Strike Two – The EEOC's Failed Attempts To Limit Background Checks

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On August 9, 2013, the EEOC suffered its second defeat of the year in litigation involving employer use of criminal and credit background checks for employment screening. A federal district court in Maryland held that the EEOC's expert analysis was statistically flawed, unreliable, and insufficient to demonstrate disparate impact. *EEOC v. Freeman.*

The district court characterized the EEOC's lawsuit as a "theory in search of facts to support it," and held that "[s]omething 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."

Background Checks: "Rational And Legitimate"
The court began its decision by stating that "[e]mployers 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."

The Freeman Companies conducted both criminal and credit background checks to screen applicants and used a narrowly-tailored approach, applying the credit background check to particular "credit-sensitive" positions, and limiting its consideration of criminal history to convictions within the past seven years and outstanding warrants. The company also conducted these checks *after* a conditional offer of employment.

Freeman designed its background screens with five goals in mind (which are common reasons rational employers decide to use background checks to screen applicants):

1. Avoid exposure to negligent hiring/retention lawsuits;
2. Increase the security of its 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.

Although the court did not decide whether the company's use of criminal and credit background checks was "job-related and consistent with business necessity," it noted that "[c]areful and appropriate use of criminal history information is an important, and in many cases essential part of the employment process of employers throughout the United States." The court further stated that:

On its face, Defendant's policy appears reasonable and suitably tailored to its purpose of ensuring an honest work force. Defendant does not unnecessarily 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.

Interestingly, the court also took note that "the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90 percent of its positions." This apparent hypocrisy is understandably frustrating to employers attempting to protect their companies from the same threats the EEOC is presumably concerned about by implementing its criminal and credit background check policies.

Flawed Expert Analysis

Ultimately, the court dismissed the EEOC's lawsuit, because the EEOC's expert witness report was flawed and unreliable and was therefore insufficient to demonstrate that the company's policies had a disparate impact on African-American and male candidates. Throughout its decision, the court cited examples of the EEOC expert's "cherry-picking" data, using flawed data, and even changing the data provided by the company to reflect the wrong sex or pass/fail result. The court characterized the EEOC expert's changes to his database as "an egregious example of scientific dishonesty."

The Court also rejected the EEOC's attempts to submit untimely "updated" reports from its expert, stating that the EEOC "should not be allowed to make a mockery of procedural standards by continually offering new expert reports for this Court's consideration, well past the applicable deadline." Finally, the court found that even if the expert report was valid, the EEOC failed to identify a specific employment practice that allegedly cause a disparate impact. The court noted that the company's criminal and credit background check policies had multiple elements and that "the EEOC has failed to demonstrate which such factor is the alleged culprit."

The *Kaplan* Decision

Earlier this year, the EEOC suffered a similar loss in its credit-check litigation against Kaplan Higher Learning Education Corp. In that case, a federal district court in Ohio tossed out the case because the EEOC's expert used scientifically-unreliable data to demonstrate disparate impact.

Using the same expert in both cases, the EEOC failed to demonstrate in *Kaplan* that the Company's credit background check policy had a statistically-significant adverse impact on minority candidates because Kaplan did not maintain race data for its applicants. The EEOC's attempt to discern candidate race from DMV photos and names was deemed insufficient and unreliable by the Court. Therefore, the EEOC's case was dismissed, although it is currently on appeal.

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Lessons For The Future

These cases highlight that the EEOC will continue to push its enforcement agenda, which includes aggressively pursuing claims that criminal and/or credit background checks violate Title VII. Employers who utilize such checks should review their policies, ensure that screens are job-related, defensible, based on business necessity, and narrowly-tailored to meet the company's objectives.

An analysis of the EEOC's Enforcement Guidance regarding criminal background checks is available in my article, "By the Way, Are You a Criminal?" available in the June, 2012 issue of the Labor Letter.

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