

EEOC Guidance: Title VII & Criminal Background Checks

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On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued an updated Enforcement Guidance, *Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*. The EEOC previously held public meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions, and heard from witnesses representing employers, individuals with criminal records, and other federal agencies, and reviewed and considered approximately 300 public comments. The Guidance is meant to consolidate and update the EEOC's guidance documents regarding the use of arrest or conviction records in employment decisions under Title VII, and to address potentially unlawful screening and discrimination. The Guidance supersedes the EEOC's 1987 and 1990 policy statements on this issue, as well as the discussion on this issue in Section VI.B.2 of the Race & Color Discrimination Compliance Manual Chapter.

Title VII does not address the acquisition of criminal history information, and having a criminal record is not a protected basis in Title VII. However, an employer's use of an individual's criminal history in making employment decisions may, in some cases, violate the prohibition against employment discrimination based on race, color, or national origin. First, Title VII prohibits criminal record exclusion based on prohibited grounds: employers cannot treat job applicants with the same criminal records differently because of the applicants' race, color, religion, sex, or national origin ("disparate treatment discrimination"). Second, even where there is no such disparate treatment discrimination, criminal record exclusions might still operate to disproportionately exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such exclusion is "job-related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII. In this context, the Guidance points out that arrest and incarceration rates are particularly high for African American and Hispanic men: at current incarceration rates, "1 in 17 White men are expected to serve time in prison during their lifetime; by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men."

An illustration is a case mentioned in the Guidance, *El v. SEPTA*, 479 F.3d 232 (3d Cir. 2007). Douglas El, a 47-year-old African American, brought a Title VII action alleging employment discrimination based on race against the Southeastern Pennsylvania Transportation Authority (SEPTA), claiming that it unnecessarily disqualified applicants because of prior criminal convictions ("any felony or misdemeanor conviction for any crime of moral turpitude or of violence against any person"). This policy, he claimed, had a disparate impact on minority applicants because they were more likely than white applicants to have convictions. El had been convicted of second-degree murder as a 15-year-old, and the conviction was his only violent offense. SEPTA moved for summary judgment, arguing that El had not submitted sufficient evidence to show that its policy had a disparate impact on racial minorities, and that it had submitted sufficient evidence to prove that its policy was justified by business necessity, particularly for the paratransit passengers that El had been conditionally hired to drive.

The U.S. Court of Appeals for the Third Circuit focused on the affirmative defense of business necessity, noting that the "Supreme Court has never dealt directly with criminal record policies." Title VII, the court concluded, required that a policy address the risk that an applicant will endanger the employer's patrons, and "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not." SEPTA submitted the reports of three experts, who relied heavily on data from the Department of Justice that showed relatively high rates of recidivism of prisoners within the first three years of their release, and possibly beyond. Because El failed to have experts rebut SEPTA's experts on the issue of recidivism (or even to depose SEPTA's experts), and given the undisputed greater vulnerability of paratransit users, the court concluded that summary judgment was appropriate because there was no substantive evidence on which a reasonable juror could find that SEPTA's policy was inconsistent with business necessity.

The EEOC's Enforcement Guidance is predicated on, and supported by, federal court precedent concerning the application of Title VII to employers' consideration of a job applicant or employee's criminal history, and incorporates judicial decisions. For the Enforcement Guidance, see http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. For the EEOC's Press Release, see http://www.eeoc.gov/eeoc/newsroom/release/4-25-12.cfm. For a Q & A Document on the Guidance, see http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm. ML