

Federal court tosses EEOC suit over background checks

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A federal judge had harsh words for the Equal Employment Opportunity Commission while dismissing the agency's suit against an employer for its policy of conducting background checks.

Last year, the EEOC issued guidance to employers about the use of background checks, cautioning that the agency was keeping a close eye on the issue. Multiple suits followed, including two highly publicized cases filed in June, alleging that employers violated Title VII because the background checks had a disparate impact on African-American employees and were therefore an **unlawful employment practice**.

But in ruling on a third suit making similar allegations filed by the agency, U.S. District Court Judge Robert W. Titus cast serious doubt about the agency's theory of liability and expressed concern about employers faced with the choice of hiring a potential criminal or conducting a check and facing a lawsuit from the EEOC.

"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," he wrote.

The case involved Freeman Decorating Services, a national provider of integrated services for expositions, conventions, corporate events, meetings, and exhibit programs. Having experienced problems with workplace violence, embezzlement, and theft, the company began conducting background checks in 2001. The type of check varied depending on the nature of the job. Those applying for a general position underwent a criminal investigation, while applicants seeking a "credit sensitive" position also faced a credit history review. Applicants were informed of the checks and signed an authorization form.

Freeman had a multistep evaluation process for reviewing the results of the checks, from comparing results to the application to evaluate truthfulness to a look at outstanding arrest warrants, followed by an individualized review of any criminal convictions. The company relied upon few bright-line rules, the court noted, and had a specific list of



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issues of concern, such as violence and job-related misdemeanors.

Significantly, the EEOC did not challenge any of the specific criteria or procedures used in the defendant's process. Instead, the agency alleged that the company engaged in a pattern or practice of discrimination against African-American job applicants by using poor credit history as a hiring criterion and against African-American, Hispanic, and male job applicants by using criminal history as a hiring criterion. Because the hiring criteria had a significant disparate impact on the identified suspect classes, the agency said they constituted an unlawful employment practice under Title VII.



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But, criticizing the statistical evidence presented by the agency, the Maryland federal judge said that it failed to carry its burden to plead a case of disparate impact, granting summary judgment for the employer. Judge Titus found the EEOC's expert report unreliable, with "such a plethora of errors and analytical fallacies" that it was insufficient to support a finding of disparate impact. From cherry-picking applicants to be included in the sample to including applicants outside the time period identified in the agency's claims, the "mind-boggling number of errors" rendered the report worthless, the court concluded.

Even if the report had been relevant, the court said the EEOC's claims would fail because the agency did not identify the specific policy or policies causing the alleged disparate impact. Merely pointing to statistical disparities does not suffice, and if the policy has multiple levels of procedures, the plaintiff must isolate a specific and discrete element that results in the discriminatory outcome. "[I]t is simply not enough to demonstrate that criminal history or credit information has been used," the court said. "Rather, a disparate impact case must be carefully focused on a specific practice with an evidentiary foundation showing that it has a disparate impact because of a prohibited factor."

"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," Judge Titus wrote. "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."

To read the opinion in *EEOC v. Freeman*, click [here](#).

Why it matters: The court ruling is a significant victory for employers, with Judge Titus' explicit statement about the "Hobson's choice" facing companies in light of the EEOC's suits challenging background checks recognizing the practical realities facing employers. "Careful and appropriate use of criminal history information is an important, and in many cases, essential, part of the employment process of employers throughout the United States," Judge Titus acknowledged. "As Freeman points out, even the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90 percent of its positions." The decision also reiterates the need to establish a multifaceted review policy that includes an individualized review of the applicant. Judge Titus noted that Freeman's evaluation process – with multiple levels of review, including an individualized assessment – was reasonable on its face and suitably tailored to its purpose of ensuring an honest workforce.

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