



For Immediate Release

EEOC Files Title VII Disparate Impact Lawsuit for Misuse of Credit and Criminal Records

Written by Arthur J. Cohen Esq., VP of Operations and General Counsel for Concorde Inc.

Philadelphia, PA (October, 12th 2009) -- Late last month, the EEOC filed a lawsuit in the United States District Court for the District of Maryland against the Freeman Companies. The suit alleges that since at least 2001 Freeman has engaged in a pattern or practice of discrimination by refusing to hire a class of black, Hispanic, and male job applicants by reason of their credit and/or criminal backgrounds. The EEOC argues that the class is discriminated against by reason of the disparate impact that negative credit and criminal records have upon members of the class without sufficient business necessity or any relationship to the jobs in question to justify the no hire employment decisions being made.

Several years ago the EEOC announced its eRACE initiative. eRACE stands for Eradicating Racism and Colorism from Employment. In the spring of this year, this writer attended a meeting in Washington with legal counsel for the EEOC to discuss eRACE and was advised that the EEOC was reviewing its options for increasing legal enforcement of the provisions of Title VII with respect to employers' utilization of applicants' criminal and credit records. The EEOC's concern is the disparate impact of negative credit and criminal background checks against members of the class in question without an employer having sufficient valid business necessity or there being any sufficient relationship of the adverse information to the job requirements to justify denying employment, especially if those records are more than a few years "old". The affected class in the Freeman case has more negative data in its credit and criminal background data than the general population. Therefore when these records are utilized and considered as reasons not to hire a member of this class, there is a disparate impact, i.e. this class is more negatively affected than the general population because of the larger percentage of members of the class having backgrounds with adverse credit and/or criminal information.

Importantly, the legal meaning and significance of "old" has yet to be clearly or completely defined by a court in a legal context, although some states do have statutes

that limit the reporting or use of convictions older than seven years. At the meeting with the EEOC earlier this year, EEOC counsel advised the agency was reviewing its position in light the decision in El v. Septa, 479 F. 3d 232 (3d. Cir. 2007)¹ and was awaiting the publication of a statistical criminology study regarding recidivism which was expected to address and shed some light on the issue of “old” from a criminologist’s perspective. In other words, was there a period of time that after which an old conviction would no longer matter? The El suit was brought by a private litigant for the exact same type of Title VII violations as alleged in Freeman. However in the El case it was a private party bringing the suit while in Freeman it is the federal government thru the EEOC.

This summer the long awaited criminology study, referenced by the EEOC, by Dr. Alfred Blumstein of Carnegie Mellon University was published. Titled Redemption in the Presence of Widespread Criminal Background Checks, 47 Journal of Criminology 327 (2009) the study suggests that after a certain period of time, a criminal record may no longer be relevant to the hiring process because a person previously convicted of an “old” crime is no more likely to recidivate and commit another crime than a person with no prior criminal record. The study can be read to suggest that with respect to certain crimes that periods of 3, 5 or 7 years might be appropriate time limits on what an employer may consider in making a hiring decision and that after those periods, a record should be considered too old to be considered at all. That study has spawned a great deal of debate by all of the stakeholders, and in this writer’s opinion, given the impetus to the EEOC to embark on a course of litigation. Parenthetically, Professor Blumstein was Septa’s expert and opined in that case in defense of the utilization and reliance upon a 40 year old record. It remains to be seen who will be the experts in the Freeman case and on what side they will testify.

What to do? Employers must again closely review and revisit their hiring process and the standards they utilize regarding the use of credit and criminal records when make hiring and no hiring decisions. While Septa seemingly permit “bright line” hiring policies, at least in the third circuit, the EEOC does not. The action filed against Freeman indicates that the EEOC wants to test the Septa rationale in a different circuit court.

**As always, contact Arthur J. Cohen, Esq., Concorde’s Vice President of Operations and General Counsel for more information.
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¹ In El, the court held that a 40-year-old second degree murder conviction was not too old so as not to have been properly considered by the employer (Septa) in denying employment to Mr. El. For a more complete discussion of the facts and legal issues in Title VII cases and El see the white paper in Concorde’s online Article Archive entitled Felony and Misdemeanor Convictions – Does (or Should) the Label Make Any Difference in the Hiring Process?