Background Checks: EMPLOYER BEWARE!

Janette Levey Frisch, Esq. | *Joulé, Inc.*
Donald J. Cayea, Esq. | *Litchfield Cavo, LLP*

YOU OWN a business. Like most business owners, you either employ people or will some day find yourself in the position of doing so. Most likely, you will want to do whatever you can to ensure that you are hiring a qualified person to perform the job. You will also want to assure that you are hiring someone that can be trusted, is honest, and who will not be a threat to you or your other employees in any way, and who will not result in anyone claiming you engaged in negligent hiring. To that end, you will probably ask for and check references from former employers. You may also decide to confirm the person's educational credentials. Will you conduct a background check? There is much in the media, and in particular online, warning employers to be careful about conducting background checks. However, there are legitimate reasons why it is in the best interest as an employer to conduct a background check. Among them are to protect against so-called "negligent hiring" claims, and in some instances to minimize the possibility of co-workers who may be injured or killed by a worker who has violent propensities.

Can you, the employer conduct a background check? Is it legal? First, let us define the term. What is a background check? A background check is the gathering of information about a person in an effort to predict his or her future behavior. A background check for employment may include interviewing neighbors or relatives and asking applicants to answer extensive questionnaires about personal and/or financial history. Most often background checks include a search of public records to find out whether the applicant has any type of criminal history. This article will focus on the use of criminal background checks. So, again, can an employer conduct a criminal background check of its applicants? The answer is yes. What then is the problem? Why do there seem to be ominous warnings to employers who want their applicants and employees to submit to background checks? We hear about lawsuits from disgruntled applicants or employees. If it is permissible for employers to conduct background checks of its applicants and employees then why do some of them find themselves the target of lawsuits? The first challenge is to be sure we are asking the proper question. The proper question is not, "Can the employer conduct a background check?" but rather, *"Can an employer use the information found on the background check to deny employment to the applicant or employee?*"

Whether, when, and to what extent an employer can use information from a background check in making its hiring decisions is determined by both state and federal law. According to a recent article in USA Today, over 25 states either have laws or pending legislation that either prohibits or limits an employer's ability to use background check information. To avoid a situation similar to what happened to Walmart in an action filed against it by a disgruntled employee (*Richie F. Levine v. Walmart Stores, Inc.*)[1], be sure to secure the written consent of the prospective or current employee and be certain that you are clear in advising her/him that the company is conducting a background check which will include a credit report and criminal records search. The court in the Walmart case found that the

Fair Credit Reporting Act 15 U.S.C. 1681b(b)(2)(A) does create a private right of action if an employee's consent isn't secured. However, the federal statutory and case law has existed since 1964, long before the passage of the Fair Credit Reporting Act.

Title VII of the Civil Rights Act of 1964 made employment discrimination illegal. Section 703(a) of the Civil Rights Act provides in relevant part:

> *It shall be an unlawful employment practice for an employer—*
>
> *1) to fail or refuse to hire or to discharge an individual, or otherwise, to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or*
>
> *2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.*

It is clear that refusing to hire someone because of his or her race, color, religion, etc., is illegal, however what does that have to do with refusing to hire someone based on results of a criminal background check? Criminal background checks are not about race, color, religion, etc., are they?

Section 703(k), may be helpful. It states that if an otherwise neutral employment practice has a disparate impact on either one particular minority group or on a few minority groups, it may have a discriminatory effect, and therefore be an impermissible practice under Title VII of the Civil Rights Act. Therefore, is an employment practice based on a disparate impact? Section 703(k), and federal cases interpreting it will provide some guidance. First, under Section 703(k), an employee establishes a disparate impact if a) an applicant or employee can show that the employer uses an employment practice that has a disparate impact on the basis of race, color, religion, sex or national origin and b) the respondent fails to demonstrate that the challenged practice is job related and consistent with a business necessity and that either: 1) each particular challenged employment practice causes a disparate impact, UNLESS each element of the employer's decision-making process are not capable of separation, (then the process may be analyzed as one employment practice) or 2) the applicant/employee demonstrates an alternative employment practice that can serve the employer's interest without having a disparate impact and the employer refuses to adopt such a practice. If the employer can show that the practice itself is not actually causing the disparate impact, then it does not have to show that the practice is required by a business necessity. What does this mean? How is denying someone employment based on the results of their background check a practice that disproportionately impacts on minorities? Where is the discrimination? Employee rights groups, and those advocating on behalf of minorities, as well as the Equal Employment Opportunity Commission argue that members of ethnic minority groups, in particular African Americans and Hispanics are more likely to be convicted of crimes than Caucasians. Therefore use of criminal background check information may have a disparate impact on minorities.

What is a disparate impact? What is a business necessity? This is where the federal court cases play an important role. The written opinions rendered by the judges help to define these terms and to provide guidance as to whether and when employers can use background checks to make employment decisions.

While the US Supreme Court has not yet dealt directly with the use of information from criminal background checks in hiring decisions[2], it did decide two cases dealing tangentially with criminal behavior and the application of Title VII. The first such case was *Griggs v. Duke Power Company*[3]. The Court held that Title VII forbids not only overtly discriminatory policies but "those fair in form but discriminatory in operation". The facially neutral practice in this case was the requirement that an applicant have a high school diploma or pass a standardized general

education test for employment in or transfer to certain jobs. The plaintiff argued that the requirement resulted in eliminating African Americans at a substantially higher rate than Caucasians. The court struck down this practice, finding a lack of connection to the job requirements. The court further held that such a practice must be "related to business necessity and/or job performance or it is prohibited by Title VII."

What exactly happens when an employee or applicant alleges that a facially neutral employment practice has a disparate impact on minorities? Clearly that is not the end. While it is the applicant/employee's burden to prove that the practice has a disparate impact, according to *McDonnell Douglas v. Green*[4] the burden then shifts to the employer to show the practice is motivated by a business necessity or job performance. While this case also did not deal with use of a criminal background check, it did deal tangentially with criminal behavior. An African American employee, who had participated in various disruptive illegal protests on the employer's premises was fired by his employer for participating in the protests. He also received a criminal conviction. Citing statistics that African Americans were more likely to have a criminal record than Caucasians, the employee alleged that the practice of refusing to re-hire him was essentially racial discrimination. The US Supreme Court held that the employer's fear the employee would continue to be disruptive in violation of the law was a legitimate business interest.

Two years later, the 8th Circuit Court of Appeals[5] applied *McDonnell Douglas* to a policy of refusing employment to anyone convicted of any crime other than minor traffic offenses (See *Green v. Missouri Pacific Railroad Company*[6]). The plaintiff, an African American, applied in September 1970 for a job as a clerk in the Railroad Company (MoPac's) personnel office. Mr. Green had been convicted in 1967 for refusing military induction and served 21 months in prison. On the basis of that conviction MoPac refused to hire him. The court noted that MoPac previously excluded applicants with arrest records but stopped doing so after *Gregory v. Litton Systems Inc.*[7] The court found that Green had made a showing of disparate impact given that statistically, MoPac's policy excluded 53 out of every 1000 African Americans, but only 22 out of 1000 Caucasians. Specifically, the court said:

> *We perceive . . . [McDonnell Douglass] to suggest that a sweeping disqualification for employment resting solely on past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis.*

The court then addressed MoPac's reasons for claiming its policy was a business necessity, specifically: a) fear of cargo theft; b) handling of company funds; c) bonding qualifications: d) possible impeachment of the employee as a witness; e) possible liability for hiring those with known violent tendencies; f) employment disruption caused by recidivism, and g) alleged lack of moral character of those with convictions. The court held that while such reasons were valid considerations, MoPac failed to show that a less restrictive policy would not serve as well. This holding is simply another way of saying that MoPac's policy was not sufficiently narrowly tailored to meet those considerations, and therefore a) was overbroad and b) had a discriminatory racial impact.

Even before criminal background checks were as common as they are now, courts have held that a state could logically deny employment to a convicted felon where the crime in question is related to the job qualifications. The United States District Court of the Southern District of Iowa in *Butts v. Nichols*[8] held that a provision of the Iowa statutes which operated across the board to bar employment of felons in civil service positions without any narrowing criteria (i.e. was the felony committed relevant to the job qualifications, such as an applicant for a bookkeeping job, who was convicted of embezzlement) was both

overly broad and overly narrow. While the court, analyzed the statute under the Equal Protection Clause of the 14th Amendment (denial of equal protection of the law to minorities) the language is still instructive under a Title VII analysis.[9]

Our discussion thus far has included disparate impact cases involving individual plaintiffs. Some of the more recent cases involving the use of criminal background checks in the hiring process have involved the Equal Employment Opportunity Commission (EEOC). As many of you know, the Civil Rights Act of 1964 also created the EEOC, an independent agency intended to eliminate employment discrimination based on race, color, religion, gender, disability, age or other criteria unrelated to job performance. It investigates complaints of discrimination, files employment discrimination lawsuits (usually on behalf of a class of plaintiffs who have endured similar patterns of discrimination by the same employer), and is responsible for enforcing equal opportunity laws in federal departments, offices and agencies. The EEOC has recently attempted to address the often disparate impact of using criminal background checks on applicants and employees of minority background. The EEOC has also issued guidelines as criteria for how and when employers may use criminal background check results to deny employment. The employer must consider:

- The nature and gravity of the offense;
- The amount of time that has passed since the conviction and/or completion of the sentence;
- The nature of the job held or sought. (EEOC Compliance Manual Section 605). [10]

While the EEOC guidelines are instructive, the federal courts do not necessarily apply and interpret them in the same manner as the EEOC.

The Third Circuit Court of Appeals in *El v. SEPTA*[11], citing *Griggs v. Duke Power Company*[12], and *Skidmore v. Swift & Co.*[13], held that while EEOC guidelines are instructive they are not necessarily entitled to great deference; rather the court will give the EEOC deference in accordance with the thoroughness of its research and the persuasiveness of its reasoning. The EEOC guidelines, according to the Third Circuit Court of Appeals, were revised to fit more with *Green v. Missouri Pacific Railroad Company* "and do not substantively analyze Title VII."

El v. SEPTA also touched on the issue of a plaintiff's responsibility when the court engages in the burden-shifting analysis enumerated by the US Supreme Court in *McDonnell Douglass*. Mr. El applied and was conditionally hired to drive paratransit buses for the mentally and physically handicapped. Forty years prior, Mr. El was convicted of murder. SEPTA's policy disqualified applicants with prior criminal convictions.[14] Citing the disproportionate number of minorities with convictions, El, an African American, alleged discrimination based on disparate impact. SEPTA argued that the policy furthered its business necessity of keeping its passengers safe. In support of its argument, SEPTA presented an expert report and testimony from an educational psychologist, finding that a) disabled people are more likely than others to be victims of violent or sexual crimes and b) employees of transportation providers commit a disproportionate share of those crimes. The burden then shifted to Mr. El to submit his own evidence rebutting the findings in the report. Mr. El did not do so, and therefore the court found that SEPTA had sufficiently proven that its policy furthered a business necessity. The court did suggest that evidence in rebuttal might have led to a different ruling when it said "Though we have reservations about such a policy in the abstract, we affirm [the lower court's ruling in favor of SEPTA] . . . because El did not present any evidence to rebut SEPTA's expert testimony".

Some courts will still require a causal link between alleged hiring disparities and an employer's conviction policy. For example, in *EEOC v. Carolina Freight Carriers Corporation*[15], the EEOC argued that

Carolina Freight's refusal to hire an Hispanic truck driver on a full-time basis at one of its terminals was discrimination, and that it retaliated against the driver by discontinuing him as a casual truck driver when he filed a discrimination complaint. [16] The driver in question applied for a full-time driver position in 1980, and had convictions from 1968 and 1969 for larceny and receiving stolen property. Carolina Freight, in the job application asked if the applicant had ever been convicted of a crime other than minor traffic violations, without any time limit (for example limiting the question about convictions to the last three years). Pursuant to a Consent Decree it previously entered into with the US Department of Justice, Carolina Freight's policy was as follows:

1. Applicants were to have no more than three convictions within the three years immediately preceding the application date if the sentence was for a $25.00 fine or less, OR
2. Where the conviction for other than a minor traffic violation was within three years prior to the application date and the fine was more than $25.00 or 6 months' license suspension or both; and
3. No felony theft or larceny convictions within the applicant's lifetime that resulted in an active prison or jail sentence.

Based on a study offered by the EEOC, the court found that the EEOC had proved that Hispanics were convicted at higher rates than their non-Hispanic counterparts, and that denying them employment based on a theft conviction adversely affected them, and to a much greater degree than non-Hispanics so convicted. The court then went on to hold that the EEOC failed to prove by preponderance of the evidence (*i.e.* that it is more likely than not) that there was sufficient imbalance of Hispanics at the terminal in question, or that the alleged disparity in hiring was due to Carolina Freight's conviction policy. The court went further by saying that while the six regular truck driver positions which opened during the period of the applicant's employment as a casual driver, were all filled by Hispanics, the EEOC study did not adequately define the relevant labor market. The court therefore held that it was reasonable for Carolina Freight to rely on an applicant's criminal record to predict trustworthiness. Carolina Freight offered the need to minimize business losses from employee theft as the business necessity justifying its policy, and also offered evidence that its theft losses were lower than the average in the trucking industry as a whole, and a lack of contrary proof offered by the EEOC.[17]

EEOC v. Con-Way Freight[18], seems to take a direction opposite that of the other cases we have analyzed. The EEOC filed on behalf of an African American woman applying for a customer service position, who had two prior shoplifting convictions, and did not get the position. The employer had a policy against hiring applicants with theft-related convictions. The applicant alleged that the Vice President had made a racial slur and that she was not hired because of her race. This case appears to differ from other cases involving allegations of disparate impact caused by criminal conviction policies in that this court, did not examine the policy or discuss business necessity. It simply held that the EEOC did not provide sufficient evidence of a causal link between the racial slurs and the failure to hire her. The court, citing *McDonnell Douglass*, ruled that the applicant had to prove that she was qualified for the position but was denied the position in favor of a non-African American. The court reasoned that since her shoplifting convictions automatically disqualified her for the position, she could not prove that she was qualified.[19] This case, contrasted with the other ones we have discussed, illustrates what happens to the interpretation of a federal statute when the US Supreme Court has yet to rule on a particular issue. Since one district or circuit court's ruling is not binding on either a higher court of courts in other circuits or districts, finding a cohesive, unified set of

rules to guide employers becomes a challenge.

What are the lessons that employers can learn from the cases we have discussed? The EEOC has its guidelines, and has clearly communicated its intention to scrutinize employers' use of criminal background checks in making its hiring decisions. The federal district courts and the circuit courts of appeals have shown that they do not necessarily defer to the EEOC's guidelines or its judgment. So what is an employer in this situation to do—or put another way, what if anything can an employer glean from the above cases to protect its business (and safety) interests, protect itself from liability for negligent hiring and from liability for discrimination based on disparate impact?

Perhaps we can find a pattern in all if not the majority of the cases cited. Here are some of the commonalities:

1. In general the courts appear to be looking for employers to articulate a logical reason for their particular policies, connected with a business need (business necessity).
2. Courts tend to inquire as to whether the policy is narrowly tailored to meet the business necessity articulated. For example, a court may strike down an across-the-board policy against hiring anyone who ever had any type of criminal conviction. In contrast, a policy that disallows hiring persons with convictions in the last ten years related to honesty or theft for an accounting or bookkeeping position would probably be upheld. *Green v. MoPac* is a prime example of a policy with a disparate impact on minorities and resting "upon a tenuous or insubstantial basis."
3. Considering the nature of and time elapsed since the offense and the nature of the position sought in order to determine whether the policy is narrowly tailored to meet a business necessity.

CONCLUSION

Now, returning to our question: Can an employer use information gained from a criminal background check to deny a candidate employment or to terminate an employee? Our analysis of federal court cases, though not necessarily binding across the country, indicates that with a policy narrowly tailored to meet a legitimate business necessity the answer appears to be "yes." Even the Federal Trade Commission has weighed in on the subject by issuing a bulletin interpreting the Fair Credit Reporting Act.

> *As an employer, you may use consumer reports when you hire new employees and when you evaluate employees for promotion, reassignment, and retention — as long as you comply with the Fair Credit Reporting Act (FCRA). Sections 604, 606, and 615 of the FCRA spell out your responsibilities when using consumer reports for employment purposes.*

Until such time as the United States Supreme Court rules directly on the issue, beware of the points discussed above--- and, as Sergeant Phil Esterhaus used to say on *Hill Street Blues*, "Hey, let's be careful out there!"

ENDNOTES

1 *Richie F. Levine v. Walmart Stores, Inc.*, US Dist Ct Mid Dist Pa 07-CV 1856

2 The US Supreme Court has yet to decide this specific issue. The recent case of *NASA v. Nelson et al* 562 US ___ (2011) discussed questionnaires given to candidates and dealt with the issue of whether they violated one's right to informational privacy and analyzed the practice under the 14th Amendment to the Constitution.

3 *Griggs v. Duke Power Company*, 401 US 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)

4 *McDonnell Douglas v. Green*, 411 U.S., 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)

5 Represents Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

6 *Green v. Missouri Pacific Railroad Company*, 523 F.2d 1290 (1975)

7 *Gregory v. Litton Systems Inc.*, 472 F.2d631, employer's policy of barring from employment anyone arrested on "a number of occasions" disproportionately impacted minorities, was not narrowly tailored to meet a legitimate business interest, and therefore violated Title VII.)

8 *Butts v. Nichols*, 381 F.Supp.573 (1974)

9 In contrast, the US Supreme Court also allowed the New York City Transit Authority to refuse to hire anyone using methadone to treat their addiction to illegal drugs (even if a disproportionate number of methadone users were of minority background) for "safety sensitive" positions on the city transit system because such a policy "serves the legitimate employment goals of safety and efficiency" See *NYCTA v. Beazer* 440 U.S. 568, 581 (1979).

10 The EEOC guidelines also discourage use of arrest records to deny employment unless the arrest is related to the job functions or safety and well being of others.

11 *El v. SEPTA*, 439 F.3d 232 (1987)

12 *Griggs v. Duke Power Company*, 401 US at 436

13 *Skidmore v. Swift & Co.*, 323 US 134, 140 (1944)

14 SEPTA was a subcontractor of another company, which prohibited SEPTA from hiring anyone with a violent criminal conviction.

15 *EEOC v. Carolina Freight Carriers Corporation*, 723 F.Supp. 734 (S.D. Florida, 1989)

16 Title VII also prohibits retaliation against anyone who complains of discrimination or who cooperates with an investigation of any discrimination complaint.

17 The court cited and seemed to rely on *Richardson v. Hotel Corporation of America* 332 F.Supp. 519 (E.D. Louisiana 1971), which upheld termination of an African American bellboy, mistakenly hired before the results of his criminal background check (showing a conviction for receiving stolen goods). Since bellmen have access to guests' rooms, luggage and keys, the court felt that his discharge was related to his job functions and the employer's business interest. White bellmen were subjected to the same requirements. Mr. Richardson was also offered other employment that was less "security sensitive".

18 *EEOC v. Con-Way Freight*, 09-2926, 09-2930 (8th Cir. 2010)

19 While *EEOC v. Freeman RWT* –09cv2573 (Dist. MD 2010) is an EEOC case involving a criminal conviction policy; it really did not deal with the policy itself. The court essentially ruled that the EEOC stands in the shoes of the individual or class of plaintiffs it represents. Therefore the EEOC cannot seek relief in a lawsuit under Title VII for individuals denied employment after the individual has passed the time limit for filing the charge that prompted the EEOC's investigation.