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Striking a Blow for Common Sense on Criminal Background Checks

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Abstract

A federal district court judge in Maryland has thrown out a lawsuit by the U.S. Equal Employment Opportunity Commission (EEOC) against a family-owned company, striking a serious blow against the agency's ill-advised and potentially unlawful new rules on criminal background checks by employers. Yet, although the EEOC lost this case, the Freeman Companies had to fight an expensive battle against a federal agency—an organization using dubious legal theory, questionable litigation tactics, and unreliable and manipulated statistical analyses. The EEOC should cease this egregious conduct and void its Enforcement Guidance. Private industry should not be faced with an expensive case-by-case fight against an out-of-control federal agency abusing its authority and federal law.

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"A Theory in Search of Facts"

In *EEOC v. Freeman*,[1] Judge Roger W. Titus granted summary judgment to Freeman, holding that the EEOC's claim against the company was "a theory in search of facts to support it."[2] The EEOC had claimed that Freeman's facially neutral policy of running credit history and criminal background checks on prospective employees

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Key Points

- In *EEOC v. Freeman*, Judge Roger W. Titus held that the Equal Employment Opportunity Commission's claim against the company—that Freeman's facially neutral policy of running credit history and criminal background checks on prospective employees violated Title VII of the Civil Rights Act of 1964—was "a theory in search of facts to support it."
- As Judge Titus further noted, "careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States."
- The EEOC itself "conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90 percent of its positions."
- The EEOC should void its Enforcement Guidance. Private industry should not be faced with an expensive case-by-case fight against an out-of-control federal agency abusing its authority and federal law.

violated Title VII of the Civil Rights Act of 1964 because it had a discriminatory effect on African American and male applicants.

The judge's opinion should serve as a warning to other employers—such as Dollar General Corp. and BMW—that have had similar complaints filed against them: In order to win its cases and advance its agenda, the EEOC is willing to use unreliable experts, "cherry-pick" data, and dishonestly manipulate statistics.

As explained in a previous Heritage Foundation Legal Memorandum,[3] on April 25, 2012, the EEOC issued a new "Enforcement Guidance" designed to restrict the use of criminal background checks by employers. Since a criminal record is not listed as a protected characteristic of Title VII (which lists race, color, religion, sex, and national origin), this new guidance is based on a legal fiction: The EEOC assumes that because blacks and Hispanics are arrested and convicted at a higher rate than whites, consideration of job applicants' criminal backgrounds will have a disparate impact on minorities and therefore violates the law. As Judge Titus pointed out, a "higher incarceration rate [for minorities] might cause one to fear that any use of criminal history information would be in violation of Title VII. However, this is simply not the case."[4]

In fact, according to Judge Titus, "careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States."[5] Judge Titus continued:

> Indeed, any rational employer in the United States should pause to consider the implications of actions of this nature brought based upon such inadequate data. 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. 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, and this is simply not what the discrimination laws of this country require.[6]

The EEOC seemed to believe that it could prove its case merely by showing that the company had used criminal history and credit information in its employment decisions, but Judge Titus disabused the EEOC of that belief: "[A] disparate impact case must be carefully focused on a specific practice with an evidentiary foundation showing that it has a disparate impact because of a prohibited factor" and "requires reliable and accurate statistical analysis performed by a qualified expert."[7] The judge noted that "it is simply not enough to demonstrate that criminal history or credit information has been used."

Judge Titus also pointed out the hypocrisy of the EEOC suing Freeman even though "the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90 percent of its positions."[8] The EEOC's actions provide another clear example of a government agency believing that the rules it is trying to force on private employers should not apply to its own actions. The EEOC's own policy with regard to its job applicants is crucial evidence that private employers should use against the agency when fighting such claims.

1. EEOC v. Freeman, Case No. RWT 09-cv-2573 (D. MD. August 9, 2013).
2. Slip Op. at 31.
3. Hans A. von Spakovsky, *The Dangerous Impact of Barring Criminal Background Checks: Congress Needs to Overrule the EEOC's New Employment "Guidelines,"* Heritage Foundation Legal Memorandum No. 81 (May 31, 2012), *available at* http://www.heritage.org/research/reports/2012/05/the-dangerous-impact-of-barring-criminal-background-checks?ac=1.
4. Slip Op. at 2.
5. *Id.*
6. *Id.* at 31–32.
7. *Id.* at 2.
8. *Id.*

Legitimate Business Reasons

Freeman provides services for expositions, conventions, corporate events, meetings, and exhibit programs, employing over 3,500 full-time and 25,000 part-time workers across the United States. In response to concerns about embezzlement, theft, drug use, and workplace violence, the company implemented a background check program that was designed to allow the company to "better evaluate the trustworthiness, reliability, and effectiveness of prospective employees."[9] The goals of Freeman's program were goals that all first-rate employers should have for their programs that evaluate prospective employees:

- Avoiding exposure to negligent hiring/retention lawsuits;
- Increasing the security of the company's assets and employees;
- Reducing liability from inconsistent hiring or screening practices;
- Proactively reducing the risk of employee-related loss; and
- Mitigating the likelihood of an adverse incident occurring on company property that could jeopardize customer or employee confidence.[10]

For general employees who did not hold credit-sensitive jobs, the company conducted a criminal background check. For credit-sensitive jobs (positions with access to credit card information, money, checks, etc.), the check also included a credit history review. Potential company officers and managers triggered a third step: an education and certification verification.

Furthermore, Freeman placed limits on its use of criminal background checks—parameters that still failed to satisfy the EEOC. With respect to convictions, for example, these checks considered only those that were within seven years of the application. Applicants that had any outstanding arrest warrants were given a "reasonable opportunity to resolve the matter and have the warrant withdrawn."[11] While a failure to do so made it unlikely, it was "not impossible, for the applicant to be hired." Freeman also considered whether the "criminal conduct underlying a particular conviction made an applicant unsuitable for employment," with particular concern about convictions for "violence, destruction of private property, sexual misconduct, felony drug convictions, or job-related misdemeanors."[12] Any decisions by managers not to hire an applicant because of a conviction were reviewed by a senior officer of the company.

As Judge Titus noted, contrary to the EEOC's assertions, Freeman's employment policy on criminal backgrounds appeared "reasonable and suitably tailored to its purpose of ensuring an honest work force." The company did not "unnecessarily intrude into applicants' prior brushes with the law, looking only seven years back for possible convictions, and ignoring any arrest that did not result in a conviction or guilty plea." This was actually a more *lenient* standard than that applied by the Federal Rules of Evidence that "permit a witness's character for truthfulness to be impeached by evidence of criminal convictions that occurred up to ten years prior."[13]

A "Mind-Boggling Number of Errors"

In addition to a faulty and dubious legal theory, the EEOC used an unreliable expert witness whose mistake-filled analysis was thrown out by the court. In an astonishing display of arrogance, the EEOC trotted out an expert who, after producing a similarly unsound analysis, had been *precluded from testifying in a prior EEOC* case and attempted to use him again in this case.[14] This expert, Kevin R. Murphy, tried to show that black applicants failed the company's criminal and credit background checks at higher rates than those of other races. However, Judge Titus found that Murphy's reports were full of "such

9. *Id.* at 4.
10. *Id.*
11. *Id.* at 6.
12. *Id.*
13. *Id.* at 6, footnote 3 (citing Fed. R. Evid. 609(b)).
14. *Id.* at 18 (citing EEOC v. Kaplan Higher Learning Education Corp., 2013 WL 322116 (N.D. Ohio Jan. 28, 2013)).

a plethora of errors and analytical fallacies" as to "render them completely unreliable, and insufficient to support a finding of disparate impact."[15]

Specifically, Murphy's analysis failed basic standards of analytical review, such as not being "based on a random sample of accurate data from the relevant applicant pool and time period."[16] Murphy had access to information about almost 60,000 job applicants; yet his analysis was based on only a little over 2,000 applicants, "with many of the 2,014 entries being duplicates." Because he failed to explain how he constructed his database, it was only through "painstaking" comparison with discovery and investigative materials that Freeman was able to uncover the numerous mistakes made by Murphy.[17]

In fact, according to Judge Titus, the EEOC's expert appeared to have "deliberately ignored the data that was available from the relevant time period" to achieve the EEOC's desired results. Judge Titus accused Murphy of an "egregious example of scientific dishonesty" because he "cherry-picked certain individuals from the other discovery materials in an attempt to pump up the number of 'fails' [applicants not hired when they failed the background check] in his database."[18] Murphy's manipulation rendered his data "a meaningless, skewed statistic."

When these mistakes were brought to the attention of the EEOC, Murphy filed a new report (past the court-imposed deadline)[19] that did not correct the problems and, in fact, "managed to introduce fresh errors into his new analysis, including many additional duplicates, material coding errors, and more double-counting." He added only a handful of new applicants to his databases "in a laughable attempt to better capture the relevant time period," and the judge noted that, "suspiciously, 11 of these double-counts are 'fail' while only 2 of them are 'passes.'"[20]

Judge Titus summed up the problems with the EEOC's statistical expert by saying that "the mind-boggling number of errors contained in Murphy's database could alone render his disparate impact conclusions worthless."[21] According to the judge, "whether intentional or not, Murphy's continued pattern of producing a skewed database plagued by material fallacies gives this Court no choice but to entirely disregard his disparate impact analysis."[22]

When the EEOC's previously unreliable expert proved unreliable once again, the agency tried to argue that even if it could not demonstrate actual disparate impact by Freeman, "the national statistics cited in their reports are sufficient evidence of disparate impact." Judge Titus disallowed this argument because "general population statistics" can be used to create an "inference of disparate impact" only if the general population is "representative of the relevant applicant pool."[23] The EEOC made no such showing about Freeman's applicant pool. Indeed, the general population pool "cannot be used as a surrogate for the class of qualified job applicants, because it contains many persons who have not [applied] (and would not) be" applying for jobs with the company.[24]

Failure to Identify a Specific Policy

One of the most interesting aspects of the decision by Judge Titus, with important implications

15. *Id.* at 14. The EEOC also used a second expert, Beth M. Huebner, but the court did not discuss her report because "it was meant to be merely a replication of Murphy's analysis, and produced the same results based on identical data containing the same underlying errors." Slip Op. at 12, footnote 5.
16. *Id.* at 15.
17. *Id.* at 16, footnote 6.
18. *Id.* at 18.
19. In another comment on the EEOC's willingness to play fast and loose with the rules, Judge Titus accused the EEOC of making "a mockery of procedural standards by continually offering new expert reports for the Court's consideration, well past the applicable deadline" and trying to label them as "supplemental" reports. They did not qualify as supplemental reports under Federal Rule of Civil Procedure 26(e) but were "instead poorly disguised attempts to counter Defendant's arguments with new expert analyses." Id. at 21.
20. *Id.* at 20.
21. *Id.* at 19.
22. *Id.* at 20–21.
23. *Id.* at 24.
24. *Id.* (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653–54 (1989)).

for other employers faced with similar unwarranted claims by the EEOC, is the fact that the judge concluded that even if the expert reports of the EEOC had been admissible, the EEOC would still have lost the case for a simple reason: The agency failed to identify the specific policy or policies causing the alleged disparate impact.

Under Title VII, it is not enough for the EEOC to "show that 'in general' the collective results of a hiring process cause disparate impact."[25] Rather, the EEOC's statistical analysis "must isolate and identify the discrete element in the hiring process that produces the discriminatory outcome." When the hiring process has multiple elements, as Freeman's did, the EEOC has to "identify the element(s) that it is challenging and 'demonstrate that each *particular* challenged employment practice causes a disparate impact' unless it can demonstrate that 'the elements' are not capable of separation for purposes of analysis."[26]

Here, the EEOC's complaint challenged Freeman's criminal and credit history screening policies as a whole. The agency made no attempt to "break down what is clearly a multi-faceted, multi-step" employment process. While it is "theoretically possible that one or more" aspects of the company's background checks caused a disparate impact, the EEOC "failed to demonstrate which such factor is the alleged culprit."[27]

The EEOC: An Agency Out of Control

While the EEOC lost this case, the Freeman Companies had to fight an expensive battle against a federal agency—an organization using dubious legal theory, questionable litigation tactics, and unreliable and manipulated statistical analyses. Other companies are facing similar lawsuits over the spurious claim that the use of criminal background checks to safeguard the lives and property of employers, their employees, and their customers is a "discriminatory" practice under federal law.

The EEOC should cease this egregious conduct and void its Enforcement Guidance. Private industry should not be faced with an expensive case-by-case fight against an out-of-control federal agency abusing its authority and federal law.

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25. *Id.* at 25.
26. *Id.* (citing 29 U.S.C. § 2000e-2(k)(1)(B) (emphasis added)).
27. *Id.* at 27.