

July 26, 2011

Ms. Jacqueline Berrien, Chair
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Mr. Stuart Ishimaru, Commissioner
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Ms. Constance Barker, Commissioner
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Ms. Chai Feldblum, Commissioner
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Ms. Victoria Lipnic, Commissioner
Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Re: EEOC Enforcement of Title VII Protections Regulating Criminal Background Checks

Dear Chair Berrien and Commissioners Ishimaru, Barker, Feldblum, and Lipnic:

Thank you for convening the EEOC Commissioners' meeting on the critical issue of Title VII violations resulting from criminal background checks for employment. The July 26th forum provides a timely opportunity to evaluate the new realities of criminal background checks for employment. We urge the EEOC to take the next step and update its guidances and enforcement strategies regulating criminal background checks, balancing the civil rights of workers of color and the legitimate concerns of employers to protect safety and security on the job.

Our organization, the National Employment Law Project (NELP), promotes more fair and accurate criminal background checks to help reduce barriers to employment of people with a criminal record. NELP represents workers to enforce the civil rights and consumer protections that apply to criminal background checks. NELP also advocates for model policy reforms at the federal, state and local levels. Attached to this letter, we have provided summaries of some of the compelling stories of workers struggling to find employment with a criminal record, often after an isolated run-in with the law in their youth that followed them for the rest of their adult working lives.

NELP recently released a report (*65 Million "Need Not Apply:" The Case for Reforming Criminal Background Checks for Employment*) documenting the major barriers to employment faced by the 65 million (or nearly one in four) U.S. adults with a criminal record and the widespread use of blanket employer restrictions denying employment to people with a criminal record. In addition, the report describes the severe impact of criminal background checks on communities of color. For example, in 2009, the number of arrests as a percentage of the population was just over three percent for whites compared to 7.6 percent for African Americans. African Americans are also about four times more likely to have a felony conviction.

The obstacles to employment posed by criminal record background checks take on special significance in light of the severe economic downturn and the shrinking employment opportunities of people of color. According to a recent U.S. Department of Labor report, *The Black Labor Force in Recovery*, "[t]he average unemployment rate for blacks in 2010 was 16.0 percent, compared to 8.7 percent for whites, and 12.5 percent for Hispanics." Thus, as our nation's workers continue to struggle to find jobs, criminal background checks compound the historic employment challenges of the African American and Latino communities. What's more, according to the Society of Human Resources Management, over 90 percent of companies reported using criminal background checks for their hiring decisions, which is up from 51 percent in 1996. (Evren Esen, *SHRM Workplace Violence Study* (Society for Human Resource Management, January 2004) at 19).

Recognizing the devastating impact of these trends on public safety, policy makers across the U.S. have taken significant steps to reduce barriers to employment of people with criminal records. For example, Attorney General Eric Holder recently convened the Federal Interagency Reentry Council, which is coordinating a federal response to the record numbers of people returning home from prison, seeking work and a new way of life. In addition, over two dozen cities and five states have adopted "ban the box" policies and other model hiring reforms. Massachusetts recently implemented the broadest law in the nation, applying these innovative hiring procedures to all public and private employers. (Chapter 256 of the Acts of 2010).

However, private and public sector employers have a long way to go to eliminate discrimination against people of color based on a criminal background check. As documented in our recent report, many private employers continue to utilize blanket prohibitions that exclude anyone with a prior criminal record from employment, which disproportionately deprive African Americans and Latinos of employment opportunities for which they are otherwise qualified. As a result, large numbers of charges of discrimination have been filed with the EEOC alleging race and national origin discrimination because of employers' criminal records hiring policies, and seven major Title VII lawsuits are pending in the courts on the issue. (See attachment). In addition, NELP recently filed several Title VI complaints with the U.S. Department of Labor against federally-funded job training programs that post job ads containing blanket hiring restrictions.

Cumulatively, these developments reinforce the significant opportunity now before the EEOC to take stock of the issue and update its policies and enforcement strategies. Nearly 25 years ago, the EEOC recognized the disparate impact that criminal background checks have on workers of color protected against employment discrimination by Title VII of the Civil Rights Act of 1964. In 1987, the EEOC made clear that "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.” (Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.* (1982) (Feb. 4, 1987)).

Because of this adverse impact, the EEOC concluded that “such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity.” *Id.* Again, in 1990, the EEOC announced that “[d]ue to this adverse impact, an employer may not base an employment decision on the conviction record of an applicant or employee absent business necessity.” (Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1982) (Sept. 7, 1990)). In addition, criminal background checks potentially impact workers protected by the Americans with Disabilities Act. Specifically, criminal background checks may work to “screen out” recovered substance abusers whose convictions were a result of their addictions, potentially violating the ADA. (42 U.S.C. § 12112(b)(6)).

The standards adopted by the EEOC properly balance the civil rights of workers and the safety and security needs of the employer community, as employers are simply obligated to take into account reasonable factors, including the age and seriousness of an offense its relation to the specific job at issue. Indeed, the latest research provides strong support for the EEOC’s standards, while calling into question blanket policies denying employment to people with a criminal record. According to a major study by one of the nation’s leading criminologists, Professor Alfred Blumstein of Carnegie Mellon University, in less than seven years most criminal records no longer predict whether an individual is a safety or security threat on the job. (Blumstein, Alfred & Kiminori Nakamura, “Redemption” in an Era of Widespread Criminal Background Checks, National Institute of Justice Journal, Issue No. 263 (June 2009)).

In his study of people with felony conviction records in New York State, Professor Blumstein found that after 3.8 years have passed, a person convicted of felony burglary was no more likely than the average person in the general public to be re-arrested (for aggravated assault it was 4.3 years, and for robbery it was 7.7 years). Importantly, Professor Blumstein’s subjects were initially arrested at 18. If the subject was initially arrested merely two years later at age 20, it takes the person three fewer years to have the same arrest rate as the general population. Thus, Professor Blumstein convincingly concluded that, within a narrow period of time, an individual’s “criminal record empirically may be shown to be irrelevant as a factor in a hiring decision.”

The plight of U.S. workers and with a criminal record has reached crisis proportions, especially given the severe economic downturn and the vast expansion of criminal background checks for employment. However, the EEOC guidelines regulating the issue date back over two decades. More than any other federal agency, the EEOC is now in a position to effectively respond to this national crisis, building on the guidelines established in 1987. By doing so, the agency will providing necessary direction and support to the courts, to the employer community, to the private screening firms, to public employers at all levels of government, and to workers struggling to support their families and their communities hard hit by unemployment.

Building on the July 26th forum, we therefore urge the EEOC to update the guidelines that apply to the use of arrest and conviction information, aggressively enforce the law and expand its education and outreach to the employer and worker communities. Thank you for your attention to this issue of critical importance to millions of Americans struggling to find work in today's economy.

Sincerely,



Maurice Emsellem
Policy Co-Director



Madeline Neighly
Staff Attorney

Encls.

Current Title VII Criminal Records Lawsuits

- *EEOC v. Freeman* (D. Md., filed Sept. 30, 2009)
- *Mays v. Burlington Northern Santa Fe Railroad Co.* (N.D. Ill., filed Jan. 11, 2010)
- *Arroyo v. Accenture* (S.D.N.Y., filed April 8, 2010)
- *Johnson et al. v. Locke* (S.D.N.Y., filed April 13, 2010)
- *Kellam v. Independence Charter School* (E.D. Pa., filed April 14, 2010)
- *Mayer v. Driver Solutions, Inc.* (E.D. Pa., filed April 30, 2010)
- *Hudson v. First Transit, Inc.* (N.D.Cal., filed July 20, 2010)

NELP Criminal Records Charges Filed at EEOC

- *Pacific Gas & Electric*
- *Comcast*
- *Lowe's*
- *Kelly's Services (2 charges)*
- *Quality Personnel*
- *Select Truckers*
- *de Young Museum*
- *Robert Half International*

Client Stories

Johnny MaGee, Garden Center Attendant at Lowe's

In September 1999, 40-year-old Johnny MaGee, who is a developmentally disabled African American man, picked up a package for his uncle that, unknown to him, contained drugs. Johnny was arrested and convicted of misdemeanor conspiracy to commit a drug offense. He had never used drugs and has never been convicted of any other offense.

Johnny held a landscaping job at the Lawrence Livermore National Laboratory for six years until budget cuts forced him to look for a new job in 2008. He applied to Lowe's Home Improvement store in Dublin, California, for a garden center attendant position. Despite his related prior work experience, Lowe's refused to hire Johnny because of his conviction. "Lowe's policy is unfair to me and lots of other good people," said Johnny. "It's unfair because they only see something that happened to me many years ago, even though I've never been in trouble since." Later in 2008, Johnny petitioned the court for a dismissal of his conviction. It was granted and his "finding of guilt . . . [was] set aside."

In 2009, Johnny filed Title VII charges with the EEOC against Lowe's.

Adrienne Hudson, Paratransit Driver with First Transit

Adrienne Hudson is a 46-year-old African American woman with a single felony conviction for welfare fraud from 2002. After successfully completing her four days of jail time and five years of probation, Adrienne's felony was reduced to a misdemeanor and the conviction was judicially dismissed.

In March 2009, Adrienne left her position as a paratransit driver with MV Transportation to accept a position as a paratransit driver with First Transit, Inc., one of the nation's largest bus providers. Soon thereafter, Adrienne was terminated from her position with First Transit because of her criminal record. Although she informed First Transit that her conviction had been reduced and dismissed, she was nonetheless terminated from her position. This dismissal was consistent with First Transit's policy of refusing to hire or firing workers with a felony conviction or who had spent even so much as one day incarcerated.

On November 9, 2009, Adrienne filed a charge of discrimination with the EEOC and on June 1, 2010, she received a right to sue notice. Her class action lawsuit on behalf of African American and Latino workers was filed on July 20, 2010.

CR (name withheld), Temporary Administrative Assistant Position with Robert Half International

In 1980, CR, an African American woman, was convicted of a misdemeanor welfare violation for failing to report \$200 of additional income. After completing her community service and paying all of her fines and restitution, CR successfully petitioned the court to have the conviction judicially dismissed from her record.

Over thirty years have passed since CR's only conviction. Now, with over ten years of administrative experience, two and a half years of which was in the healthcare industry, CR is struggling to find work in the current economy. She recently thought her job search was over when she was contacted by a subsidiary of Robert Half International and asked to apply for a position as an executive assistant in the healthcare industry. Though not required by law, CR disclosed her dismissed misdemeanor conviction, noting that it was over thirty years old. Once she disclosed the conviction, CR was informed that she was ineligible for employment by Robert Half because of her conviction.

CR recently filed an EEOC charge of discrimination against Robert Half and its subsidiaries.