

TITLE VII AND CRIMINAL RECORDS – A PLAINTIFFS’ BAR PERSPECTIVE

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The recent widespread use of criminal records in employment decisions and its attendant effect of creating a disparate impact on communities of color have placed the enforcement of Title VII squarely at the fore of civil rights litigation today. On one hand, civil rights advocates maintain that the use of such hiring screens should be discouraged because these screens disproportionately exclude minorities who are over-represented in the criminal justice system. On the other, employers insist that criminal background checks are needed to ensure a safe and harmonious workplace. In the midst of these competing interests, Title VII and its long standing disparate impact jurisprudence provide a legal framework in which employees and employers alike can determine how to balance these interests and craft effective, yet non-discriminatory hiring policies. Now more than ever, with the publishing of the EEOC’s 2012 updated enforcement guidance and the recent wave of litigation, it is critical that employers understand and comply with the requirements of Title VII or risk exposure to costly litigation.

A. THE RACIAL IMPACT OF USING CRIMINAL RECORDS IN EMPLOYMENT DECISIONS

It is estimated that 65 million people in the United States, roughly one in four adults, have a criminal record.¹ Approximately 700,000 people are released from prisons each year.²

Within this broad population, minorities are vastly over-represented in both arrests and convictions. In 2010, African Americans made up 28% of all arrests even though they comprised only 14% of the U.S. population that year. Similarly, Latinos, in 2008, were arrested for drug related offenses at almost 3 times their U.S. population share. The conviction data are no better. Despite comprising just 13.1% of the U.S. population in 2012, African Americans made up 37% of the incarcerated individuals.³ African Americans are also incarcerated at a rate

¹ National Employment Law Project (NELP), 65 Million “Need Not Apply”, at 3 (March 2011), *available at* http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1.

² Paul Guerino, et al., Bureau of Justice Statistics, U.S. Dep’t of Justice, Prisoners in 2010, at 1 (2011, rev. 2012).

³ See U.S. Census Bureau, State & County QuickFacts.

of almost 7 times that of Whites.⁴ The racial impact of the current war on drugs underscores this disparity. A recent ACLU report finds that African Americans are nearly 4 times more likely than Whites to be arrested for marijuana possession even though both groups use marijuana at similar rates.⁵ Data also show that Latinos are more likely to be arrested for drug related offenses compared to Whites.⁶

Meanwhile, most employers currently perform criminal background checks as part of their hiring processes. According to a recent survey by the Society of Human Resources Management, the largest association of human resources personnel, 92 percent of their members perform criminal background checks on some or all job candidates.⁷ The scopes of these criminal background screens run the gamut from targeted exclusions to overly broad disqualifications. Unfortunately, many employers continue to apply blanket bans on hiring persons with criminal records – whether by insisting on clean records and no arrests, applying a lifetime bar on applicants who have felony convictions, or prohibiting the hire of persons with any convictions within a specific timeframe, such as in the past 7 or 10 years.⁸

It is therefore unsurprising that, as the EEOC articulated in its 1987 Enforcement Guidance and reaffirmed in its 2012 Enforcement Guidance, “an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population.”⁹

The negative effect of employer’s widespread use of criminal background checks is compounded by the fact that many of these criminal records are inaccurate or contain material mistakes. Recent studies have found that most states failed to show pending charges or arrests were closed, some states failed to document whether felony charges resulted in a conviction or dismissal, and that the failure to properly seal dismissed cases and convictions is rampant.¹⁰ Commercially prepared criminal background checks also have been found to be riddled with similar inaccuracies.¹¹ These types of mistakes can be particularly detrimental to job applicants

⁴ Paul Guerino, et al., Bureau of Justice Statistics, U.S. Dep’t of Justice, Prisoners in 2010, at 27, Table 14.

⁵ ACLU, The War on Marijuana in Black and White, at 4 (June 2013).

⁶ See EEOC Enforcement Guidance in Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, at 9 (April 25, 2012), herein “EEOC 2012 Guidance.”

⁷ See Society for Human Resources Management, Background Checking: Conducting Criminal Background Checks, at slide 3 (Jan. 22, 2010).

⁸ NELP, 65 Million “Need Not Apply”, at 13-18.

⁹ See EEOC, Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, As Amended, 42 U.S.C. § 2000 et seq. (1982) (Feb. 4, 1987).

¹⁰ Legal Action Center, The Problem of RAP Sheets Errors: An Analysis by the Legal Action Center (2013) (concluding that the criminal records of at least 2.1 million New York residents contained misinformation); Bureau of Justice Statistics, U.S. Dep’t of Justice, Survey of State Criminal History Information Systems, 2010 at 2-3 (2011).

¹¹ NELP, 65 Million “Need Not Apply”, at 7 and n. 22; EEOC 2012 Guidance at 6.

because many employers refuse to hire individuals with pending arrests or charges and because employers should have no knowledge of sealed convictions when making employment decisions.

B. REASONS EMPLOYERS USE CRIMINAL BACKGROUND CHECKS

Employers have cited numerous reasons for conducting criminal background checks, including interest in reducing theft and fraud, concern about workplace violence, potential liability for negligent hiring,¹² and compliance with specific federal, state, and local laws.¹³ It is indisputable that criminal convictions, in certain circumstances, can and should be used in employment decisions. However, this need to consider criminal convictions in some circumstances does not provide employers with a blanket justification to use overly broad screening policies, but rather counsels for the implementation of targeted and reasoned screens. Just how targeted these criminal background check policies must be is a question that Title VII answers.

C. TITLE VII LIABILITY FOR EMPLOYER USE OF CRIMINAL RECORDS IN HIRING DECISIONS

Title VII prohibits employers from discriminating against employees or applicants on the basis of race, color, religion, sex, or national origin.¹⁴ Two theories of liability are available under Title VII: disparate treatment and disparate impact.¹⁵

For a disparate impact claim, a plaintiff establishes a *prima facie* violation by showing that an employer uses an employment practice that causes a disparate impact on the basis of race. The employer may rebut the plaintiff's *prima facie* showing by proving that the employment practice is job related and consistent with business necessity. If the employer proves business necessity, the plaintiff may still succeed by showing there is an available alternative employment practice that has less disparate impact while serving the employer's legitimate needs.¹⁶

On April 25, 2012, the EEOC published an updated Enforcement Guidance regarding the use of criminal records in employment decisions. Building on and reinforcing its previous Enforcement Guidances, the EEOC updated this Guidance to reaffirm its position that the use of criminal records in employment decisions continues to have a disparate impact on minorities. This updated Guidance not only demonstrates the EEOC's strong commitment to enforcing Title

¹² The author notes that he has been unable to find many, if any, significant negligent hiring claims litigated in the past several years, which raises the question whether this proffered reason for increased criminal background checks presents a real or manufactured concern.

¹³ Society for Human Resources Management, Background Checking: Conducting Criminal Background Checks, at slide 7.

¹⁴ 42 U.S.C. § 2000e-2(a).

¹⁵ This paper will focus on disparate impact liability under Title VII related to the use of criminal records by employers and therefore will not discuss disparate treatment liability. However, it should be noted that the use of criminal records by employers can result in disparate treatment liability. *See* EEOC 2012 Guidance at 6-8.

¹⁶ *Ricci v. DeStafano*, 557 U.S. 557, 578 (2009) (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

VII in employment decisions involving criminal background checks, but also provides additional clarity to litigators, employers, and courts on how these claims should be litigated and can be avoided.

1. Making a Prima Facie Showing of Disparate Impact

To establish that an employer's criminal background check policy results in a disparate impact, a plaintiff must present statistical evidence of a racial disparity caused by that policy. One way to make this showing is through the use national and regional statistics regarding the disparities in arrest and conviction rates of African Americans and Latinos compared to Whites.¹⁷ In *El v. Southeastern Pennsylvania Transp. Authority*, the court found that the plaintiff made a prima facie showing of disparate impact, in part, with national data sources from the U.S. Bureau of Justice Statistics and the Statistical Abstract of the U.S., which showed that minorities had substantially higher conviction rates than Whites.¹⁸

Alternately, if reliable and complete applicant flow/employee data is available, a plaintiff could present a statistical analysis of that data showing that African American and Latino employees or applicants are excluded at a statistically significant higher rate than Whites.¹⁹ For example, in *Green v. Missouri Pac. R. Co.* (discussed further below), the court found that the plaintiff made a prima facie showing of discrimination by demonstrating, with company data, that the rejection rate of African American applicants was 2.5 times that of Whites due to the employer's criminal background check policy.²⁰ However, an applicant flow analysis may not be possible where the employer fails to keep accurate or complete records (often application and hiring data do not contain race information of applicants) or where accurate applicant data does not exist because the employer's policy discouraged otherwise qualified applicants from even applying.²¹

Employers may contest a showing of disparate impact either by (1) presenting regional or local data that shows minorities are not disproportionately arrested or convicted compared to Whites, or (2) using its own company employment and applicant data to demonstrate that its policy does not cause a disparate impact.²² Importantly, a "bottom line" racial balance in an

¹⁷ EEOC 2012 Guidance at 10; *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1294 (8th Cir. 1975) (relying, in part, on evidence of national and state racial disparities in incarceration and conviction rates).

¹⁸ 418 F. Supp. 2d 659, 668-69 (E.D. Penn. 2005) *aff'd on other grounds* 479 F.3d 232 (3rd Cir. 2007) (also relying on rejected applicant data that showed that minority employees had a conviction rate twice that of White employees).

¹⁹ *Green*, 523 F.2d at 1293-94.

²⁰ *Id.* at 1294-1295.

²¹ See *Dothard v. Rawlison*, 433 U.S. 321, 330 (1977) (recognizing that applicant flow data can be unreliable where the employer has deterred qualified applicants from applying). The EEOC also recognized this deterrence effect principle in its updated 2012 Guidance. EEOC 2012 Guidance at 10.

²² EEOC 2012 Guidance at 10.

employer's workforce neither refutes a showing of disparate impact nor constitutes a defense to a disparate impact claim.²³

2. Employer's Burden to Prove Job Relatedness and Business Necessity

Once a prima facie showing of disparate impact is made, the burden shifts to the employer to prove that its policy is a targeted one that meets a valid business necessity. There are three factors, known as the *Green* factors and adopted by the EEOC's 2012 Guidance, to consider in determining if a criminal background check policy is sufficiently targeted and supported by business necessity, which include: (1) the nature and gravity of the offense or offenses; (2) the amount of time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.²⁴

As to the first factor, arrests alone may not be used to deny an employment opportunity.²⁵ Convictions, which unlike arrests can have predictive value for determining workplace behavior, should be considered based on the type of harm they cause, relevant legal elements of the crime, and whether they are felonies or less severe misdemeanors.²⁶

For the second factor, the amount of time that has elapsed since the offense can be probative of the probability that an individual will engage in negative behavior in the workplace. In *Green*, the court found that a lifetime ban for all offenses overly broad and not adequately targeted.²⁷ While studies regarding recidivism in the workplace are limited, several published recidivism studies have confirmed the *Green* court's holding, which find that the after a certain number of years, such as 4 to 7 years according to one study, a person with a conviction is no more likely to be re-arrested than someone with no criminal history.²⁸ Therefore it is important that employers apply reasoned time spans, rather than untethered lifetime bans, when considering the potential risk created by certain offenses.

Finally, with the third factor, employers must accurately understand the nature of the job in question, including essential job functions, types of job duties, and the environment in which the job is performed, so that they can determine whether a particular offense is likely to pose a risk for that position.

²³ *Connecticut v. Teal*, 457 U.S. 440, 454-55 (1982). The court went on to explain this concept with the following example: "we recognized that a rule barring employment of all married *women* with preschool children, if not a bona fide occupational qualification under § 703(e), violated Title VII, even though female applicants without preschool children were hired in sufficient numbers that they constituted 75 to 80 percent of the persons employed in the position plaintiff sought." *Id.* at 455.

²⁴ *Green*, 523 F.2d at 1298-99. Employers may also demonstrate business necessity through obtaining validation of the screen consistent with the Uniform Guidelines on Employee Selection Procedures. EEOC 2012 Guidance at 14.

²⁵ EEOC 2012 Guidance at 12-13.

²⁶ *Id.* at 15.

²⁷ *Green*, 523 F.3d at 1298.

²⁸ Alfred Blumstein & Kiminori Nakamura, "Redemption" in an Era of Widespread Criminal Background Checks, National Institute of Justice Journal, Issue No. 263, at 12-13 (June 2009), available at <http://www.nij.gov/journals/263/redemption.htm#note4>.

Although employers often apply the *Green* factors at a policy level, the EEOC strongly encourages the use of individualized assessments.²⁹ This individualized assessment would include informing the individual that exclusion may be warranted due to his criminal records, providing the individual the chance to show that the exclusion should not apply to him, and considering whether any additional supplied information demonstrates that the policy as applied is neither job related nor a business necessity; in other words, giving workers an opportunity explain the circumstances of their criminal records.³⁰ What these factors make clear, is that blind reliance on business contracts or unsubstantiated security concerns will not satisfy Title VII. Nor may employers rely upon state laws or local ordinances that contravene Title VII and the *Green* factors as those laws are pre-empted by federal law.³¹ However, employers may rely upon specific federal prohibitions or restrictions to exclude persons with certain criminal records from employment.³²

D. TITLE VII LITIGATION REGARDING THE USE OF CRIMINAL RECORDS IN HIRING DECISIONS

Despite the long standing recognition of the potential for disparate impact liability surrounding the use of criminal records by employers, there is a surprising dearth of completed litigation for these claims. Consequently, many aspects of Title VII jurisprudence in this specific context remain undeveloped and will be largely shaped by the pending and future litigation. Below is a summary of key and recent cases involving Title VII and the use of criminal records.

1. *Green* and *El*

The two leading appellate court cases that have addressed Title VII liability regarding the use of criminal records in hiring decisions are *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290 (8th Cir. 1975) and *El v. Southeastern Pennsylvania Transp. Authority*, 479 F.3d 232 (3rd Cir. 2007).

In *Green*, the court, in a class case, held that an employer's absolute bar against hiring persons convicted of a crime, with the exception of a minor traffic offense, violated Title VII.³³ The court, finding a lack of business necessity, concluded "[t]o deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden."³⁴

²⁹ EEOC 2012 Guidance at 18.

³⁰ *Id.*

³¹ See, e.g., *Waldon v. Cincinnati Public Schools*, No. 1:12-CV-00677, 2013 WL 1755664, at *4-5 (S.D. Ohio April 24, 2013).

³² EEOC 2012 Guidance at 20-23.

³³ *Green*, 523 F.2d at 1298-99.

³⁴ *Id.* at 1298-99.

In *El*, brought 30 years after *Green*, the court affirmed summary judgment in favor of the employer, finding that the employer had successfully raised a business necessity defense.³⁵ Confronted with a policy that barred convictions related to moral turpitude or violence, the *El* court found that the employer's un-rebutted expert testimony that individuals convicted of violent crimes had a "somewhat" higher risk to commit a future violent act than those without such a conviction could lead a reasonable juror to conclude that the employer's policy was consistent with business necessity.³⁶

2. Recent Plaintiffs' Bar Litigation

Since *El v. Septa* in 2007, the plaintiffs' bar has filed several Title VII lawsuits aimed at the use of overly broad criminal background checking policies. *Johnson et al. v. Locke*,³⁷ Case No. 10-cv-3105 (S.D.N.Y., filed April 13, 2010), is a pending class action brought against the U.S. Census Bureau for its hiring procedures that allegedly screened out African American and Latino applicants by presuming that individuals with arrest records were unfit to work as temporary Census workers.³⁸ The *Johnson* plaintiffs filed their motion for class certification on June 28, 2013 and the court is expected to rule on that motion later this year.

Mays v. Burlington Northern Santa Fe Railroad Co. (BNSFR), Case No. 1:10-cv-00153 (N.D. Ill., filed Jan. 11, 2010) is another pending Title VII disparate impact case brought on behalf of an individual plaintiff challenging BNSFR's ban on hiring or employing individuals with a felony conviction for any offense in the previous 7 years. The parties have fully briefed cross motions for summary judgment and are awaiting a decision.³⁹

Waldon v. Cincinnati Public Schools, No. 1:12-CV-00677, (S.D. Ohio, filed September 6, 2012) is a pending case brought by two former school employees who were terminated after many years of excellent service due to a newly enacted Ohio law that barred from employment individuals with certain types of conviction no matter the age of the conviction. On April 24, 2012, the court ruled that the Ohio law did not constitute grounds for business necessity and affirmed that Title VII preempts state law.⁴⁰

³⁵ 479 F.3d at 248. *El* involved an individual plaintiff case and did not raise class allegations.

³⁶ *Id.* at 246-247. The *El* decision also concluded that the EEOC guidances, then in effect, were not persuasive due a perceived failure to substantively analyze Title VII. *Id.* at 244. With its updated guidance, however, the EEOC appears to have addressed this perceived lack of analysis.

³⁷ Due to the substitution of plaintiffs and a new Secretary of Commerce, the case is now captioned as *Houser, et al. v. Pritzker*.

³⁸ The policy at issue in the *Johnson* case required applicants, once requested by the Census, to produce official court records for any arrests within 30 days; a requirement which plaintiffs allege acted to bar virtually all applicants with criminal records. Second Amended Class Action Complaint, at ¶ 2.

³⁹ Case No. 1:10-cv-00153, Dkt. No. 119.

⁴⁰ No. 1:12-CV-00677, 2013 WL 1755664, at *4-5 (S.D. Ohio April 24, 2013).

3. Recent EEOC Litigation

The EEOC has recently been very active in bringing and settling these types of Title VII cases. For example, it has a pending case against Freeman Companies, in which it has accused Freeman of violating Title VII through Freeman's alleged policy of screening African American, Latinos, and male applicants through the use of credit checks and criminal background checks that barred the hiring of individuals with certain criminal charges or convictions.⁴¹ The parties are awaiting a ruling on the defendant's motion for summary judgment.

In June 2013, the EEOC filed lawsuits against BMW and Dollar General regarding their respective criminal background check policies.⁴² In the *BMW* lawsuit, the EEOC is challenging BMW's alleged lifetime ban on employing individuals with certain criminal records. The *Dollar General* lawsuit seeks to challenge an allegedly overly broad criminal background check policy that excludes drug convictions if they are less than 10 years old and refuses to reconsider disqualification decisions based on incorrect criminal records reports.⁴³

The EEOC has also reached settlements with several high profile employers. In 2012, Pepsi Beverages agreed to pay \$3.13 million and enact major changes to its criminal background check policy.⁴⁴ On June 28, 2013, the EEOC announced the settlement of race discrimination claims arising from criminal background check policies with J.B. Hunt., a national transportation company.⁴⁵

E. SITUATING TITLE VII LITIGATION IN A GREATER SOCIAL MOVEMENT TO CHANGE THE WAY CRIMINAL RECORDS ARE USED IN EMPLOYMENT DECISIONS.

In addition to Title VII litigation, it is important to note that there have been other successful non-litigation based efforts working in conjunction with Title VII enforcement that are improving and altering the way employers use criminal records in making hiring decisions.

Chief among these efforts is the strong bipartisan movement to delay the consideration of criminal records until the end of the hiring process. These initiatives, commonly referred to as "ban the box" initiatives, seek to remove questions about criminal records from applications and defer consideration of criminal records to the end of the hiring process so that applicants are primarily evaluated based on their qualifications for the job. To date, 9 states, most recently

⁴¹ *EEOC v. Freeman*, Case No. 8:08-cv-02573 (D. Md., filed Nov. 30, 2009).

⁴² EEOC Files Suit Against Two Employers for Use of Criminal Background Checks, EEOC Press Release (June 11, 2013).

⁴³ *Id.*

⁴⁴ Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans, EEOC Press Release (Jan. 11, 2012).

⁴⁵ J.B. Hunt Agrees to Settle EEOC Race Discrimination Case Regarding Criminal Conviction Records, EEOC Press Release (June 28, 2013).

joined by Maryland, have banned the box and removed conviction history questions from state job applications.⁴⁶ Over 60 local municipalities have also banned the box, including San Francisco, New York, Newark, Philadelphia, Pittsburgh, and Detroit.⁴⁷

The Federal government has also been active in improving the employment prospects of formerly incarcerated individuals. The Federal Interagency Re-Entry Council, a collection of 20 federal agencies headed by the Attorney General, was created for the purpose of removing federal barriers to successful reentry by formerly incarcerated individuals.⁴⁸ In the past few years, it has taken several significant steps towards achieving its goal in the employment sector, which has included the Department of Labor issuing a guidance for federal, state, and local offices about job postings that contain hiring restrictions based on criminal history, the Office of Federal Contract Compliance Programs issuing a directive advising all federal contractors and subcontractors of their nondiscrimination obligations relating to use of criminal records, and the Federal Trade Commission announcing an enforcement action against a criminal background screening company for failing to comply with the Fair Credit Reporting Act.⁴⁹

Even the Federal and state governments are providing tax credits as financial incentive for employers to hire workers with criminal records.⁵⁰

F. CONCLUSION

With virtually all employers considering criminal records in their hiring and employment decisions, the issue is not whether, but how employers use those criminal records to make non-discriminatory employment related decisions. Title VII represents one tool that can ensure employers use these criminal records in a targeted manner so that their legitimate business needs are met without relegating minority workers to the ranks of the permanently unemployed. However, the ever-expanding reach of the criminal justice system demands that we, as a society, begin to address the larger problem of mass incarceration and its racial effects in ways beyond just the courtroom.

⁴⁶ The nine states include Colorado, California, Connecticut, Illinois, Maryland, Massachusetts, New Mexico, Minnesota, and Hawaii. *See* Maryland Becomes Latest State to “Ban the Box”, NELP Press Release (May 6, 2013).
⁴⁷ *Id.*

⁴⁸ Federal Interagency Reentry Council – Overview.

⁴⁹ Federal Interagency Reentry Council, Employment Snapshot (June 2013).

⁵⁰ The Federal Work Opportunity Tax Credit provides up to \$2,400 per employed worker with a felony conviction. Different states have their own formulations of tax credits for employing workers with felony convictions as well. *See, e.g.*, Cal. Rev. & Tax Code § 17053.34 (providing 50% of qualified wages, subject to a ceiling, in the first year for employing individuals felony convictions).