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Federal Court Limits Employer's Right to Discover Information About the EEOC's Own Hiring Policies and Expands the EEOC's Rights on Discoverability

By Rod Fliegel and Molly Shah

In recent years, the Equal Employment Opportunity Commission has aggressively sought to enforce its April 2012 enforcement guidance concerning how, in the EEOC's view, Title VII of the Civil Rights Act of 1964 restricts an employer's discretion to consider criminal records for hiring decisions.[1] Despite court rulings favorable to employers in three high-profile EEOC lawsuits against Kaplan Higher Education Corporation, Freeman and BMW,[2] a recent decision in Illinois in the EEOC's suit against Dollar General highlights disagreement among some courts regarding whether an employer can force the EEOC to explain how the EEOC uses criminal records for its own hiring decisions. That same court is also allowing the EEOC access to personal information for the aggrieved employees and unredacted background check program documents. It thus appears that despite three consecutive setbacks, the EEOC is refusing to let criminal record check claims fade into the background.

The *Dollar General* Lawsuit

On June 11, 2013, the EEOC filed suit against Dollar General, alleging that the company's use of criminal background checks purportedly disparately impacts African-American applicants in violation of Title VII.[3] The individuals who filed the charges that prompted the EEOC's lawsuit are African-Americans, one of whom alleged that Dollar General denied her employment because of a six-year-old conviction for possession of a controlled substance, and the other alleged she was terminated because of a felony conviction that actually belonged to someone else. The lawsuit alleged that there was a "gross disparity in the rates at which Black and non-Black conditional employees were discharged," in violation of Title VII.

1 *See* Rod Fliegel, Barry Hartstein, and Jennifer Mora, *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 30, 2012).

2 *See* Rod Fliegel and Jennifer Mora, *Another Court Upholds the Employer's Right to Discover Information About the EEOC's Own Hiring Policies*, Littler ASAP (Aug. 29, 2012); *see* Rod Fliegel and Alex Frondorf, *"Do As I Say, Not As I Do:" EEOC Required to Provide Discovery of Its Employment Practices*, Littler ASAP (Apr. 30, 2012).

3 *See* Press Release, EEOC, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks (June 11, 2013).

Personal Information

On December 18, 2013, the EEOC propounded discovery requests seeking electronically-stored data on Dollar General's conditional hires. After Dollar General refused to provide personal information about the potential class (including names and social security numbers), the EEOC moved the district court to compel the company to provide the information so the EEOC could identify employees allegedly impacted by the background check policy. The EEOC maintained that it needed the information to contact potential class members, to enable its experts to perform a full statistical analysis, and to combine multiple databases into a single database.

Dollar General argued there was no reason for the EEOC to have personally identifiable information for the aggrieved individuals and that it could provide the EEOC with unique identifying numbers in *lieu* of personal information that would assist the EEOC to link data sets it had received. The district court disagreed. The court ruled that the information the EEOC sought was relevant because it helped the EEOC link databases of information together and assist with its experts' analysis. The court rejected the company's offer to provide the EEOC with unique identifying numbers because of its potential for leading to future discovery disputes. The court also rejected the company's argument that the information would violate the privacy of its conditional hires. The court found that the information sought was "sufficiently relevant to the litigation" and that the confidentiality order in place would protect the information from unnecessary disclosure.

Unredacted Background Check Documents

In its same motion to compel, the EEOC sought production of unredacted versions of Dollar General's background check documents, the crown jewel of most background check programs. Although Dollar General had redacted the information because it was not relevant to the claims in the lawsuit, the court disagreed and ruled that the unredacted information could be relevant taken in context and that it was not sufficiently sensitive to warrant redaction. The court again focused on the confidentiality order in place as a protection for the company.

The EEOC's Own Hiring Policies

On April 21, 2014, Dollar General served the EEOC with interrogatories and requests for production of documents that sought information on the EEOC's methodology for its own use of criminal background checks and hiring practices, among other things. The request was in line with similar requests from employers in other litigation with the EEOC. When the EEOC refused to provide the information, Dollar General moved to compel the EEOC to respond to its requests. Dollar General emphasized how federal courts have required the EEOC to produce the requested documents and information in other lawsuits.

The district court denied the company's request for the EEOC's hiring practices, focusing on the job-specific nature of the business necessity defense and the dissimilarity between work that the employees would have performed or did perform in Dollar General's retail setting versus work performed at the EEOC. Breaking with the pro-employer opinions against the EEOC on this point, the court found more persuasive Title VII's "plain language" (i.e., the position-specific inquiry) and the U.S. Supreme Court decision in *Johnson v. Mayor & City Council of Baltimore*, 472 U.S. 353 (1985), which held that federal requirements pertaining to federal employees were not persuasive when examining private employers' requirements.

The court also rejected Dollar General's argument that the EEOC's hiring practices were relevant for its asserted estoppel defense. The court, not addressing the *Kaplan* court's acceptance of the potential argument, noted that the Supreme Court has not accepted any estoppel defense asserted under similar circumstances. It further held that Dollar General had not pled the specific elements of estoppel required to establish the defense and called the defense "legally dubious."

The court did, however, order the EEOC to provide documents relating to what the EEOC considers to be reasonable or acceptable criminal background check policies.

Takeaways

The *Dollar General* discovery order, while significant for the *Dollar General* litigation, may also have broader ramifications for the EEOC. Even after high profile losses in *Peoplemark*, *Kaplan* and *Freeman*, all of which were affirmed on appeal, the EEOC remains committed to vigorously

litigating criminal background check cases. This success for the EEOC—which conflicts with the decisions in *Kaplan* and *Freeman*—may only further embolden the agency already aggressively trying to limit that ways in which employers use background checks.

In the EEOC's current and future background check lawsuits, the employer's policies and procedures will be front and center as exhibits. Perhaps more significant is the fact that the critical business necessity defense standard in these background check cases still has yet to be decided or discussed. Employers should exercise caution and care in drafting their background check policies to ensure they stand up to the scrutiny likely to be shined on them, which includes a careful analysis of whether the business necessity burden can be met.

Employers should consider reviewing their credit and criminal record-based screening policies and procedures to fortify these processes and assure defensibility consistent with Title VII. In light of ever-increasing litigation alleging violations of the Fair Credit Reporting Act (FCRA) and state fair employment laws restricting inquiries into, and the use of, credit history and criminal records, employers should strongly consider a privileged tune-up of their background check programs.[4]

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4 *See, e.g.*, Jennifer Mora, David Warner and Rod Fliegel, *New York City Council Passes the First Citywide Bill Restricting Employers from Using Credit Information in Employment Decisions*, Littler ASAP (Apr. 21, 2015); Rod Fliegel and Jennifer Mora, *California Joins States Restricting Use of Credit Reports for Employment Purposes*, Littler ASAP (Oct. 10, 2011); Rod Fliegel, Philip Gordon, and Jennifer Mora, *Colorado is the Latest and Ninth State to Enact Legislation Restricting the Use of Credit Reports for Employment Purposes*, Littler ASAP (Apr. 26, 2013); Rod Fliegel and William Simmons, *Use of Credit Reports by Employers Will Soon Be Restricted in Connecticut*, Littler ASAP (July 22, 2011); Philip Gordon and Jeffrey Kauffman, *New Illinois Law Puts Credit Reports and Credit History Off Limits for Most Employers and Most Positions*, Littler ASAP (Aug. 24, 2010); Rod Fliegel, Steven Kaplan, and Emily Tyler, *Legislation Roundup: Maryland Law Restricts Use of Applicant's or Employee's Credit Report or Credit History*, Littler ASAP (Apr. 20, 2011); Rod Fliegel, Bruce Young and Jennifer Mora, *Nevada is the Latest State to Restrict the Use of Credit Reports for Employment Purposes*, Littler ASAP (May 30, 2013); Howard Rubin and Jennifer Nelson, *New Oregon Law Prohibits Credit Checks*, Littler ASAP (Apr. 2, 2010); and Rod Fliegel and Jennifer Mora, *Vermont Becomes the Eighth State to Restrict the Use of Credit Reports for Employment Purposes*, Littler ASAP (June 18, 2012).