

How They Won It: Akin Beats EEOC Background Check Case

By Dan Prochilo

Law360, New York (September 24, 2013, 10:54 PM ET) -- The maneuvering Akin Gump Strauss Hauer & Feld LLP used to topple a U.S. Equal Employment Opportunity Commission race bias suit against event planner Freeman over its use of background checks could serve as a playbook for employers trying to defuse similar EEOC cases.

The defense team's success at trimming the claims and eventually sinking the suit for lack of evidence could offer lessons for BMW Manufacturing Co. LLC and Dollar General Corp.'s DolGenCorp LLC, which are likewise battling allegations that their use of background checks led to discriminatory hiring decisions, Freeman's lead attorney said.

"We were having some success in narrowing the claims over the course of the litigation, and each of those [developments] become important when you look at Dollar General and BMW," said Akin Gump partner Don Livingston. "Each provide authority to them to narrow the scope of the EEOC claims against them" and beat the allegations, he said.

The Dallas-based corporate event planner was hit with the suit in Maryland federal court in September 2009, after would-be employee Katrina Vaughn filed a racial discrimination charge with the EEOC, saying the company had denied her a job following a look into her credit history.

An EEOC investigation ensued and led to a suit accusing Freeman of engaging in a pattern of discrimination resulting from its background checks' disqualification of black, Hispanic and male job applicants at a higher rate than other prospective employees.

The case was one of several that involved what had become one of the EEOC's top priorities. Informal guidance the commission published in late 2005 warned that the EEOC would presume hiring policies that take applicants' criminal histories into account violate the Civil Rights Act by disproportionately excluding certain minorities.

But Livingston said the guidance "is imprecise, providing no information on what positions [the EEOC] would take in the courtroom, and a lot of employers were watching the [Freeman] case to see whether they could get clarification."

The company's attorneys prepared to demonstrate that Freeman's standards for its prospective employees were job-related and that its hiring decisions were prompted by business necessity. That included gathering evidence on the commission's hiring practices that showed "our practices were similar in many relevant respects to those of the EEOC — which presumably would not be using practices that are not job-related," Livingston noted.

But the case was dismissed before Freeman had to justify its use of background checks, with the court deciding Aug. 9 there was no proof of discrimination.

The suit met a similar fate as actions the EEOC had pursued against the test prep company Kaplan Inc. over its use of credit checks and against the staffing company Peoplemark Inc. over its refusal to hire applicants with criminal records. The Kaplan case was tossed earlier this year, and the Peoplemark one was dismissed in October 2011 and has been appealed.

The court's Freeman ruling laid out a higher bar for the EEOC to prove disparate impact, with the judge ruling that the commission had to specify which elements of the company's background checks allegedly had a discriminatory effect, Livingston said.

"That makes it much more difficult for them to establish a prima facie case," he said.

Freeman's defense attorneys put the first significant dent in the EEOC's case when it persuaded the court to reject the commission's attempt to seek relief for applicants denied jobs stretching back to February 2001, the start of Freeman's use of background checks.

Siding with Freeman, the court ordered the dismissal of claims arising from hiring decisions made more than 300 days before Vaughn filed her charge, citing the time constraints imposed by the Civil Rights Act.

"If Congress intended to make an exception for the EEOC to revive stale claims [under the act], it should have said so," wrote U.S. District Judge Roger Titus.

Then in January 2011, the court granted another motion from Freeman and shaved another eight months' worth of claims from the suit. Freeman persuaded the court that, when it came to claims arising from decisions based on criminal background checks, the charge filing date from which the limitations period should extend back should be Sept. 25, 2008.

That was the date the EEOC had officially notified Freeman its investigation was expanding beyond alleged discrimination based on applicants' credit histories to encompass criminal background check claims.

The EEOC had contended that the statute of limitations for those additional claims should begin when Vaughn filed her original charge in January 2008, because the agency's general policy pronouncements put the company on notice of its potential liability for considering would-be employees' criminal pasts in its hiring choices, according to the order.

But the judge found that "the EEOC's general statements of its view of the law ... cannot substitute for notice to an employer that it is charged with, or is being investigated for, a violation."

A report later filed by EEOC expert Kevin Murphy to document the discriminatory effect of Freeman's background checks provided the company's attorneys with the ammunition they needed to take down what was left of the claims, according to Livingston.

In a December 2012 motion for summary judgment, Freeman blasted Murphy's analysis as "based on a highly selective, erroneous and incomplete data set and woefully inadequate statistical techniques."

Livingston says Murphy's report also confirmed something he had suspected since the suit was filed: that the commission was not going to get specific about how Freeman's evaluation of particular information turned up during the background checks caused the alleged disparate impact. According to Livingston, this meant that the EEOC's case fell short of requirements that plaintiffs identify, with particularity, the policy resulting in discriminatory hiring decisions, which were added to Title VII in a set of 1991 amendments.

"My expectation was this would be a vulnerability, that the EEOC would not attempt to make that showing," Livingston said. "[Judging from] the way the complaint was written to suggest that the overall policy ... was having a disparate impact, I assumed at that point that the EEOC team did not interpret that statute the same way I did."

Both arguments led to the case's undoing on Aug. 9, when Judge Titus ruled that the commission had failed to provide evidence "to support a theory of disparate impact resulting from any identified, specific practice of the defendant."

The court found that Murphy's report contained such "an abundance of vital errors and mistakes" that it had been rendered "completely unreliable." A report offered by another EEOC expert was also deemed invalid. But the EEOC's case would have failed regardless, based on the statutory requirement that plaintiffs' disparate impact claims specify precisely which practice led to the alleged discrimination, Judge Titus added.

"Even if meaningful and reliable statistics are presented, a plaintiff is required to separate out and identify the 'specific' employment practice that is allegedly responsible for the disparate impact," he wrote.

The decision gave employers authority to press the EEOC to fine-tune its claims and show how a particular piece of information gleaned through the checks — for example, conviction records for a specific criminal offense — and then used to remove applicants from the running for a particular job vacancy had a disparate impact, Livingston said.

"It puts a heavy burden on the plaintiff to be able to demonstrate disparate impact on that level of particularity," Livingston said.

An attorney for the EEOC did not respond to a message seeking comment Monday.

Freeman is represented by Don Livingston, W. Randolph Teslik, John Koerner and Amy Glad of Akin Gump Strauss Hauer & Feld LLP.

The case is EEOC v. Freeman, case number 8:09-cv-02573, in the U.S. District Court for the District of Maryland.

--Additional reporting by Ben James. Editing by Kat Laskowski.

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