiring under this approach, the plaintiff must first demonstrate that he is a member of a protected group under Title VII. The plaintiff must then show that he applied for a job for which he was qualified and was rejected despite such qualifications. In addition, the plaintiff must also show that the position remained open after his rejection and that the employer continued to seek applicants of the plaintiff's qualifications.\(^{32}\)

Once a prima facie case of disparate treatment is established, the employer can rebut the inference of discrimination by specifying a nondiscriminatory reason for the action. If the employer is successful in rebutting the inference of discrimination, the plaintiff will then be given an opportunity to prove that the asserted legitimate reason was a mere pretext for discrimination.

In disparate treatment cases, the employer is not required to accord preference to minorities or women among equally qualified applicants.\(^{33}\) The employer need only explain clearly and specifically the nondiscriminatory reasons for the action.\(^{34}\) The plaintiff carries the burden of persuasion to prove intentional discrimination by a preponderance of the evidence.\(^{35}\)

III. JUDICIAL VIEW OF EXECUTIVE TITLE VII CHALLENGES

The Supreme Court has not upheld a different standard for determining discrimination in upper level jobs as opposed to lower level employment practices. However, some courts have shown a far greater leniency when presented with cases alleging discrimination by executive or professional employers than by lower level employers. In Faro v. New York Univ.,\(^{38}\) a sex discrimination case, the court stated that, "[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."\(^{37}\)

The court in Faro seemed hostile to the Title VII claim, describing the plaintiff as a "modern day Jeanne d'Arc fighting for the right of womanhood on an academic battlefield, facing a solid phalanx of

\(^{32}\) 411 U.S. at 802.

\(^{33}\) See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Lee v. Washington City Bd. of Educ., 625 F.2d 1235 (5th Cir. 1980).

\(^{34}\) McDonnell Douglas Corp., 411 U.S. at 802.

\(^{35}\) Id.

\(^{36}\) 502 F.2d 1229 (2d Cir. 1974).

\(^{37}\) Id. at 1231-32.
men and male prejudice.”

*Townsend v. Nassau County Medical Center* is another example of judicial deference to executive or professional employers. In *Townsend*, a Black female blood bank technician brought a Title VII action to obtain reinstatement and back pay after she was disqualified from continuing to hold her former position because she failed to obtain a college degree and failed to pass an examination. The court, in dictum, seemed to be in favor of relaxing the standards for degree requirements for professional jobs.

The requirements of a college degree particularly in the sciences, seems to be in the modern day of advanced scientific method, a neutral requirement for the protection of the public. No doubt such a requirement could serve as a pretext for racial or sexual discrimination, but this consequence should not be assumed.

In most executive or professional level cases, the traditional Title VII standards as enumerated in *Griggs* and its progeny are purportedly applied, but liability is generally denied. A review of upper level employment cases leads to the conclusion that courts are tacitly applying a different standard to executive employers than to lower level employers.

Even in the most difficult cases involving lower level employment, the courts have traditionally been willing to assess an applicant's qualification in resolving claims of discrimination. In contrast, courts in upper level cases often profess a lack of expertise and refuse to assess an applicant's qualifications. In addition, courts also tend to be reluctant to allow discovery which would make such assessment possible. As a result, it seems virtually impossible for an individual Black executive suing a sports league to win, since proof in such a case involves a prohibitively difficult showing that the employer has subjected comparably qualified individuals of different races to different treatment.

The manner in which courts deal with certain key procedural is-

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58 Id. at 1231.
59 558 F.2d 117 (2d Cir. 1977).
60 Id. at 120.
sues also reflects judicial reluctance to interfere with executive employment practices. For instance, in determining the plaintiff's right to relief, courts seem to weigh different equities in executive employment cases than in lower level cases. In Albemarle Paper Co. v. Moody, a lower level employment case, the Supreme Court held that once liability is determined, the victim of discrimination has a right to "make whole relief." This includes placement in the job position they were denied because of discrimination. Nonetheless, in EEOC v. Kallin, Phillips, Ross, Inc., an executive level discrimination case, the court after determining liability granted the plaintiff back pay, but denied reinstatement. The court's reasoning follows: "[t]he employee's job required a close working relationship between her and top executives of the employer and the three and a half years of bitter litigation destroyed the possibility of a relationship with trust and confidence between the employee and employer, the employee is not entitled to reinstatement." Furthermore, potential litigants may find it difficult to file class actions against executive employers.

IV. SUBJECTIVITY AND THE DISPARATE DOCTRINES

Under the disparate treatment doctrine, an inference of intentional discrimination arises when an employer treats comparably qualified persons of different races differently. The employer can rebut this inference by explaining the reasons for his employment decision. Should the employer's rebuttal prove successful, the employee is then given the opportunity to show that the employer's explanation is a pretext for a discriminatory motive, and thereby prevail. On the other hand the disparate impact doctrine disregards the issue of discriminatory motive and treats all employment tests or other selection devices that have adverse racial impact as unlawful discrimination per se, unless the employer shows the job-relatedness and business necessity for such devices.

44 422 U.S. 405 (1975).
47 Id. at 920.
49 See supra note 33 and accompanying text.
50 See supra note 29.
These doctrines impose heavy burdens on employers to justify objective criteria that have a racial impact on lower level employees. Courts in lower level employment discrimination cases have consistently struck down objective criteria\textsuperscript{51} in the absence of convincing evidence of job-relatedness and business necessity. In executive or employment cases involving objective criteria having a racial impact, however, courts have taken a different approach.\textsuperscript{52} Applying a significantly softer standard, courts have been willing to accept evidence of criteria commonly used throughout the business or industry as persuasive,\textsuperscript{53} although such evidence carries no weight in lower level employment cases. Some lower federal courts seem to be disregarding the consequences of objective criteria while applying a "legitimate business purpose" test. This is contrary to the approach used in *Griggs* where the Court stated that the consequences of certain employment practices were more important than the motivation.\textsuperscript{54} The Court there also rejected the legitimate business purpose test.\textsuperscript{55}

The scrutiny applied to subjective criteria is much more important than that applied to objective criteria in executive employment cases under Title VII. Objective criteria such as educational and experience requirements usually are the minimum qualifications for executive employment. Courts often assume that the minimal objective criteria have been met, and are considered as part of an overall subjective assessment. This overall subjective assessment is generally based on interviews, previous educational performance and prior work experience.

Subjective criteria having a racial impact have generally been condemned in lower level employment cases.\textsuperscript{56} Nevertheless, employers

\begin{footnotes}
\item[52] See B. Schlei & P. Grossman, *Employment Discrimination Law* 40-41 (Supp. 1979) (objective criteria tend to be struck down in lower level and upheld in upper level job cases).
\item[54] 401 U.S. at 432 (1971).
\item[55] Id.
\item[56] See, Albermarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975) (criticizing subjective rating system as "extremely vague and fatally open to divergent interpretation"); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972) (subjective criteria are mechanisms for discrimination against Blacks).
\end{footnotes}
of upper level executives are allowed to use broad subjective criteria in hiring employees. One striking example is found in Pierce v. Owens-Corning Fiberglass Corp.\(^\text{57}\) There, the court upheld the use of subjective criteria to rebut the plaintiff's prima facie case. In Pierce seven people applied for an opening as an engineer. Plaintiff was the only Black applicant.

Plaintiff was denied the job even though he performed well on the practical test, although not receiving the highest score, and possessed more experience than the white applicant ultimately hired. Plaintiff made out a prima facie case by showing that the employer on a previous occasion had hired a white who had just quit his job because he could not get along with his supervisor.

The employer rebutted plaintiff's prima facie case by showing that, while plaintiff had more experience than the white applicant hired, the white applicant produced glowing letters of recommendation, was responsive and forthright in answering questions during interview, demonstrated initiative by taking night classes on his own time and had an employment history indicating no problems in dealing with supervisors, whereas the Black applicant was rambling and unresponsive in answering interview questions, had no letter of recommendation, did not show initiative in use of personal time and openly admitted leaving his previous job because he could not get along with his supervisor. The court found these subjective evaluations to be valid and not discriminatory per se.\(^\text{58}\)

In another upper level employment case, Phillips v. Amoco Oil Co.,\(^\text{59}\) the court upheld a highly subjective decision-making process which rejected a Black applicant who scored higher on the pre-employment examination than some applicants who were hired.

- The lenient standards applied to upper level subjective criteria effectively allow interviewers and hiring officials to judge the employability of Black candidates without restraint. Whether racial bias, consciously or unconsciously, enters into the decision is irrelevant under such standards. This is exactly the kind of criteria condemned by the Court in Albermarle.\(^\text{60}\)

The traditional doctrines of disparate impact and disparate treatment are still very important in assessing employment discrimination cases. Substantial differences exist in these doctrines. Since it is more difficult to prove discrimination involving disparate treatment

\(^{57}\) 30 Fair Employment Practice 53 (1982).
\(^{58}\) Id. at 56.
\(^{59}\) 34 Fair Employment Practice 137 (1982).
\(^{60}\) 422 U.S. at 433.
than disparate impact, it is important that the underlying facts of a potential claim be carefully considered. Whether a court's assessment of the nature of the charge is outcome determinative is an open question at present. The distinction between disparate treatment and disparate impact is not always clear. There are differences of opinion among Supreme Court justices\footnote{See Connecticut v. Teal, 457 U.S. 440 (1982)(majority and dissenting opinions).} and among lower federal courts\footnote{Compare William v. Colorado Springs School Dist. No. 11, 641 F.2d 835, 839-42 (10th Cir. 1981) with Wilkins v. University of Houston, 654 F.2d 388, 394-405 (5th Cir. 1981). See also Peters v. Lieuillant, 693 F.2d 966 (9th Cir. 1982).} regarding what constitutes disparate treatment in contrast to disparate impact. Moreover, legal principles regarding the burden of proof in disparate treatment cases are still evolving.\footnote{See Evans v. Harnett County Bd. of Educ., 684 F.2d 304, 307 (4th Cir. 1982); Lee v. Russell City Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982).}

Both doctrines continue to suffer from important similarities. These consist of three analytically distinct parts: plaintiff's prima facie case, defendant's defense and plaintiff's response. The factors accepted as necessary for making out a prima facie case under disparate treatment are flexible and not uniformly applicable in differing factual situations.\footnote{McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (factors are (i) that he belonged to a racial minority, (ii) that he applied and was qualified for a job for which the employer was seeking applicants, (iii) that despite his qualifications he was rejected, and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications).} Neither approach requires a showing of discriminatory intent and it is conceivable that the two doctrines may be used simultaneously with appropriate facts in a given fact situation. Justice Marshall's concurring opinion in Furnco Construction Corp. v. Waters,\footnote{438 U.S. 567, 582-83 (1978).} seems to suggest such an approach.

**Conclusion**

The Supreme Court has not confronted the issue of determining which Title VII standards and rules should apply to discrimination cases involving Black executives. Lower federal courts have seemingly begun to distort these standards in discrimination cases involving executive and professional employees. Given the fact that executive positions have unique characteristics, resolution of these discrimination actions becomes all the more difficult. Many courts feel that subjective evaluation criteria are inescapable in the context of executive or professional employment.\footnote{Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir.), vacated on...}
Executive Employment Discrimination

Broad general rules developed to deal with lower level Title VII cases may not always be applicable to executive employment cases. Nevertheless, Title VII remains important to Black executives seeking upper level employment. Application of Title VII principles established in lower level employment cases is proper if due consideration is given to the unique considerations that necessarily go into executive employment decisions.

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other grounds, 423 U.S. 809, reinstated with modification, 526 F.2d 722 (8th Cir. 1975). See, e.g., EEOC v. E.I. du Pont de Nemours, 445 F. Supp. 223, 254 (D. Del. 1978) ("[i]t is true that defendant's procedures leave room for the exercise of subjective judgment in the evaluation of potential candidates for both above career level and supervisory jobs but this fact alone does not make them unlawful. Indeed, it would not be feasible to eliminate subjective criteria from the selection process for jobs at these levels."); Frink v. United States Navy, 16 Fair Employment Practice 67, 69-70 (E.D. Pa. 1977) ("[t]he position in question [naval architect] is fairly sophisticated and technical unlike the occupations often encountered in Title VII cases. Consequently, in selecting employees for promotion, subjective and technical factors necessarily must be considered.")