Insight

IN-DEPTH DISCUSSION

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EEOC Settles Background Check Litigation with BMW, But Also Faces Steep Attorneys' Fees in Freeman Case

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After several high-profile setbacks in disparate impact discrimination lawsuits challenging criminal record screening policies,[1] the EEOC has entered into a settlement (consent decree) in one of its few remaining cases, a settlement that includes payouts to individual employees in an amount up to $1,600,000. Beyond this not insubstantial settlement amount, the consent decree also reflects the EEOC's view of a model criminal record screening policy, and is useful in that respect.[2] While the EEOC has been trumpeting the settlement on its Web site, the EEOC's bluster may have been tempered by a further and strongly worded opinion in the Freeman case in Maryland, one of the EEOC's spectacularly unsuccessful disparate impact lawsuits challenging criminal record screening policies (affirmed by the Fourth Circuit).[3] The opinion awards Freeman just under $1,000,000 in attorneys' fees and costs from the EEOC. Together, these two developments create some uncertainty about whether the EEOC will continue to steadily focus on criminal record screening policies. Odds are the settlement will embolden the EEOC, notwithstanding the award in Freeman, and thus employers should continue to monitor this and related areas of the law, including fair credit reporting act class action litigation.[4]

EEOC v. BMW

Background of Litigation

On July 11, 2013, the EEOC filed a lawsuit against BMW's manufacturing facility in South Carolina claiming that BMW violated Title VII by implementing and utilizing a criminal background policy

1 *See* Rod Fliegel and Jennifer Mora, *Sixth Circuit Upholds Dismissal of EEOC Suit Against Employer Screening Applicants Based on Credit History Information,* Littler Insight (Apr. 17, 2014).

2 For a comprehensive review of the EEOC's updated guidance and related legal concerns, including applicable state law compliance issues, see Barry Hartstein, Rod Fliegel, Jennifer Mora and Marcy McGovern, *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community,* Littler Report (May 17, 2012).

3 *See* Barry Hartstein, Rod Fliegel, Jennifer Mora and Carly Zuba, *Update on Criminal Background Checks: Impact of EEOC v. Freeman and Ongoing Challenges in a Continuously Changing Legal Environment,* Littler Insight (Feb. 23, 2015).

4 *See* Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler ASAP (Jan. 6, 2014); Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler Report (Aug. 1, 2014).

that allegedly disproportionately screened out African Americans from jobs, and rejected job applicants with convictions without considering whether the conviction was job-related and consistent with business necessity.

The claimants were employees of UTi Integrated Logistics, Inc. (UTi), which provided logistic services to BMW at its South Carolina facility. The logistics services included warehouse and distribution assistance, transportation services and manufacturing support.

BMW implemented its criminal conviction policy in 1994. The policy understandably restricted facility-access to BMW employees and employees of contractors with certain criminal convictions. When UTi assigned the claimants to work at the South Carolina facility, UTi ran criminal background checks on employees according to UTi's criminal conviction policy. UTi's criminal background check limited review to convictions within the prior seven years. BMW's policy, however, had no time limit with regard to convictions and excluded job applicants with certain convictions.

In 2008, UTi ended its contract with BMW. During a transitional period, UTi employees were informed of the need to re-apply with the new contractor to retain their positions in the South Carolina warehouse. As part of the application process, the new contractor performed new criminal background checks on every current UTi employee applying for a position with the new contractor. The new contractor discovered that several UTi employees had criminal convictions that purportedly disqualified them under BMW's policy. Those employees were not offered employment with the new contractor.

The Litigation and the Consent Decree

Both sides litigated aggressively, including filing cross motions for summary judgment, both of which were denied. However, after two years, on September 8, 2015, a federal district court judge approved a Consent Decree, reflecting a settlement between the EEOC and BMW that requires BMW to

- refrain from further use of the criminal record screening policy at issue in the litigation (Exhibit A to the contest decree);
- continue to utilize its updated criminal record screening policy, which is fashioned to resemble the EEOC's recommended best practices from April 2012.[5]
- pay $1.6 million to 56 claimants in the litigation, in addition to other applicants not yet identified;
- offer those 56 claimants, and up to 90 other applicants not yet identified, employment through a logistics labor contractor; and
- train on the proper use of criminal background checks and maintain pertinent records.

EEOC v. Freeman

On August 9, 2013, a federal district court judge in Maryland dismissed, without a trial, the EEOC's Title VII suit against Freeman over alleged discriminatory background checks based largely on fatal flaws in the EEOC's expert report—described by the court as "an egregious example of scientific dishonesty." In that case, the EEOC alleged that Freeman's criminal checks had a disparate impact on African American and male applicants, and that the credit checks had a disparate impact on African American job applicants.

On February 20, 2015, in a unanimous decision by the three-judge panel, the U.S. Court of Appeals for the Fourth Circuit affirmed the lower court's decision, which stemmed from the exclusion of the EEOC's expert reports, noting the "district court found a 'mind-boggling' number of errors and unexplained discrepancies." A separate concurring opinion was written to address what one judge referred to as "disappointing litigation conduct" by the EEOC, including continued reliance on an expert whose testimony was "fatally flawed in multiple respects," who previously had been used by the EEOC despite a "record of slipshod work, faulty analysis, and statistical sleight of hand." The concurring opinion further cautioned:

> "The EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress, as its 'significant resources, authority, and discretion' will affect all 'those outside parties they investigate or sue'…The Commission's

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

> conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences for failing to do so."

On September 4, 2015, the federal district court judge ordered the EEOC to pay approximately $1 million in attorneys' fees to Freeman, which had sought $1.7 million to defend the litigation. Although the judge recognized the EEOC's interest in monitoring employer background screening policies, the judge almost chastised the EEOC in the opening paragraph of his order, stating:

> "World-renowned poker expert Kenny Rogers once sagely advised, "You've got to know when to hold 'em. Know when to fold 'em. Know when to walk away." In the Title VII context, the plaintiff who wishes to avoid paying a defendant's attorneys' fees must fold 'em once its case becomes so groundless that continuing to litigate is unreasonable, i.e. once it is clear it cannot have a winning hand. In this case, once Defendant Freeman revealed the inexplicably shoddy work of the EEOC's expert witness in its motion to exclude that expert, it was obvious Freeman held a royal flush, while the EEOC held nothing. Yet, instead 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. Because the EEOC insisted on playing a hand it could not win, it is liable for Freeman's reasonable attorneys' fees."

Whether the EEOC will appeal the decision remains to be seen.

Takeaways for Employers

Odds are the settlement will embolden the EEOC, notwithstanding the award in Freeman, and thus employers, particularly multi-state employers, should continue to monitor this and related areas of the law, including the so-called "ban the box" laws.[6] Employers that use criminal records (or credit checks) to screen applicants or employees should continue to consider the following:

Employers that want to assess potential disparate impact risks should consider conducting a privileged review of their screening policies to help identify areas of opportunity to fortify Title VII compliance. Questions to consider include whether the policy:

- incorporates variation for different roles within the company;
- strategically sequences the consideration of criminal records and other types of background information;
- accounts for the developing body of criminological literature discussing recidivism; and
- requires confidential handling and destruction of sensitive information.

Employers also should continue to be mindful of, and comply with, the federal and state fair credit reporting laws, such as the Fair Credit Reporting Act (where the storm of class actions against employers has not yet abated).[7]

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6 *See* Jennifer Mora, Jennifer Warberg and Philip Gordon, Oregon to Become the Latest State to Ban the Box, Littler ASAP (Jun. 22, 2015); Jennifer Mora, David Warner, and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (Jun. 12, 2015).

7 *See* Rod Fliegel and Jennifer Mora, *The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011).