

# Publications

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## Federal Court Dismisses EEOC Title VII Disparate Impact Suit Over Alleged Discriminatory Background Checks Without Trial

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On August 9, 2013, a federal district court judge in Maryland dismissed, without a trial, the Equal Employment Opportunity Commission's (EEOC) Title VII suit against Freeman over alleged discriminatory background checks based largely on fatal flaws in the EEOC's expert report—described by the court as “an egregious example of scientific dishonesty.”<sup>1</sup> The opinion acknowledges the legitimate, even “essential,” business reasons for conducting criminal background checks and highlights significant challenges the EEOC faces when prosecuting such suits. Although the court did not slam the door shut on the EEOC's ability to challenge background checks in general, an appeal to the U.S. Court of Appeals for the Fourth Circuit seems likely. Because the EEOC remains focused on background checks<sup>2</sup> – on June 11, 2013, it filed two new criminal record lawsuits, one in South Carolina and one in Illinois<sup>3</sup> – the court's opinion merits careful study.

Below, we summarize the court's opinion, with an emphasis on how the court construed the governing legal standard under Title VII, including the court's flat-out rejection of the EEOC's central premise that, because of disproportionate conviction rates, *any* consideration of criminal or credit background checks has an unlawful disparate impact. In the court's words, the mere consideration of such information is not a matter of concern under Title VII, but what *is* important is the specific information an employer uses and how it uses that information.

Although we do not discuss related considerations, such as the proliferation of new state law criminal history restrictions, employers should continue to stay abreast of state law and local developments.<sup>4</sup>

### Freeman's Background Screening Program

The defendant-employer ordered different types of background checks for different positions. For some, the company ordered only a criminal check and verification of the applicant's Social Security number. (For “credit sensitive” positions, the company had ordered a credit check, but after the suit was filed, it stopped doing so.) For other positions, such as general managers and department heads, the company added education and credential checks.<sup>5</sup>

The company's job application included a question about prior convictions, and stated that a “conviction does not automatically mean you will not be offered a job.” Rather: “What you were convicted of, the circumstances surrounding the conviction and how long ago the conviction occurred are important considerations in determining your eligibility. Give all the facts, so that a fair decision can be made.” Space was provided for the applicant to provide an answer. The company did not consider arrest records, but it did consider outstanding warrants, and it limited its consideration of conviction records to seven years.

The company conducted post-offer background checks and cited a variety of reasons for conducting the checks, presenting the court with evidence that the company had experienced serious problems facing many employers, including theft, embezzlement, drug use and workplace violence. The company designed its background check program with five goals in mind: (1) avoid exposure to negligent hiring/retention lawsuits; (2) increase the security of

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the company's assets and employees; (3) reduce liability from inconsistent hiring or screening practices; (4) proactively reduce the risk of employee-related loss; and (5) mitigate the likelihood of an adverse incident occurring on company property that could jeopardize customer or employee confidence.

The company used a *multi-step* evaluation process when considering any criminal records. First, it determined whether the applicant honestly disclosed prior convictions on the application and "automatically disqualified" applicants for dishonesty. Applicants with outstanding warrants were provided an opportunity to resolve the matter and have the warrant withdrawn. Finally, the company evaluated whether the criminal conduct underlying a particular conviction made the applicant "unsuitable for employment." The company stated that it was particularly concerned about and disqualified applicants with convictions involving violence, destruction of private property, sexual misconduct, felony drug convictions and job-related misdemeanors.

### **Procedural Background of the EEOC's Lawsuit**

In October 2009, the EEOC filed suit against the company, alleging that it engaged in an ongoing pattern and practice of discriminating against African Americans, Hispanics, and male applicants by examining their criminal reports and against African Americans by examining their credit histories for employment purposes. The individual who filed the charge that prompted the EEOC's lawsuit was an African American female applicant who alleged that the company denied her employment because of her credit history (the credit class). The EEOC ultimately expanded the scope of its investigation to include the company's use of criminal records as part of its pre-employment screening program (the criminal class). According to an EEOC press release, the lawsuit alleged that the company "rejected job applicants based on their credit history and if they had one or more of various types of criminal charges or convictions," in violation of Title VII.<sup>6</sup> The EEOC sought "make whole" relief for affected class members, including back pay with prejudgment interest and "other affirmative relief necessary to eradicate the effects of unlawful employment practices, such as reinstatement and front pay in lieu thereof."

According to the district court, a period of "contentious discovery and a flurry of motions activity followed the filing of the complaint."<sup>7</sup> The company also filed motions to exclude the EEOC's expert report on the grounds that the report was "plagued by troublesome errors that rendered it unreliable." The company then moved for summary judgment, arguing that the EEOC could not prove a violation of Title VII because, the company argued, the EEOC had failed to present any reliable statistical evidence of a disparate impact.

### **The Court Dismisses the EEOC's Lawsuit**

The district court granted summary judgment for the company based on its findings that the EEOC's expert testimony (1) was *unreliable* and would not support a finding of disparate impact, and (2) failed to attribute any supposed disparate impact to a *specific* employment practice. The court did not reach the question of whether the company could affirmatively demonstrate "business necessity."

The district court devoted most of its opinion detailing the reasons the expert report submitted by the EEOC's expert, Kevin Murphy, was inadmissible, and therefore insufficient to sustain the EEOC's burden to demonstrate a disparate impact. The court ruled that Murphy's report was fatally flawed because: Murphy had access to data needed to analyze a random sample of the company's job applicants but instead was selective (described by the court at one point as "an egregious example of scientific dishonesty"); it did not focus on the relevant time-period; it was based on incomplete data; and it included a "mind-boggling" number of errors, including miscoding the race of certain job applicants.

In another blow to the EEOC, the district court ruled that the EEOC could not demonstrate disparate impact based on national criminal justice statistics cited in Murphy's report. The court explained that such statistics may be used only where the general population is representative of the relevant applicant pool, a showing the EEOC failed to make. The court also explained that such statistics related to factors not considered by the company, such as arrest and incarceration rates.<sup>8</sup>

The court ruled that the EEOC failed to attribute any supposed disparate impact to a *specific* employment practice, and thereby rejected the EEOC's attempt to impugn the company's *overall* consideration of background checks. The court emphasized that the company's screening program did not involve a simple, one-step and across-the-board assessment, but rather considered several factors that could influence the ultimate employment decision.

Particularly telling are the court's concluding comments about the suit, described as "a theory in support of facts to support it." In a stinging rebuke to the EEOC, the court noted:

Indeed, any rational employer in the United States should pause to consider the implications of actions of this nature brought based upon such inadequate data. By bringing actions of this nature, the EEOC has placed many employers in the “Hobson’s choice” of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers. Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks. To require less, would be to condemn the use of common sense, and this is simply not what the discrimination laws of this country require.

Although the court did not analyze whether the company’s program satisfied the “business necessity” standard, the court suggested as much. In a footnote, the court stated:

On its face, Defendant’s policy appears reasonable and suitably tailored to its purpose of ensuring an honest work force. Defendant does not necessarily intrude into applicants’ prior brushes with the law, looking only seven years back for possible convictions, and ignoring any arrests that did not result in a conviction or guilty plea. By contrast, the Federal Rules of Evidence permit a witness’s character for truthfulness to be impeached by evidence of criminal convictions that occurred up to ten years prior. Fed. R. Evid. 609(b).

The court also acknowledged the legitimate business reasons for conducting criminal background checks.

For many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable.<sup>9</sup>

## Conclusion

The court’s strongly worded opinion stops short of slamming the door shut on the EEOC’s efforts to challenge background checks and recognizes that “some specific uses of criminal and credit background checks may be discriminatory and violate the provisions of Title VII.” The EEOC surely will appeal the decision – and has already done so in another high-profile credit check case in Ohio, where the court similarly ruled the EEOC failed to show any disparate impact. Nonetheless, the court’s opinion confirms that:

- the EEOC, as the plaintiff, cannot proceed to trial without making a threshold showing of disparate impact;
- the EEOC can only sustain this showing with reliable expert statistical evidence, and cannot necessarily rely on nationwide criminal justice statistics (that is, in such cases, it is not necessarily enough to rely on disproportionate conviction rates for society at large); and
- when, as in this case, the employer does not have a single-step, across-the-board screening process, the EEOC cannot merely challenge the process “as a whole,” but it must demonstrate that the alleged disparate impact stems from specific elements of the process.

Employers that use criminal records or credit checks to screen applicants should continue to consider the following:

- Employers that want to assess potential disparate impact risks should consider conducting a privileged review of their screening policies to help identify areas of opportunity to fortify Title VII compliance.<sup>10</sup> Questions to consider include whether the policy:
  - o incorporates variation for different roles within the company;
  - o strategically sequences the consideration of criminal records and other types of background information;
  - o accounts for the developing body of criminological literature discussing recidivism; and
  - o requires confidential handling and destruction of sensitive information.

Employers also should continue to be mindful of, and comply with, the various laws that impact the use of criminal records in addition to Title VII, including state fair employment laws and federal and state fair credit reporting laws, such as the Fair Credit Reporting Act (where a new storm of class actions has been unleashed on employers).<sup>11</sup>

<sup>1</sup> *EEOC v. Freeman*, Case No. 09-cv-02573 (D. Md.) (slip opinion).

<sup>2</sup> See Rod Fliegel, Barry Hartstein and Jennifer Mora, *Two New EEOC Criminal Record Lawsuits Underscore Important Strategic and Practical Considerations for Employers Conducting Background Checks*, Littler ASAP (Jun. 12, 2013).

<sup>3</sup> See Strategic Enforcement Plan, approved by the EEOC on December 17, 2012, available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

<sup>4</sup> See Jennifer Mora, Rod Fliegel and Sherry Travers, *The Flurry of New Employment Laws Regulating the Use of Criminal Records Continues with Expanded Restrictions in Indiana, North Carolina, Texas, and Buffalo, New York*, Littler ASAP (Jun. 7, 2013). See also Rod Fliegel and Jennifer Mora, *Rhode Island Enacts “Ban the Box” Law Prohibiting Employment Application Criminal History Inquiries Until the First Job Interview*, Littler ASAP (Jul. 17, 2013).

<sup>5</sup> Notably, the EEOC itself considers an applicant's criminal history for *all* positions and it considers credit information for approximately 90% of the positions for which it hires.

<sup>6</sup> The EEOC ultimately dismissed its claims that the company's use of criminal history had a disparate impact on Hispanic job applicants.

<sup>7</sup> Early in the litigation, the company filed a motion for partial summary judgment, which raised a statute of limitations defense. Specifically, the company argued that, for those claims that were not part of the original charge, the 300-day statute of limitations should run from the date that the EEOC notified the company that it was expanding its investigation to include new claims, rather than the date of the original charge. The district court agreed and granted the company's motion for partial summary judgment. *EEOC v. Freeman*, 2011 U.S. Dist. LEXIS 8718 (D. Md. Jan. 31, 2011).

<sup>8</sup> The EEOC also submitted a second expert report from Beth Huebner, which was supposed to replicate Murphy's analysis and confirm his conclusions. The court made short work of Huebner's report, finding it suffered from the same flaws as Murphy's.

<sup>9</sup> See Rod Fliegel and William Simmons, *U.S. Supreme Court Holds that Constitutional Privacy Rights Do Not Restrict the Government's Discretion to Background Check Federal Contractors*, Littler ASAP (Jan. 24, 2011).

<sup>10</sup> For a comprehensive review of the EEOC's updated guidance and related legal concerns, including applicable state law compliance issues, see Barry Hartstein, Rod Fliegel, Jennifer Mora and Marcy McGovern, *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community*, Littler Report (May 17, 2012).

<sup>11</sup> See Rod Fliegel and Jennifer Mora, *The FTC Staff Report on “40 Years of Experience with the Fair Credit Reporting Act” Illuminates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011).

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