

Conference on Criminal Records and Employment

Title VII, Adverse Impact, and
Criminal Records as a Selection
Device, Matrix Approaches, and the
Uniform Selection Guidelines

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Background

A. Prevalence of Use of Arrest/Convictions Screens

- A 2004 survey done by the Society of Human Resource Management showed that the percentage of employers conducting criminal background checks is on the rise. Fifty-one percent of employers completed criminal background checks in 1996, compared to 80% in 2003 (86% for large employers).
- Employers often refuse to hire people with arrest and conviction records even years after they have completed their sentences.

(Source: Soc'y for Human Resource Management, Workplace Violence Survey (2004))

Background

Criminal history information makes a difference

- 60% of employers surveyed from four major metro areas stated that they would “probably” or “definitely” not be willing to hire an applicant with a criminal record
- 64% of employers are influenced by arrests
- 97% of employers are influenced by non-violent misdemeanors
- 99% of employers are influenced by violent misdemeanors
- ALL employers are influenced by felonies

Background

B. Impact of Practice

Many Americans are affected

- 1 in 100 adults behind bars in the U.S.
- More than 700,000 people are released from state and federal prisons each year
- Another 9 million cycle through local jails
- Sixty-five million adults in the U.S. have criminal records

Background

- People of color disproportionately affected
 - 1 in 8 African American men in their 20's is in prison or jail
 - 1 in 15 African American men are incarcerated
 - In 2009, African Americans were 12.4% of population, but 28.3% of those arrested
 - In the corrections population, ratio of African Americans to Whites is 5.6 to 1 and the ratio of Hispanics to Whites is 1.8 to 1
 - Prison population is 93.5% male, 39 is average age, 37.9% African American, 34.2% Hispanic, 1.8% Native American, 1.7% Asian American
 - Study in Milwaukee using paired testers revealed that whites with criminal record preferred over African Americans without criminal record

Background

Impact: Widespread unemployment

- Underemployment of individuals with criminal histories lowers overall male employment rates as much as 1.5 to 1.7 percentage points, costing the country \$57 to \$65 billion per year
 - 2 in 3 men were working/ financial contributors before incarceration
- Incarceration reduces annual employment by more than two months and reduces yearly earnings by 40%
- Unemployment Rates by Race/Ethnicity
 - Whites – 8.1%
 - African Americans – 15.9%
 - Hispanics – 11.3%

Background

C. Importance of Stable Employment

- Stable employment is critical to a successful transition into the community after incarceration
 - Being employed is an important predictor of a former prisoner's ability to remain law-abiding
- Problem of reentry intersects with a number of issues, including health, housing, education, employment
 - facilitating reentry presents a major opportunity to improve public safety, public health, workforce, education, family, and community outcomes

BACKGROUND

D. EMPLOYER'S REASONS FOR USE OF BACKGROUND INVESTIGATION

- To ensure a safe work environment for employees.
- To reduce legal liability for negligent hiring.
- To reduce theft and embezzlement or other criminal activity.
- To comply with all applicable state laws requiring a background check (e.g., day care teachers, licensed medical practitioners, etc.) for a particular position.
- To assess the overall trustworthiness of the candidate.

(Source: Conducting Criminal Background Checks, SHRM (2010).

Work of EEOC

A. Reentry Council

- The Reentry Council is a Cabinet-level interagency group convened by Attorney General Eric Holder to examine all aspects of reentry of individuals with criminal records with the goals of:
 - 1. making communities safe from recidivism and victimization
 - 2. assisting people returning from jail or prison to become productive citizens
 - 3. reducing direct and collateral costs of incarceration and saving tax dollars
- On August 31st, the Federal Interagency Reentry Council, of which EEOC is a member, held the 2011 Annual National Equal Opportunity Symposium – “Road to Re-Entry: Criminal Records and Getting Back into the Workforce”

Work of EEOC

B. EEOC POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (2/4/87)

“Blanket” Policies that Bar Employment

- An automatic bar to hiring everyone with a criminal record is likely to limit employment opportunities of applicants or workers because of their race or ethnicity.
 - An employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on blacks and Hispanics, in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population
- Where there is evidence of adverse impact, an absolute bar to employment based on mere fact that an individual has a conviction record is unlawful under Title VII in the absence of a justifying business necessity

Work of EEOC

Policy Statement (Cont.)

Respondent must show that it considered three factors to determine whether its decision was justified by business necessity:

1. Nature and gravity of the offense
 - Encompasses consideration of circumstances of offense(s) for which an individual was convicted as well as number of offenses
2. Time that has passed since conviction and/or completion of sentence
3. Nature of job held or sought

Even if the employer can establish business necessity for its policy, employer will nonetheless be in violation of Title VII if it has refused to adopt a less discriminatory alternative

Work of EEOC

POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER THE CIVIL RIGHTS ACT OF 1964 (9/7/90)

- Arrests alone are not reliable evidence that a person has actually committed a crime
- To justify use of arrest records, an additional inquiry must be made
 - The employer should assess whether conduct is closely enough related to job to justify denial of employment
- Even where conduct alleged in arrest record *is* related to job at issue, employer must evaluate whether the arrest record reflects the applicant's conduct
 - Should examine surrounding circumstances and offer applicant or employee an opportunity to explain
 - The EEOC suggests that employers assure employees or applicants that honestly providing such history will not automatically disqualify them from consideration for the position
 - If employee or applicant denies engaging in conduct, make follow-up inquiries necessary to evaluate his/her credibility

WORK OF THE EEOC

Other Relevant EEOC Policy Documents

- EEOC SUPPLEMENTAL POLICY STATEMENT (7/29/1987)

Guidance on statistical analysis of conviction screen where employer's policy is or is not crime-specific.

- EEOC COMPLIANCE SECTION MANUAL
SECTION REGARDING RACE AND COLOR DISCRIMINATION,
Sec. VI.B.2. (4/19/06)
 - Reiterated three-factor test demonstrating job relatedness.
 - A blanket exclusion of persons with any crime thus would not be job-related and consistent with business necessity.
 - "Instead, the above [three] factors must be applied to each circumstance. Generally, employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.

WORK OF THE EEOC

Other Documents

INFORMAL DISCUSSION LETTERS (do not constitute an official position of the Commission)

- June 17, 2011 Opinion Letter to Department of Commerce
Department of Commerce inquired as to whether Census may exclude from employment persons with convictions, including those that have occurred since age 18. Informal response noted that screening questions “may be overbroad.” Instead, recommended narrow criminal history inquiry so it “focuses on convictions that are related to the specific positions in question and have taken place within the last seven years,” consistent with federal government application. Also recommended “that the Census Bureau educate and provide training to the relevant hiring officials about how to assess suitability for the particular positions in question when evaluating applicants’ conviction records.”
- September 11, 2011 Letter to Peace Corps
Peace Corps inquired as to whether broad based inquiries regarding criminal offenses including broad based inquiries on drug and alcohol use. Informal response indicated that criminal conduct should be “recent enough and sufficiently job related to be predictive of performance in position sought, given its duties and responsibilities.” Also discussed application that inquired about convictions regardless of when they occurred and what it involved. This may not be “job related and consistent with business necessity.” Recommended instead that the employer narrow its criminal history inquiries to the specific positions in question and that have taken place in the past seven years, consistent with the proposed provisions of the federal government’s general employment application form.

Work of EEOC

- In the context of reentry issues, Title VII prohibits employers from treating individuals with the same criminal records differently because of their race or national origin.
- If an employer chooses to collect arrest or conviction information, it must therefore do so consistently.
 - For example, a charge brought under a disparate treatment theory of discrimination is one where an employer allegedly rejects Black applicants who have conviction records, but does not reject similarly situated White applicants.
 - Similarly, it would be unlawful for an employer to only require background investigations of applicants who were born in the Middle East or who are Muslims.

Work of EEOC

C. Commission Meeting

- On July 26th, 2011, the EEOC held a Commission meeting examining private and government employers' use of arrest and conviction records in employment, applicable legal standards, and best practices of employers – *“Striking the Balance between Workplace Fairness and Workplace Safety”*
- The meeting, which featured testimony of DOJ and OPM representatives, added to the agency's existing knowledge-base on the issue and illustrated practical ways employers balance business concerns with the need to ensure that employment practices are fair and non-discriminatory.
- Superstar panelists included Adam Klein and Barry Hartstein

Work of EEOC

- importance of incorporating growing research on recidivism into EEOC guidance
 - Increased understanding of “collateral consequences” of having a criminal record
- need for education on fair employment best practices in this area
 - confusing and often contradictory pressures on businesses when using arrest and conviction records in making employment decisions, including conflicting laws
- some federal and state licensing restrictions are arbitrary and costly
 - some states train individuals while in prison for careers in barbering and cosmetology, but then bar them upon release from getting these licenses because of records

Work of EEOC

- Unreliability of criminal record databases and criminal background reports
 - proliferation of online companies offering ‘instant’ background checks that generate reports that often contain inaccurate or incomplete information and that rarely provide explanatory details about criminal record info
 - 25% of criminal background reports include errors serious enough to deny loans or employment
 - Online providers of background info often fail to ensure data collected for permissible purposes, provide a summary of rights for consumers, and comply with seven year limitation on reporting arrest information under FCRA

Litigation

A. Emerging and Challenging Issues

- o Inaccuracy of criminal records.
- o On-line availability of background information
- o Role of experts in development of screening devices and litigation.
- o The practicality of individualized assessments

LITIGATION

B. LEGAL BACKGROUND: DISPARATE IMPACT DISCRIMINATION

- *Griggs v. Duke Power*, 401 U.S. 424 (1971)

Court examined the lawfulness of a high school diploma requirement. Title VII “proscribes practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African-Americans], cannot be shown to be related to job performance, the practice is prohibited.” If impact is established, the employer has the burden of showing the practice is “job related for the position in question and consistent with business necessity. “What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.” 401 U.S. at 436.

— *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)

Court examined written tests with a discriminatory impact against African-Americans who sought entry into skilled positions. “Discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be ‘predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or Jobs for which candidates are being evaluated.’” Even if the employer established job-relatedness, the complaining party could still show the employer failed to adopt alternative practice which is as effective as the challenged practice but without the same discriminatory impact.

- *Dothard v. Rawlinson*, 433 U.S. 321 (1977)

Court examined height and weight minimum restrictions for prison guard position. The requirement disproportionately excluded women. An employer must show the exclusionary practice is “necessary to safe and efficient job performance.” This is a fact specific inquiry. Even if employer makes this showing, the complainant can still show that there is a less-discriminatory alternative that meets the employer’s needs and that the employer refused to adopt it.

LITIGATION

B. LEGAL BACKGROUND: DISPARATE IMPACT DISCRIMINATION (cont.)

- *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979)

Court examined the whether the Transit Authority's exclusion of methadone users violated the Fourteenth Amendment and Title VII.

Majority opinion

"At best, respondents' statistical showing is weak; even if it is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is "job-related."" 440 U.S. at 602.

(Brennan dissent)

No one could reasonably argue that petitioners have made the kind of showing demanded by *Griggs* or *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975). By petitioners' own stipulation, see n. 14, *infra*, this employment barrier was adopted "without meaningful study of [its] relationship to job performance ability." *Griggs*, *supra* at 401 U. S. 431. 440 U.S. at 603-604.

- Civil Rights Act of 1991, Section 703 (a)(2) and 703(k)

Codified disparate impact, business necessity, lesser restrictive alternative analyses.

Litigation

C. Legal Background: Cases Analyzing Whether Arrest or Conviction Screens are Discriminatory.

- *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975).
 - Appellee had an absolute policy of refusing employment to any person convicted of a crime other than a minor traffic offense. Appellant, who was black, challenged the policy as a violation of Title VII, alleging that it disqualified blacks from employment at a higher rate than whites.
 - Eighth Circuit held that appellee's blanket policy was not justified by business necessity.
- *Gregory v. Litton Sys.*, 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).
 - Leading case concerning employer's use of arrest records
 - Plaintiff, who was black, was refused employment on the basis of his arrest record. District Court held that employer's use of arrest records violated Title VII because it had a discriminatory impact on blacks.

Litigation

- *EI v. SEPTA*, 479 F.3d 232 (3d Cir. 2007).
 - Plaintiff worked for a subcontractor of SEPTA as a driver, providing transportation services for the disabled
 - Under the subcontract, SEPTA prohibiting hiring anyone with a violent criminal conviction. EI's employer discovered after hiring that EI had a 40-year-old conviction for second-degree murder and terminated his employment.
 - Third Circuit upheld grant of summary judgment to SEPTA. Court skeptical as to whether there was a real basis for the policy but plaintiff did not present rebuttal evidence.
 - The court failed to adopt EEOC's guidelines for finding business necessity and distinguished case from *Green* on the basis of materially different facts. Instead, the Court required an employer's policy to "accurately [but not perfectly] distinguish between applicants that pose an unacceptable level of risk and those that do not."
 - The standards set out in *Griggs* and its progeny were inapplicable. "[T]he standard is worded to address ability, not risk."
 - However, "bare or common-sense based assertions of business necessity" are unacceptable, and instead "some level of empirical proof that [the] challenged hiring criteria actually predicted job performance" is required.

Litigation

D. EEOC Litigation

EEOC v. Peplemark, Inc., (W.D. Mich. 2008)

o On September 29, 2008, the Detroit Field Office (Indianapolis District Office) filed the above referenced action under Title VII of the Civil Rights Act of 1964 (“Title VII”) against Peplemark, Inc., a temporary staffing agency that refers personnel to work in light industrial and clerical jobs. In its suit, the EEOC alleged that Peplemark maintained a policy of not referring applicants who have a felony conviction, and that this policy violates Title VII because it has a disparate impact on African American applicants and is not job-related and consistent with business necessity

EEOC v. Freeman, (D. Md. 2009)

- Freeman is a nationwide convention, exhibition and corporate events marketing company
 - Engaged in a pattern or practice of unlawful discrimination by refusing to hire a class of black, Hispanic, and male job applicants across the United States
 - Since 2001, Freeman has rejected job applicants based on their credit history and if they have had one or more of various types of criminal charges or convictions
- Violated Title VII of Civil Rights Act of 1964 - practice has an unlawful discriminatory impact because of race, national origin, and sex and is neither job-related nor justified by business impact
- Still in litigation.

Litigation

E. Selected Non-EEOC Cases in Litigation

- *Arroyo v. Accenture*, Case No. 10-civ-3013 (S.D.N.Y., filed April 8, 2010).
- *Johnson et al. v. Locke*, Case No. 10-cv-3105 (S.D.N.Y., filed April 13, 2010)
- *Mays v. Burlington Northern Santa Fe Railroad Co.*, Case No. 1:10-cv-00153 (N.D. Ill., filed Jan. 11, 2010).
- *Kellam v. Independence Charter School*, Case No. 2:10-cv-01644 (E.D. Pa., filed April 14, 2010).
- *Mayer v. Driver Solutions, Inc.*, Case No. 10-cv-01939 (E.D. Pa., filed April 30, 2010).
- *Hudson v. First Transit, Inc.*, Case No. C10-03158 (N.D.Cal., filed July 20, 2010).

CONCLUSION

- Importance of private sector innovation and development of best practices in this area.
- Importance of state and local strategies to address this solution.
- If necessary, federal litigation ensures screening devices with exclusionary impact are job related and consistent with business necessity.