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## Another Court Upholds the Employer's Right to Discover Information About the EEOC's Own Hiring Policies

By Rod Fliegel and Jennifer Mora

In April 2012, the Equal Employment Opportunity Commission (EEOC) issued its updated enforcement guidance concerning how, in the EEOC's view, Title VII of the Civil Rights Act of 1964 (Title VII) restricts an employer's discretion to consider criminal records relative to employment decisions.<sup>1</sup> Even before April 2012, however, the EEOC sued certain employers for allegedly violating Title VII by relying on criminal records, including Freeman, a nationwide convention, exhibition and corporate events marketing company.<sup>2</sup> As discussed below, Freeman's recent success in Maryland in overcoming the EEOC's objections to revealing details about the EEOC's own hiring policies builds on a similar discovery order obtained by Kaplan Higher Education Corporation (Kaplan) in its battle with the EEOC in Ohio over Kaplan's use of credit history information for employment decisions. These successes have strategic importance to employers who are assessing how to react to the EEOC's vigorous efforts to regulate background checks.<sup>3</sup> The importance of a well-reasoned strategy is highlighted by the EEOC's recent \$3.13 million settlement with a nationwide beverage company in a dispute concerning criminal records.<sup>4</sup>

### Freeman Overcomes the EEOC's Objections to Revealing Details About the EEOC's Own Hiring Policies

In October 2009 the EEOC filed suit against Freeman, alleging that the company engaged in an ongoing pattern and practice of discriminating against African Americans, Hispanics, and male applicants by examining their criminal reports and credit histories for employment purposes.<sup>5</sup>

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), [www.littler.com/publication-press/publication/eec-issues-updated-criminal-record-guidance-highlights-important-stra](http://www.littler.com/publication-press/publication/eec-issues-updated-criminal-record-guidance-highlights-important-stra).

2 *EEOC v. Freeman*, No. 8:09-cv-02573 (D. Md. Sept. 30, 2009). The EEOC also suffered a significant loss in a conviction-records case in Michigan and was ordered to pay attorneys' fees and costs in excess of \$750,000. *EEOC v. Peopemark*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011), *aff'd*, 2011 U.S. Dist. LEXIS 154429 (W.D. Mich. Oct. 17, 2011). In that case, the EEOC conceded its claims of discrimination against the employer for refusing to hire job applicants with criminal records. The employer had no such policy and the district court found that the EEOC's complaint was "without foundation from the beginning." The EEOC has appealed to the U.S. Court of Appeals for the Sixth Circuit.

3 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), [www.littler.com/publication-press/publication/do-i-say-not-i-do-eec-required-provide-discovery-its-employment-pract](http://www.littler.com/publication-press/publication/do-i-say-not-i-do-eec-required-provide-discovery-its-employment-pract).

4 See Press Release, EEOC (Jan. 1, 2012), available at [www.eec.gov/eec/newsroom/release/1-11-12a.cfm](http://www.eec.gov/eec/newsroom/release/1-11-12a.cfm).

5 See Press Release, EEOC, *EEOC Files Nationwide Hiring Discrimination Lawsuit Against Freeman* (Oct. 1, 2009), available at [www.eec.gov/eec/newsroom/release/10-1-09b.cfm](http://www.eec.gov/eec/newsroom/release/10-1-09b.cfm).

The individual who filed the charge that prompted the EEOC's lawsuit was an African-American applicant who alleged that Freeman denied her an employment opportunity because of her credit history. The EEOC ultimately expanded the scope of its investigation to include Freeman's use of criminal records as part of its pre-employment screening program.<sup>6</sup> According to the EEOC's press release, the lawsuit alleged that Freeman "rejected job applicants based on their credit history and if they had one or more of various types of criminal charges or convictions," in violation of Title VII.

On March 27, 2012, Freeman served the EEOC with a deposition notice asking that a designated EEOC representative appear to testify on a number of topics, such as: (1) the agency's basis for challenging an employer's use of credit history or arrest records in hiring; (2) the EEOC's policies on and justifications for restrictions against considering arrest and credit records in hiring; and (3) the EEOC's adjudicative procedures for determining the "credentialing and suitability decision making process." The EEOC filed a motion for a protective order and asked the district court to deny Freeman's request to depose the EEOC regarding these topics.

The district court denied the motion. Although the EEOC argued that its use of criminal records and credit histories for hiring purposes within the agency was not relevant to its lawsuit against Freeman because (1) the business necessity defense "is employer- and job-specific," and (2) Freeman "[was] the employer in question," the district court disagreed. According to the court, it could not, in the early stages of the litigation, evaluate the merits of Freeman's defense. Rather, relying on the Ohio district court's order in *Kaplan* requiring the EEOC to provide information about its hiring practices,<sup>7</sup> the court reasoned that if the EEOC "uses hiring practices similar to those used by [Freeman], this fact may show the appropriateness of those practices, particularly because [the EEOC] is the agency fighting unfair hiring practices." The court further added that Freeman was "not required to accept [the EEOC's] position in its briefs that the two entities' practices are dissimilar. . . ." In fact, Freeman presented evidence that the parties' hiring practices were comparable because they both considered similar factors, such as the "nature of the offense" committed, the "seriousness of the conduct," and the position to be filled.

The court also rejected the EEOC's argument that allowing Freeman to depose agency officials would be duplicative because the EEOC had been deposed on similar issues in the *Kaplan* litigation. In doing so, the court noted that Freeman was not a party to that litigation and "the record does not show that the deposition in *Kaplan* covered all of the same topics that [Freeman] seeks to cover in its deposition of [the EEOC]." Finally, the court rejected the EEOC's remaining "burdensomeness" argument in support of its request for a protective order.

## Significance of the Discovery Orders

The U.S. Supreme Court recognizes that background checks and related investigations serve legitimate business purposes for employers.<sup>8</sup> Indeed, this seems readily apparent from the screening policies deployed by the EEOC and other government agencies. Despite this, the EEOC appears intent on pursuing an aggressive agenda of targeting what it views as discriminatory practices through sweeping "practice and pattern" cases, which focus, in part, on certain employers' use or reliance on credit checks and criminal background investigations.<sup>9</sup>

Although the *Freeman* and *Kaplan* discovery orders are significant to those specific cases, they may also have broader ramifications for the EEOC to the extent the agency elects to challenge *any* hiring practice that the agency itself may use. The discovery orders appear to suggest that at least some courts will not allow the EEOC to aggressively litigate against employers in the face of a "Do As I Say, Not As I Do" position. Whether *Freeman* or *Kaplan* will discover from the EEOC anything of significant value to employers regarding the agency's hiring practices remains to be seen. In the meantime, employers should consider reviewing their credit and criminal record-based screening policies and procedures to fortify the policies and procedures and assure defensibility consistent with Title VII. In addition, employers that consider credit history information and/or criminal records for employment purposes must be mindful not only of the EEOC's interpretation of Title VII, but

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6 Early in the litigation, Freeman filed a motion for partial summary judgment, which raised a statute of limitations defense. Specifically, Freeman argued that, for those claims that were not part of the original charge, the 300-day statute of limitations should run from the date that the EEOC notified Freeman that it was expanding its investigation to include new claims, rather than the date of the original charge. The district court agreed and granted Freeman's motion for partial summary judgment. *EEOC v. Freeman*, 2011 U.S. Dist. LEXIS 8718 (D. Md. Jan. 31, 2011).

7 *EEOC v. Kaplan Higher Education Corp.*, 2012 U.S. Dist. LEXIS 54949 (N.D. Ohio Apr. 18, 2012).

8 See Rod Fliegel and William Simmons, *U.S. Supreme Court Holds that Constitutional Privacy Rights Do Not Restrict the Government's Discretion to Background Check Federal Contractors*, Littler ASAP (Jan. 24, 2011), [www.littler.com/publication-press/publication/us-supreme-court-holds-constitutional-privacy-rights-do-not-restrict-g](http://www.littler.com/publication-press/publication/us-supreme-court-holds-constitutional-privacy-rights-do-not-restrict-g).

9 See EEOC, E-RACE GOALS AND OBJECTIVES, available at [www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm#goal3](http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm#goal3).

related federal and state laws, including the Fair Credit Reporting Act (FCRA)<sup>10</sup> and state fair employment laws restricting inquiries into, and the use of, credit history and criminal records (e.g., the new laws in Vermont and Indiana<sup>11</sup>).

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10 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), available at [www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illumin](http://www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illumin).

11 See Rod Fliegel, Jennifer Mora, and William Simmons, *Indiana Passes New Legislation Restricting Criminal History Information Reported in Background Checks*, Littler ASAP (June 26, 2012), [www.littler.com/publication-press/publication/indiana-passes-new-legislation-restricting-criminal-history-informatio](http://www.littler.com/publication-press/publication/indiana-passes-new-legislation-restricting-criminal-history-informatio) (discussing the new law in Indiana); see also 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), [www.littler.com/publication-press/publication/vermont-becomes-eighth-state-restrict-use-credit-reports-employment-pu](http://www.littler.com/publication-press/publication/vermont-becomes-eighth-state-restrict-use-credit-reports-employment-pu) (discussing Vermont’s new restrictions on using credit history information).

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