



## LABOR AND EMPLOYMENT BLOG

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### Q&A: Two 2012 Standouts from EEOC Policy, Litigation

by Lydell C. Bridgeford

What have been the most noteworthy developments to emerge so far this year from EEOC policy guidance and litigation? Donald R. Livingston, a partner at Akin, Gump, Strauss, Hauer & Feld in Washington, D.C. and former general counsel at the Equal Employment Opportunity Commission, tells Bloomberg BNA what has piqued his interest about EEOC in 2012.

From Nov. 1991 to June 1993, Livingston served as general counsel at the commission. [Full disclosure: Livingston is also the author of the book *EEOC Litigation and Charge Resolution*, which is published by Bloomberg BNA.]

**Bloomberg BNA:** In assessing 2012, what has stood out to you as significant moments from EEOC's regulatory agenda and federal litigation?

**Livingston:** Two things stand out: First, is the EEOC's April 2012 policy guidance on criminal history information. Second, is the trend in the courts to hold EEOC accountable when its investigations and pre-suit efforts at conciliation are unfair to respondents, as illustrated in *EEOC v. CRST Van Expedited Inc.*

The EEOC's policy guidance on criminal history information seemed to swell from the confluence of events that occurred more than five years ago. These were the EEOC's February 28, 2007, announcement that, as part of its "E-RACE initiative," it would target employers' use of arrest and conviction records, immediately followed by an opinion of the Third Circuit Court of Appeals that rejected the EEOC's then existing enforcement guidance on convictions.

In *EI v. Se. Pa. Transp. Auth.*, the court found the EEOC's position poorly researched and unpersuasive. The new guidance is better researched. But, its persuasiveness has yet to be evaluated by a court. However, the new guidance has caused many large employers to recalibrate existing policies to try to avoid entanglements with the EEOC.

In hindsight, the CRST decision seems to have been inevitable, at some point. For years, EEOC has forced employers to settle ill-defined EEOC claims.

In CRST, a federal court of appeals affirmed the dismissal of many of the EEOC's claims brought under §706 of Title VII because the EEOC had refused during its pre-suit conciliation efforts to identify the persons for whom it was seeking remedies. The court stated that before the EEOC can seek remedies for persons it "must discover such individuals and wrongdoing during the course of its investigation," and conciliate for these victims.

The consequence of this opinion is likely to be more detailed, prolonged, and cumbersome pre-litigation investigations by the EEOC during its class investigations, which will increase the cost and burdens to employers of dealing with these investigations.

**Bloomberg BNA:** What do you think the remaining months of 2012 will hold for the EEOC and its stakeholders in terms of new guidance and legal developments?

**Livingston:** Things should be relatively calm until after the November election. Then, who knows?