

Rollercoaster Week For EEOC Regarding Background Checks

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Last week started poorly for the agency often criticized as overly aggressive, as a federal judge in Maryland ordered the EEOC to pay attorneys' fees of nearly a million dollars for overplaying its hand. In *EEOC v. Freeman*, the agency sued a corporate events company for its background check policies, charging that those checks had a disparate impact on minorities. The problem arose when the EEOC brazenly pushed ahead with its case even after its alleged statistics expert's report was thoroughly debunked by Fourth Circuit as "inexplicably shoddy" and containing a "mind-boggling" number of errors. Peppering its opinion with poker references (even invoking The Gambler himself, Kenny Rogers), the court stated that the EEOC's "inexcusably slipshod" evidence should have informed it that "Freeman held a royal flush, while the EEOC held nothing." The judge said the EEOC failed to know when to hold 'em and know when to fold 'em. "[I]nstead of folding, the EEOC went all in and defended its expert through extensive briefing in this Court and on appeal. Like the unwise gambler, it did so at its peril." At bottom, the judge found that "[b]ecause the EEOC insisted on playing a hand it could not win, it is liable for Freeman's reasonable attorneys' fees." The agency's cards got hotter later in the week, however, as the EEOC settled another criminal background check case against BMW for \$1.6 Million. In that case, BMW's criminal background screening policies barred employment in blanket fashion for those with convictions in certain types of crimes regardless of when the employee had been convicted or the severity of the conviction. The EEOC's 2012 guidance on the subject makes clear that employers reviewing criminal histories need to show that the consideration is job-related and consistent with a business necessity. Blanket policies that apply across different positions or classes of jobs will likely receive special scrutiny from the agency. The upshot of these cases – despite their vastly different outcomes – is that the EEOC shows no signs of abating its uber-aggressive stance toward criminal and credit background checks. If your company uses such checks to screen applicants (often a logical and necessary step), pay close attention to casting too wide a net and make sure the filtering criteria is tailored to the position in question.

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