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DISPARATE IMPACT CLAIMS

Down but not out: the EEOC and background checks

by Lauren E.M. Russell

In recent months, the Equal Employment Opportunity Commission (EEOC) has suffered some significant defeats in lawsuits related to employers' use of background checks. Despite the losses, representatives of the EEOC have made clear that they will continue to pursue these claims.

The theory

The EEOC is responsible for enforcing a variety of laws, among them Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, sex, and national origin (as well as other protected categories). Employment discrimination can be demonstrated under a variety of theories, including the theory of disparate impact. In a disparate impact case, an employee must demonstrate that his employer has a facially neutral policy — i.e., a policy that applies to all individuals equally — that nevertheless has an unduly heavy impact on a

particular group.

Background check policies are generally challenged under the disparate impact theory. By definition, such policies are facially neutral: All job applicants are required to submit to a criminal background or credit check before being hired. However, data indicate that a disproportionate number of African-American men are disqualified from jobs on the basis of criminal background checks, while a disproportionate number of minorities and women are negatively affected by credit checks. As a result, disparate impact claims seem like they should be strong cases for the EEOC. But the case law hasn't supported the agency's position.

The cases

Despite the apparent viability of its challenge to background checks, the EEOC has suffered some significant losses recently. In April 2014, for example, the U.S. 6th Circuit Court of Appeals upheld a lower court's decision dismissing an EEOC lawsuit over the use of credit checks. In *EEOC v. Kaplan Higher Education Corp.*, the court concluded that the EEOC had failed at the most fundamental level: It hadn't presented evidence that Kaplan's use of credit checks had a disparate impact on minorities. The court questioned certain methods used by the EEOC to obtain information on applicants' race because the information wasn't readily available.

More recently, in February 2015, the 4th Circuit affirmed a decision against the agency in *Kaplan* case, the court rejected the statistical evidence offered by the EEOC, finding it failed at the most basic level to demonstrate that Freeman's background checks had a disparate impact on minority job applicants. Notably, the same expert was used by the EEOC in the *Freeman* cases.

The district covering Delaware

Delaware falls within the jurisdiction of the EEOC's Philadelphia District Office, which also includes all of Maryland, Pennsylvania, and West Virginia and parts of New Jersey, Ohio, and Virginia. The *Freeman* case was decided by the U.S. District

Court for the District of Maryland — in the Philadelphia Field Office's jurisdiction — which might lead you to the assumption that our district will be backing off of these types of cases. However, Philadelphia regional EEOC attorney Debra Lawrence has made clear that she has no intention of backing away from these cases.

The EEOC has a history of taking progressive positions on the scope of Title VII. For years, the agency advanced the position that Title VII's prohibition against sex discrimination included discrimination on the basis of sexual orientation and gender identity. It lost case after case under that theory, but it kept trying. And eventually, there was a sea change, and it's now widely recognized that Title VII prohibits discrimination on the basis of gender stereotypes, which is the basis for many sexual orientation and gender identity claims.

In the same vein, we can expect that the EEOC, and in particular the Philadelphia District Office, will continue to bring disparate impact claims challenging employers' use of criminal background and credit checks. There's strong evidence that these policies have a negative impact on female and minority job applicants. The EEOC appears to be hoping that it will eventually find a receptive judge and jury to provide solid precedent for its theory.

Bottom line

You would be well-advised to think carefully about your use of background checks. Despite repeated losses, the EEOC hasn't been dissuaded from its cause. Lawrence, the attorney who represents the EEOC in Delaware, has emphasized that she will continue to challenge employer background check policies that aren't tied to a clear business necessity. With that declaration in mind, you should review the EEOC's guidance on the use of background checks, and make sure your business is in compliance.

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