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Discrimination

Rights Agency Reviews EEOC Guidance On Employers' Use of Criminal Histories

An Equal Employment Opportunity Commission enforcement guidance under Title VII of the 1964 Civil Rights Act regarding potential discrimination resulting from employers' use of arrest and conviction records in employment decisions drew both praise and derision at a U.S. Commission on Civil Rights briefing Dec. 7.

The eight-member commission, which reports to the president and Congress on civil rights enforcement matters, heard about 20 witnesses weigh in on the actual and potential effects of EEOC's guidance, which was issued last April (80 DLR A-1, 4/25/12).

Representatives of groups that aid ex-offenders in seeking jobs and re-entering society hailed EEOC's action as a useful reminder to employers that they should not use blanket bans to exclude applicants with past arrests and convictions, who are disproportionately black and Hispanic males.

But employer representatives warned that EEOC's guidance puts employers that conduct criminal background checks in legally precarious positions. This is particularly true when employers are hiring for jobs in which other federal, state, or local laws compel background checks and may preclude the hiring of individuals with particular types of past convictions, the employer advocates said.

Civil Rights Commission Chairman Martin Castro, a Democrat, said the briefing was intended to explore whether EEOC's guidance encourages or discourages re-entry of former criminal offenders into the U.S. labor market. The commission will use information gleaned from the briefing to prepare a report to the White House and Congress on EEOC's action, Castro said.

Commissioner Peter Kirsanow, a Republican, said EEOC's guidance contains no "safe harbors" for employers that conduct background checks. Nor does it show any EEOC recognition that state or local laws compel some employers to conduct criminal background checks and exclude applicants with certain past convictions, he said.

Kirsanow said the guidance is not a "judicious application" of Title VII disparate impact theory and it places a large burden on small employers in particular that "don't know what to do with this thing."

No Bar Placed on Background Checks. Carol Miaskoff, EEOC's acting associate legal counsel, said the guidance builds on prior EEOC policy documents issued in

1987 and 1990, so it is based on factors "already familiar" to employers covered by Title VII. Even prior to the release of the guidance, she said, many employers were giving applicants with criminal histories an opportunity to explain their situations, before making a hiring decision.

Commissioner David Kladney, a Democrat, noted that EEOC's guidance does not bar employers' use of criminal background checks. He asked Miaskoff if a business hiring for positions involving "lots of customer contact" could "safely exclude" from employment an applicant with convictions for violent crime, consistent with the "Green factors."

The reference is to *Green v. Missouri Pacific Railroad*, 523 F.2d 1290, 11 FEP Cases 658 (8th Cir. 1975), in which the court said the nature and severity of the criminal conviction, time elapsed since the criminal offense, and nature of the job at issue all are relevant factors in an employer's defense of a Title VII claim by an applicant denied a job because of a past conviction.

Miaskoff replied yes to Kladney's question, adding that the *Green* factors provide a "common sense" way for employers to conduct risk assessments when they consider applicants with criminal histories.

Commissioner Peter Kirsanow (R) said EEOC's guidance includes no "safe harbors" for employers that conduct background checks or show any EEOC recognition that other laws may compel some employers to conduct such criminal screens.

Commissioner Todd Gaziano (I) suggested that "overuse of disparate impact" under Title VII is a "very complicated and tricky area" and its use to "get at the problem of prisoner re-entry" into the workforce may be misguided. He said EEOC being "too heavy handed" with the disparate impact approach "may backfire" if employers are discouraged from conducting background checks and hire fewer racial minorities as a result.

Donald Livingston, a management attorney with Akin, Gump, Strauss, Hauer & Feld in Washington, D.C., and former EEOC general counsel, questioned EEOC's assertion that "nothing has really changed" under its new guidance because it reiterates use of the *Green* factors.

"I would argue a great deal has changed," Livingston said. EEOC for the first time is requiring employers to conduct an "individualized assessment" of an applicant with a criminal conviction, he said.

EEOC rejects employers' use of "bright line" standards and instead requires the types of "subjective, individualized assessments" employers in other contexts have been "trying to eliminate for years," Livingston said.

But Miaskoff said EEOC's guidance does not require "individualized assessments" but rather states that such assessments can "at times be an important supplement" to the *Green* factors. She said the guidance also provides that at times, an employer's "bright line rules" on barring employment of persons with certain types of convictions "will be okay" under Title VII.

Harry Holzer, a Georgetown University professor and former Labor Department chief economist, said EEOC's guidance "seems to be a relatively sensible application" of the *Green* factors that does not pose "an enormous burden" on small businesses.

Holzer said EEOC's guidance should be seen in context as one of several federal policy initiatives to address the social and economic problems resulting from former convicts being shut out of employment, with the attendant ripple effects on racial minorities in poor communities.

Harry Holzer of Georgetown University said EEOC's guidance is one of several federal policy initiatives to address the social and economic costs of former convicts being shut out of employment.

The "status quo" does "enormous social and economic damage," Holzer said. The risks articulated by employers' advocates about the potential dire effects of the guidance are "hypothetical" and "do not seem to be very high," Holzer said.

Why Focus on Racial Minority Convicts? Commissioner Gail Heriot (I) asked Miaskoff how EEOC chooses among different potential "disparate impacts that may be out there."

If EEOC's guidance discourages employers from conducting criminal background checks because of potential disparate impacts on men of color, for example, that could have a disparate impact on women, as more male job applicants would be eliminated by criminal checks, Heriot said. Is race driving EEOC's enforcement efforts or is it something else? Heriot asked.

Miaskoff replied that when considering whether policy guidance is warranted, EEOC reviews available research and data. An overlap between race and possession of criminal records is "voluminous" and "stark," she said. "Title VII is not an affirmative action statute" and it "does not require special consideration" of race, Miaskoff said.

In deciding on potential enforcement guidance, EEOC focuses on "issues that have a big impact on American society," Miaskoff said. The "overlap" between race and exclusion from jobs based on criminal

histories has been "well documented" in social science and legal literature and EEOC is "cognizant of that," she said.

Holzer added that he sees nothing in EEOC's guidance requiring an employer to hire a black male applicant with a criminal record over an elderly woman of Asian descent, addressing a hypothetical case Heriot had posed.

Instead, EEOC's guidance instructs employers not to "use that one aspect" of an applicant's criminal history "without considering other factors" in making a hiring decision, Holzer said.

Relevant research indicates black men in the United States face the "harshest discrimination in hiring" among all race and gender groups, Holzer said. "No body of evidence says elderly women from Asia" face a comparable level of bias, he said.

Commissioner Michael Yaki (D) said EEOC's guidance helps "open up a pool for everyone to jump in," as minority applicants with criminal convictions currently "can't even get in the door" to compete for jobs. EEOC's guidance is "not a hiring mandate" but rather a "broadening of the pool of prospects," Yaki said.

Livingston said he agrees the United States cannot be a society in which a person who commits a crime and serves prison time can never work again. The question is "who decides what the rules will be" regarding hiring of persons with past convictions, Livingston said. He questioned whether EEOC, an agency "not answerable to the electorate," or Congress should set such rules. "We have a Congress that should deal with this issue in a very thoughtful way," Livingston said.

Different From Usual Title VII Inquiry. Kirsanow suggested that Title VII's disparate impact analysis, in which an employer's defense consists of showing a challenged job requirement is "job-related" and consistent with "business necessity," is ill-suited for evaluating an employer's risk assessment when considering an applicant with prior criminal convictions.

A criminal conviction is "perhaps different" from other hiring tests, such as a high-school diploma requirement, Kirsanow said. He questioned whether any data, for example, show that persons with a criminal conviction are better or worse at performing particular jobs than persons without a criminal history.

After EEOC's Miaskoff replied "that's the data that we need," Kirsanow said he was "astonished" EEOC admits it lacks such data and did not try to gather such information before issuing the enforcement guidance.

Miaskoff said an applicant's criminal background is a "different beast" than the usual job qualification involved in disparate impact cases. In criminal history cases, EEOC is looking at the employer's "assessment of the risk" that a person with past convictions may harm others if given a particular job, Miaskoff said. She said the "tension" between the usual disparate impact inquiry and that involved in criminal history cases is "very fully addressed" by the U.S. Court of Appeals for the Third Circuit in *El v. SEPTA*, 479 F.3d 232, 100 FEP Cases 195 (3d Cir. 2007) (54 DLR AA-1, 3/21/07).

Is EEOC Wearing Blinders? Other witnesses criticized EEOC's process in developing the guidance and EEOC's alleged aggressive enforcement tactics in investigating employers that conduct criminal background checks and reject applicants with past convictions.

Lucia Bone, founder of Sue Weaver CAUSE (Consumer Awareness of Unsafe Service Employment), said EEOC never contacted victims' advocacy groups in seeking witnesses for a July 2011 public meeting regarding employers' use of criminal histories (143 DLR C-1, 7/26/11).

Bone started her organization, which opposes restrictions on employer background checks of in-home service workers, after her sister was raped and murdered by a customer service employee who entered her sister's home to do air duct cleaning. If that employer had done a criminal background screen, it would have discovered the murderer's prior convictions for violent crimes and her sister would be alive today, Bone told the commission.

EEOC's failure to include consumer safety or victims' rights organizations at its July 2011 hearing shows that EEOC was only interested in one part of the equation and not concerned that background investigations protect co-workers, consumers, and the public, Bone said. EEOC guidance fails to balance consumers' safety with the rights of ex-offenders, she said.

Julie Payne, general counsel for G4S Secure Solutions USA Inc. in Jupiter, Fla., said EEOC currently is investigating her company, formerly known as Wackenhut, after the company rejected for a security officer job an applicant with two prior theft convictions.

According to Payne, EEOC expanded its race discrimination investigation from the single charge to seeking data on all of G4S's and Wackenhut's hiring decisions across the United States since the company began using criminal background checks some years ago. G4S has spent "hundreds of thousands of dollars" on legal costs and document production with no end in sight, Payne said.

Employers such as G4S, which provides armed guards to sensitive workplaces including nuclear power facilities, often are compelled by other federal, state, or local laws to conduct criminal background screens, Payne said. EEOC fails to account for employers' conflicting legal obligations and their enormous potential liability if an employee with a criminal history inten-

tionally harms co-workers, consumers, or the public, Payne said.

EEOC is "targeting" under Title VII companies such as G4S even though the employers use "legitimate screening policies," Payne said. The combination of EEOC's guidance and its enforcement plan are creating a "very difficult, no-win situation" for employers that conduct criminal background checks, she told the commission.

Garen Dodge, a management attorney with Jackson & Lewis in Reston, Va., and general counsel for the Council for Employment Law Equity, said employers' "dilemma" of whether to risk potential tort liability for negligent hiring or worse by not conducting criminal background checks or risk discrimination charges by screening applicants is "only exacerbated" by EEOC's guidance.

EEOC is "squarely taking aim" at employers that use criminal background checks, Dodge said. He warned that EEOC's guidance and enforcement actions could chill employers' use of necessary background screens in hiring. "Employers should not be forced to bet in the dark" whether a hired applicant poses an unacceptable risk of harm, Dodge said.

But EEOC is not saying employers should not do criminal background checks, Commission Chairman Castro interjected. He questioned how Dodge's multiple examples of violent crimes committed by employees whose companies did not perform criminal background screens are relevant, as all the incidents predate EEOC's guidance.

Dodge replied that such cases represent the effect EEOC's guidance could have on employers "in the real world." For example, EEOC's suggestion that employers should consider removing the prior convictions question from their employment applications could deter employers from asking that question because they fear drawing EEOC's enforcement attention, Dodge said.

BY KEVIN P. MCGOWAN

Text of the guidance is available at <http://op.bna.com/dlrcases.nsf/r?Open=kmgm-8tpnv9>.