

U.S. District Court Decision Against EEOC: Use of Criminal Background and Credit History Checks in Making Hiring Decisions

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A U.S. District Court judge in Maryland has dismissed a lawsuit that accused a nationwide marketing company of using background checks to discriminate against minority and male job applicants after finding the Equal Employment Opportunity Commission (EEOC) relied on flawed data that contained a “mind-boggling number of errors.”

The case, *EEOC v. Freeman*, Case No. RWT 09cv2573, is part of a series of actions the EEOC has filed against employers who rely on criminal background and credit history checks in making hiring decisions. They include recent lawsuits against Dollar General Corp. and car manufacturer BMW.

The agency alleges that criminal background checks can unlawfully discriminate against African Americans and men because they have higher rates of incarceration. However, as the court points out, the careful and appropriate use of criminal history information is also an essential part of the employee hiring process.

“Any rational employer in the United States should pause to consider the implications of actions of this nature brought based on such inadequate data,” U.S. District Court Judge Roger Titus wrote.

In criticizing the agency, the judge pointed out that it recently encountered similar problems involving the same expert in another case, *EEOC v. Kaplan Higher Learning Education Corp.*, 2013 WL 322116 (N.D. Ohio Jan. 28, 2013). In that case, the district court precluded the expert from testifying because his analysis was based on a “sample of a sample” that was not random and did not represent the applicant pool as a whole.

“By bringing actions of this nature, the EEOC has placed many employers in the ‘Hobson’s choice’ of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers,” the judge noted.

In order to demonstrate unlawful employment discrimination under Title VII of the Civil Rights Act of 1964, the EEOC must specifically identify what part of the background check process had a disparate impact on certain classes of employees. It must do this by relying on reliable and accurate statistical analysis by a qualified expert.

The EEOC alleged that Freeman engaged in a pattern or practice of discrimination against African-American job applicants by using poor credit history as a hiring criterion. It also alleged that Freeman discriminated against African-American, Hispanic and male job applicants by using criminal history as another hiring criterion.

Freeman, a family-owned company that employs 3,500 full-time employees and 25,000 seasonal employees, used a multi-step evaluation process in hiring applicants. It took into account convictions within the past seven years, any outstanding arrest warrants as well as any misrepresentations on the job application. The company generally disqualified an applicant with convictions involving violence, destruction of private property, sexual misconduct, felony drug convictions and job-related misdemeanors. For higher-level employees, Freeman also excluded applicants with serious financial issues.

The EEOC alleged that its expert statistical analysis proved that Freeman's background system as a whole produced a disparate impact on certain protected classes under Title VII.

Freeman challenged the analysis, arguing the expert's conclusions were based on unreliable data, were rife with analytical errors and failed to identify which aspect of the background check allegedly caused the discrimination. It argued the expert ignored vast amounts of data, double counted certain applicants and cherry-picked other applicants to bolster its claims.

The judge sided with Freeman in granting its motion for summary judgment.

"There are simply no facts here to support a theory of disparate impact resulting from any identified, specific practice of the defendant," Judge Titus wrote. "Something 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. To require less would be to condemn the use of common sense."

Despite several setbacks, the EEOC continues to pursue companies that rely on criminal background and credit history checks in making hiring decisions. Employers should be aware that there are risks associated with conducting such checks. However, employers should also know that courts so far have not been persuaded by the EEOC's position.

Additional Information

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