

EEOC Fails Again in its Effort to Bring a Disparate Impact Claim Based on Background Checks

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The EEOC recently filed suit against an education corporation for discrimination in violation of Title VII of the Civil Rights Act of 1964 arguing that the employer's use of criminal and credit background checks for applicants had a disparate impact on racial minorities.

The prospective employees were being screened as part of the company's hiring process for positions with access to sensitive financial and student information after it discovered employees stealing student financial aid payments. The EEOC claimed that criminal background checks on applicants have a "disparate impact" on non-white job applicants, which is a legal theory reflected in its 2012 "Enforcement Guidance" concerning the use of credit history information.

The District Court for the Northern District of Ohio granted the employer's motion for summary judgment ruling that the EEOC had failed to meet its burden of proving the employer's screening practices disproportionately excluded racial minorities and the United States Court of Appeals for the Sixth Circuit agreed in its opinion on April 9, 2014.

In analyzing whether a disparate impact on minority applicants existed, the Sixth Circuit Court of Appeals was sharply critical of the EEOC's for several reasons including the agency's own use of background checks in their hiring decisions for similar job related reasons and its use of an unreliable expert and faulty statistical analyzes (referred to by the court as "laughable"). A similar lawsuit by the EEOC filed in the district court in Maryland using the same purported "expert" was tossed out in 2013 for almost identical reasons (EEOC v. Freeman).

Despite these setbacks, employers should be aware of the EEOC's ongoing strategy to target the hiring process focusing on the disparate impact on racial minorities of an employer's use of background checks. At least for employers who are not government contractors they must remain vigilant to ensure that use of criminal and credit background checks comply with federal and state law and these efforts do not adversely impact minority persons, are justified by legitimate concerns about sensitive jobs duties, and seek to gather only information relevant to performance.