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# EEOC Not Faring Well In Background Check Disparate Impact Cases

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Background checks

The EEOC's crackdown on the use of background checks has taken another body blow, this time delivered by federal Judge Roger Titus out of the District of Maryland. After a recent spate of adverse decisions in such cases (including cases against BMW Group and Kaplan Higher Education Corp.), national event planning company Freeman found itself in the agency's cross-hairs. The opinion, granting Freeman summary judgment, can be found here.

While acknowledging that it is possible to prove a discriminatory disparate impact (here, against African-Americans and males) in criminal and credit background check cases, Judge Titus went on to thoroughly debunk the so-called "expert" report filed by the EEOC. Among other choice descriptions, the judge called the report "laughable," "skewed," and "an egregious example of scientific dishonesty." The report ignored data, "cherry-picked" data, used data from the wrong time frame, and miscoded data, which contributed to "a mind-boggling number of errors." This "plethora of errors and analytical fallacies" rendered the EEOC's statistical evidence "completely unreliable, and insufficient to support a finding of disparate impact."

Further, the EEOC could not simply rely on national statistics showing racial and gender disparities in credit ratings and convictions, because such general statistics are not directly applicable to the specific allegations at issue in this case. Statistics from the relevant labor market, not the nation as a whole, are what must be considered.

In his conclusion, Judge Titus gave voice to the catch-22 many employers have criticized related to this EEOC enforcement priority:

> [A]ny rational employer in the United States should pause to consider the implications of actions of this nature brought based upon such inadequate data. 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. Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks. To require less, would be to condemn the use of common sense, and this is simply not what the discrimination laws of this country require.

From an enforcement standpoint, the question is whether the EEOC, after suffering numerous setbacks in this arena, will continue its often overly-aggressive pursuit of such cases. Only time will tell, but there is no current indication that the agency will apply the brakes. Accordingly, wise employers

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will take advantage of experienced employment counsel to ensure that applicant background check policies will not result in the EEOC knocking at the front door. After four years of litigation and discovery disputes, even Freeman’s complete victory was undoubtedly a costly one.