



July 25, 2011

SENT VIA EMAIL: Commissionmeetingcomments@eeoc.gov

Ms. Jacqueline Berrien, Chair
Mr. Stuart Ishimaru, Commissioner
Ms. Constance Barker, Commissioner
Ms. Chai Feldblum, Commissioner
Ms. Victoria Lipnic, Commissioner

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U.S. Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, DC 20507

Re: EEOC Enforcement of Title VII Protections Regulating Criminal Background Checks

Dear Chair Berrien and Commissioners Ishimaru, Barker, Feldblum, and Lipnic:

On behalf of the American Civil Liberties Union (ACLU), more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to thank you for convening this meeting to focus on the pressing problem of the use of criminal background screening to exclude individuals from job opportunities. We appreciate the opportunity to comment as you undertake the important process of revising and updating your guidelines and enforcement strategies to ensure that workers' ability to obtain employment free from discrimination and unnecessary barriers is preserved.

Introduction

The ACLU is a nationwide, non-partisan organization dedicated to preserving the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws, including the right, guaranteed by Title VII of the Civil Rights Act of 1964, as amended, to equal opportunity in employment. In addition, the ACLU is dedicated to combating the barriers to equal opportunity posed by the dramatic increase in the number of Americans who have been arrested, convicted, or incarcerated, and to combating the effects of the racial disparities that plague our criminal justice system. For these reasons, we are concerned that the right to equal opportunity in employment is increasingly threatened by the growing

employer reliance on commercial background checks in almost every sector, particularly in sectors in which low-wage workers, workers of color, and women workers are disproportionately concentrated.

Over the last two years, the ACLU has received **more than 850 reports** from women and men around the country who have been refused or dismissed from employment because of their criminal record. Additionally, because the FBI conducts over 5 million background checks per year mostly for employment purposes, the ACLU is also working to increase support for the Fairness and Accuracy in Employment Background Checks Act which seeks to improve the reliability and accuracy of criminal background checks issued by the FBI for employment screening purposes.

The sheer number of such stories demonstrates the tremendous impact of this unnecessary employment barrier, as well as the need for the Commission to consider carefully how best to prevent individuals' criminal backgrounds from stymieing their efforts to make meaningful contributions to society.¹ Below, we highlight a number of problems, illustrated by the intakes our litigators in our Women's Rights Project have received, coupled with some recommendations for the Commission to consider.

Outsourcing of Employment Decision to Screening Companies

Background checking is no longer a specialized screening procedure affecting only highly specialized workers. On the contrary, individuals who reported their experiences to the ACLU indicated that employers in low-wage sectors, such as retail, are outsourcing critical components of their hiring decisions, even for entry-level positions, to screening companies that conduct background checks. Our intakes indicate that such companies sometimes are permitted to issue a pass/fail judgment about an applicant, without ever providing employers with details regarding the arrest and/or conviction that supposedly disqualifies the applicant. The following intake illustrates that point:

Ms. W, a Native American woman in Washington State, was convicted in 2008 for possession of marijuana. After applying for a job at a discount retail store and receiving a conditional offer of employment, Ms. W received a call from the manager telling her that a background check company had given her a failing evaluation, without providing the employer with any further information. As a result of this evaluation, the employer rescinded the conditional offer of employment. When Ms. W investigated, she found out that her background check erroneously reflected a more serious offense. Although the background check company subsequently corrected Ms. W's report, the damage had been done.

Ms. W's experience demonstrates why it is essential that employers give applicants the opportunity to explain or correct any mistakes, as required by the Fair Credit Reporting Act. For many job seekers, the background check does not tell the whole story or even the correct story. It is equally critical, however, that the Commission provide clear and updated

¹ The Commission should also note that, according to a recent research study, offenders that are given equal housing and employment opportunities are less likely to re-offend. *See* <http://psychservices.psychiatryonline.org/cgi/reprint/60/2/224.pdf>.

guidance to the large numbers of employers in retail, the service sector, and other low-paying entry level jobs, on the permissible and impermissible uses of screening companies in the hiring process.

Impact of Blankets Bans on Low Wage Workers

Our intakes also reflect the particular impact that background checking practices have on low-wage women workers. Women are disproportionately represented in professions, such as home health care and child care, in which employees' and applicants' backgrounds are already heavily scrutinized. Many employers in these fields have blanket bans on hiring anyone who has ever had any contact with the criminal justice system, regardless of whether the person was convicted of any crime, whether the conviction has been expunged, or whether the individual has undergone a process of rehabilitation.

Ms. X is a long-term care worker whose two misdemeanor convictions were set aside and vacated. Despite having studied and obtained a license to work as a certified nurse's aide in her state, more than one employer has refused to consider her, because of her expunged convictions. One employer told her that the company's policy is not to hire anyone who has ever had contact with the police.

As the Commission has previously recognized, such blanket bans have an adverse impact on people of color – and in the case of long-term care workers, on low-wage women workers of color.

Improper Use of Expunged and Vacated Convictions

We have observed that some applicants for low-paying jobs are instructed, either by the employer or by statute or regulation, that they are not required to disclose on an application, a conviction that took place more than a certain number of years ago. Nonetheless, after excluding such information from their application, applicants are accused of lying and are denied employment on that basis. Similarly, some job seekers are refused employment for failing to disclose information such as expunged convictions or deferred adjudications.

Ms. Y, an African American woman from Los Angeles, was told after her interview that she would be hired. After conducting a background check, the employer withdrew the offer, explaining that Ms. Y would not be hired because she did not disclose her conviction for petty theft on her application, even though it had been expunged.

Such practices create an unfair Catch-22 for workers, in which they can be denied employment for disclosing or failing to disclose convictions that have been expunged, even where state laws prohibit employers from asking about expunged convictions or convictions from a certain number of years ago. Such practices undermine governmental policies allowing workers to expunge or seal convictions under certain circumstances.

Improper Reliance on Arrests that Do Not Result in Convictions

Finally, the intakes we have received reflect the fact that employers continue to use arrests as a basis for denying workers opportunities, notwithstanding current Commission guidelines stating that arrest records alone should not be used routinely to exclude people from employment, particularly when the arrest was not recent.

Ms. Z, a woman of color from Florida, was denied the opportunity even to *volunteer* at a city community center based on a 2004 arrest for possession of marijuana, for which she was never prosecuted.

Such reports are particularly disturbing in light of studies indicating that people of color are more likely to be subjected to arrests for drug offenses, despite the fact that whites sell and use drugs at comparable rates.²

Recommendations

The Commission should make clear that employers may not delegate employment decisions to a background checking company to make a pass/fail determination. Rather, employers are obligated to consider the factors the Commission has long emphasized, as well as others, including: the time that has passed since the offense, conviction, or completion of sentence; whether the conduct is related to the job sought and whether excluding the worker based on the conduct is justified by business necessity; whether the worker or applicant can demonstrate rehabilitation or a good work record since the offense occurred; and other potentially relevant factors, such as the worker's age at the time of the conduct.

The Commission should affirm that blanket bans on hiring anyone who has ever been arrested or convicted have a disparate impact on workers of color and are not justified by business necessity under Title VII. In addition, the Commission should explain that business necessity generally will not justify consideration of sealed records, juvenile adjudications, expunged or vacated convictions, convictions that were subsequently pardoned, and instances in which a worker was able to defer or avoid a conviction by, for example, completing a treatment program.

The Commission should re-affirm that arrest records alone will rarely provide a sound basis for excluding an employee, particularly where the arrest involved non-violent conduct.

Conclusion

Current Commission guidelines require employers to consider the nature and gravity of a worker's offense, the time that has passed since conviction and/or completion of sentence,

² For example, K. Beckett et al., "Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle," *52 Social Problems* Issue 3, pp. 419-441 (2005) (<http://www.plu.edu/~renfrodg/doc/srebeckett.pdf> (discussing racial disparities in drug arrest rates nationwide and in Seattle)); <http://www.racialdisparity.org/files/Defining%20the%20Disparity%20Taking%20Closer%20Look.pdf> (March 2002) (examining disparities between whites and African Americans in drug-related arrests in Minnesota);

and the nature of the job. As our intakes demonstrate, however, too many employers – including those employing a large number of low-wage and women workers in entry-level positions – consistently fail to give meaningful consideration to these factors.

We therefore applaud the Commission’s decision to give this problem renewed attention, and we urge the Commission to update its guidelines and give clear direction to employers, so that a large and growing segment of America’s workforce will not continue to face discriminatory barriers to employment in the future.

The ACLU appreciates this opportunity to give the Commission input on these important issues. Please contact Deborah J. Vagins at dvagins@aclu.org or (202) 715-0816 with any questions.

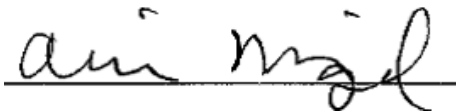
Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Deborah J. Vagins
Senior Legislative Counsel



Ariela Migdal
Senior Staff Attorney
Women’s Rights Project