

Use of Criminal Background Checks Upheld by Federal Judge

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In a rebuke to the Obama Administration, a federal judge has held that an employer may use criminal history as a hiring criterion without violating a job applicant's civil rights.

The case, *EEOC v. Freeman*, centers around a recent Equal Employment Opportunity Commission ("EEOC") policy that employers may run afoul of the [Civil Rights Act of 1964](#) by conducting criminal background checks. As we have reported, the EEOC maintains that such checks have a disproportionate adverse impact on minorities.

The employer in the federal case, Freeman, provides integrated services for expositions, conventions, and corporate events. Having experienced problems with embezzlement, theft, drug use and workplace violence, the company began conducting criminal background checks on job applicants.

The EEOC sued, alleging that the background checks were an unlawful discriminatory practice. The EEOC also challenged Freeman's practice of running credit checks on applicants. Maryland district court judge Roger W. Titus granted summary judgment in favor of Freeman, holding that the EEOC's allegations had no merit.

"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.

The court was especially critical of an expert report by Kevin R. Murphy offered by the EEOC to support its disparate impact theory. The report, the court held, "cherry-picked" facts and disingenuously distorted data. Moreover,

"The mind-boggling number of errors contained in Murphy's database could alone render his disparate impact conclusions worthless.

Caution to employers: The *Freeman* case does not render the EEOC policy a dead letter. The agency has not reversed its position and it can still bring discrimination actions against employers that conduct criminal

background checks. A different court, faced with different facts, could rule differently.

However, Freeman does provide a potent precedent in defending against such actions.

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