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## Federal Court Grants Class Certification in Title VII Disparate Impact Suit Over Alleged Discriminatory Criminal Records Screening Policy

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On July 1, 2014, the court granted class certification in a high-profile disparate impact discrimination case against the Census Bureau in federal court in New York based on its criminal record screening practices, *Houser et al. v. Pritzker*. The plaintiffs are represented by a well-known New York class action law firm and not by the Equal Employment Opportunity Commission (EEOC). The suit seeks back pay and equitable relief for a class of unsuccessful Latino and African-American job applicants. The Bureau allegedly discriminated against the class members by (1) requiring them to provide the Bureau with detailed information about their prior criminal records in order to progress in the hiring process (referred to as the 30-day Letter), and (2) rejecting job applicants on the basis of an allegedly arbitrary and inflexible assessment of their prior criminal records.

The court did not decide whether the Bureau discriminated against the class members. The court only reached the *procedural* question of whether the plaintiffs could certify the case as a class action. Nevertheless, the court's opinion is significant because it may tend to encourage similar disparate impact discrimination suits by the plaintiff's bar. In that regard, the court distinguished the U.S. Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes* because the Bureau's practices, unlike those of the company in *Dukes*, were both *uniform* and *non-discretionary*.

Additionally, the court's ruling that the Bureau's practices can be tested by common proof may encourage the EEOC to continue to press its criminal records screening cases.<sup>1</sup> The EEOC can prosecute broad claims without even certifying a class, but in disparate impact litigation must still identify with *specificity* the alleged discriminatory employment practice. Indeed, in its disparate impact lawsuit against a different employer, the EEOC has, so far, failed to meet this burden.<sup>2</sup>

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1 See Rod Fliegel, Barry Hartstein and Jennifer Mora, *Two New EEOC Criminal Record Lawsuits Underscore Important Strategic and Practical Considerations for Employers Conducting Background Checks*, Littler ASAP (June 12, 2013). For a thorough discussion of the EEOC's updated enforcement guidance, 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).

2 See Rod Fliegel and Jennifer Mora, *Federal Court Dismisses EEOC Title VII Disparate Impact Suit Over Alleged Discriminatory Background Checks Without Trial*, Littler ASAP (Aug. 12, 2013). This case is on appeal.

## The Bureau's Background Check Program

Applicants for the Bureau completed a written exam and underwent a criminal background check. The first step of the background check process entailed the Bureau running each applicant's name, date of birth and Social Security number through the Federal Bureau of Investigation's (FBI) criminal history database. If the FBI database located a criminal history record for an applicant, staff members at the Local Census Office (LCO) reviewed the record "using certain criteria" and determined whether the applicant could be hired immediately, or whether the Bureau needed further information from the applicant. If the Bureau needed additional information, it mailed the 30-day Letter, which instructed the applicant to provide "official court documentation on any and all arrest(s) and/or conviction(s)" within 30 days. If the applicant disputed the existence of the arrest record, the 30-day Letter advised the applicant to submit fingerprints within that period.

For those applicants who responded to the 30-day Letter, the Bureau then applied "Adjudication Criteria" to determine whether they were suitable for employment. This Adjudication Criteria included an automatic exclusion for applicants with prior arrests for almost all felonies and most misdemeanors. The only discretion allowed by the Adjudication Criteria was an instruction to defer anything the staff members felt "strongly about" or as to which they could not make an unbiased decision.

This process often took months to complete, and the plaintiffs alleged that many applicants with criminal histories who were ultimately eligible for hire were never considered for a position because the Bureau already had filled the temporary positions by that time.

## Procedural Background of the Lawsuit

The plaintiffs allege that the Bureau's screening process disparately impacted African-American and Latino applicants. The plaintiffs challenge the Bureau's 30-day Letter and its Adjudication Criteria.

The plaintiffs moved to certify the lawsuit as a class action under Rule 23 on July 8, 2013. On December 16, 2013, the Bureau moved to dismiss for lack of subject matter jurisdiction, alleging the named plaintiffs lacked standing to pursue relief under Title VII.

## The Court Partially Granted the Bureau's Motion to Dismiss

The court ruled that, to establish standing, the named plaintiffs had to establish that they possessed the "bare minimum" qualifications for employment with the Bureau. The court declined to require the named plaintiffs to demonstrate that they would have ultimately been hired notwithstanding the background check. Instead, the court followed the U.S. Supreme Court in stating that, for standing purposes, the plaintiffs need only show they were denied equal treatment because of the practice.

The court dismissed three of the named plaintiffs—all of the Latino named plaintiffs—for lack of standing because they failed to meet the bare minimum qualifications of the position due to their low scores on the written exam. Although the five remaining named plaintiffs may not have been ultimately hired, the court found they had standing by virtue of their meeting the "bare minimum" qualifications and were, thus, "denied the opportunity to compete with other applicants."

## The Court Grants Plaintiffs' Certification Motion

In granting class certification, the court applied different provisions of Rule 23 to different phases of the litigation in order to avoid class-wide problems in the face of individualized damages inquiries. The court certified a class under Rule 23(b)(2) for the first phase to determine liability and afford class-wide injunctive relief. It then used its discretion under Rule 23(c)(4) to certify a class only as to the issue of liability, while allowing the plaintiffs to litigate damages individually, if liability is found. The certified class comprised all African-American applicants who applied for temporary employment and were harmed by the 30-day Letter and/or Adjudication Criteria.<sup>3</sup>

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<sup>3</sup> Since the court had dismissed the only Latino named plaintiffs, it declined to include them in the certified class, but invited the named plaintiffs to add a Latino named plaintiff and amend the certification order if they did so.

The court ruled that the named plaintiffs met the requirements of Rule 23(a) by establishing numerosity, commonality, typicality and adequacy of representation. The court found that the named plaintiffs established commonality since each of the proposed class member's claims raised at least one common question: whether the 30-day Letter, the Adjudication Criteria or both were racially-biased. The court held that *Wal-Mart Stores, Inc. v. Dukes* was different as there was no "uniform testing procedure or companywide evaluation" there but, instead, the employer afforded its regional managers with discretion in pay and promotion decisions. Here, the court held, the Bureau's practices of using the 30-day Letter and Adjudication Criteria to exclude applicants from the hiring pool were uniform and non-discretionary. The court essentially found these to be the type of "testing procedures" that the *Dukes* court found "clearly" satisfied commonality. The court further found that the parties' "battle of the experts" demonstrated that the central questions in the case have a common, class-wide answer, and the parties only disagreed on the answers.

As to Rule 23(a)'s typicality requirement, the court found no merit in the Bureau's argument that the individualized nature of the adjudication process precluded a finding of typicality. The court held that, at the liability stage, the plaintiffs only have to prove that the Adjudication Criteria had a disproportionate impact on African-American applicants and were not justified by business necessity. Since "the same set of objective Adjudication Criteria applied to all applicants nationwide," which sometimes resulted in automatic exclusions, there was no real individualized inquiry necessary for the plaintiffs to meet their burdens.

The court further held that the plaintiffs' seeking of injunctive relief satisfied the requirements of Rule 23(b)(2). The court could easily craft one injunction to remedy all of the eligible class members' injuries, i.e., it could enjoin using the 30-day Letter and mandate the Bureau to revise its Adjudication Criteria to ensure "a more comprehensive, job-related screening process." The court left open the possibility of amending the certification order and creating subclasses in the event one of the challenged hiring practices is found not to have disparately impacted minorities, but held that concern did not preclude certification at this stage.

The court declined, however, to certify the plaintiffs' proposed damages subclasses under Rule 23(b)(3) based on the U.S. Supreme Court's ruling in *Comcast Corp. v. Behrend*. In *Comcast*, the Supreme Court held that the district court improperly certified the proposed class under Rule 23(b)(3) because the plaintiffs' proposed damages model did not isolate those class members entitled to damages from those who were not. The Supreme Court held that, as such, individual questions of entitlement to damages would predominate at the remedial stage. Similarly, the court here held that the plaintiffs' proposed damages model was over-inclusive and "inevitably" included individuals not entitled to back pay because they would not have been hired absent the alleged discrimination. Since Title VII affords defendants the right to rebut a presumptive entitlement to back pay with fact-specific, individualized defenses, questions of individualized entitlement to damages would overwhelm the litigation.

However, the court cured the plaintiffs' shortcomings under Rule 23(b)(3) by exercising its discretion under Rule 23(c)(4) to isolate the liability and injunctive relief questions. According to the district court, where the liability and damages phases have been bifurcated, Rule 23(c)(4) is a viable option if Rule 23(a) and (b) have been met regarding liability. Since the court could certify the class under Rule 23(b)(2) to address liability and injunctive relief issues, it applied Rule 23(c)(4) and did not certify a class as to damages determinations. The court left open the means by which damages would ultimately be determined if the Bureau is found liable.

**Update:** On July 15, 2014, the federal government moved the Southern District of New York to reconsider its decision to certify the class described above. The government urged the court to undertake a more rigorous analysis of class certification requirements in light of the "nation's largest peacetime mobilization of Federal workers whose jobs require close and personal interaction with the public." In its motion, the government took aim at the court's findings with respect to the commonality and typicality requirements of Rule 23, as well as the "potential susceptibility of damages claims here to resolution at a later stage of a class action." In support of its motion, the government pointed to numerous arguments it had purportedly made in initial briefing that the court did not address or allegedly misconstrued, as well as the U.S. Supreme Court's holdings in *Wal-Mart Stores, Inc. v. Dukes* regarding the inapplicability of Rule 23(b)(2) "when each class member would be entitled to an individualized award of monetary damages."

## Conclusion

The court's opinion, which as compared to *Freeman* is remarkably neutral in tone, may encourage similar suits both by the plaintiff's bar and the EEOC. Accordingly, employers that use criminal records or credit checks to screen job applicants 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 various laws that impact the use of criminal records in addition to Title VII, including state fair employment laws, the so-called "ban the box" laws,<sup>4</sup> and the federal and state fair credit reporting laws, such as the Fair Credit Reporting Act (where a new storm of class actions has been unleashed on employers).<sup>5</sup>

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- 4 See Jennifer Mora, Rod Fliegel and Sherry Travers, [The Flurry of New Employment Laws Regulating the Use of Criminal Records Continues with Expanded Restrictions in Indiana, North Carolina, Texas, and Buffalo, New York](#), Littler ASAP (Jun. 7, 2013); Trent Sutton, Philip Gordon and Jessica Pizzutelli, [Rochester, New York Joins "Ban-the-Box Movement,"](#) Littler ASAP (May 27, 2014); Rod Fliegel, Jedd Mendelson and Jennifer Mora, [Employers in Newark, New Jersey Must Comply with a New Ordinance Broadly Restricting Their Discretion to Rely on Criminal Records for Employment Purposes](#), Littler ASAP (Oct. 2012); Rod Fliegel and William Simmons, [Philadelphia Passes Ordinance Restricting Certain Employer Inquiries Into, and Use of, Criminal Record History](#), Littler ASAP (Apr. 14, 2011); Rod Fliegel and Jennifer Mora, ["Ban-the-Box" and Beyond: Employers That Do Business In or Contract with the City of San Francisco Should Review Sweeping Restrictions. Regarding Inquiries Into, and the Use of, Criminal Records](#), Littler ASAP (Feb. 14, 2014); Rod Fliegel, Pam Salgado, Dan Thieme and Jennifer Mora, [Seattle Adopts Ordinance Limiting Inquiries Into and Use of Criminal Records for Employment Purposes](#), Littler ASAP (Jun. 20, 2013); Dale Deitchler, Rod Fliegel, Susan Fitzke and Jennifer Mora, [Minnesota Enacts "Ban the Box Law" Prohibiting Employment Application Criminal History Checkmark Boxes and Restricting Criminal Record Inquiries Until After Interviews or Conditional Job Offers](#), Littler ASAP (May 17, 2013); Rod Fliegel and Jennifer Mora, [Rhode Island Enacts "Ban the Box" Law Prohibiting Employment Application Criminal History Inquiries Until the First Job Interview](#), Littler ASAP (Jul. 17, 2013).
- 5 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); Rod Fliegel and Jennifer Mora, [Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014](#), Littler ASAP (Jan. 6, 2014); Rod Fliegel and Jennifer Mora, [Sixth Circuit Upholds Dismissal of EEOC Suit Against Employer Screening Applicants Based on Credit History Information](#), Littler ASAP (Apr. 17, 2014).