

# Court Slams Attempt To Preclude Background Checks

By former Associate Ethan Don

In one of a handful of recent Equal Employment Opportunity Commission (“EEOC”) cases brought challenging employers’ use of background checks, the EEOC has been squarely defeated (at least prior to any appellate review). Judge Roger W. Titus of the United States District Court for the District of Maryland granted summary judgment in favor of the employer, Freeman, dismissing the EEOC’s claims that Freeman’s use of criminal and credit histories in hiring had an unlawful disparate impact on African-American, Hispanic, and male applicants. The court provided a limited roadmap for employers on how to deal with credit and criminal background checks. It makes clear that, at least for Judge Titus, the important aspects of an employer’s background check policy are: not using blanket checks; separating out “credit sensitive” positions from ones where a credit history is likely not relevant; limiting how far back in time the criminal background checks extend; evaluating the relationship between underlying criminal conduct and the position at issue; generally performing the background checks after an offer has been made; and, having a multi-step review process prior to final employment decisions.

The opinion has three primary substantive parts: a review of Freeman’s policies and practices; a discussion of the EEOC’s lack of evidence of disparate impact; and an analysis of the EEOC’s failure to identify a specific policy causing the alleged disparate impact.

The Court carefully laid out the types of background checks performed by Freeman. To begin with, the background checks were generally only performed after an offer had been made to an applicant. Credit checks were only conducted for delineated “credit sensitive” positions, criminal background checks only went back seven years, and convictions were not an automatic bar to hiring. Freeman also used a multi-step evaluation process once the criminal background check information was received – it compared the background check to application materials to assess the truthfulness of the applicant; it examined outstanding arrest warrants and gave applicants the opportunity to resolve the matter; and, it evaluated the specific circumstances of the criminal conduct underlying the criminal conviction to determine whether it was job-related. Moreover, initial decisions not to hire based on a particular conviction had a second, higher-level review.

The EEOC did not challenge any specific aspect of either Freeman’s criminal or credit background checks. It instead alleged that the policy of conducting these checks, as a whole, created a disparate impact and sought to end the use of any criminal or credit background checks by Freeman.

Judge Titus was particularly critical of the EEOC’s utter inability to produce timely, accurate, and reliable statistical analyses to support its disparate impact theory. In fact, much of the opinion is devoted to a discussion of the flaws in the EEOC’s expert’s reports, the “plethora of errors and analytical fallacies” contained in them and the other “material flaws” that rendered them meaningless and inadmissible. In its conclusion, the Court stated that the “[t]he story of the [EEOC’s case] has been that of a theory in search of facts to support it. But there are simply no facts here to support a theory of disparate impact resulting from any identified, specific practice of [Freeman].”

Even if the experts’ reports had been admissible, summary judgment would have been granted due to the EEOC’s failure to identify the specific background check policy or policies claimed to cause the alleged disparate impact. The Court pointed out that Freeman’s policies involved different types of checks for different jobs, included both objective and subjective decision-making criteria, and included a multi-factor, multi-step process before the ultimate employment decision was made. Because the EEOC could not point to any particular step or factor in these policies which created the alleged disparities, the Court held that it failed to establish a necessary element of its case.

The Court took the time to note that many employers conduct a criminal history or credit record background check during the hiring process, including the EEOC, and that the reasons for doing so were obvious. The opinion specifically castigated the EEOC for “placing 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.”

This case does not mark the end of the EEOC's policy or recent guidance; other similar cases filed by the EEOC remain pending. But, based on the Court's repeated reference to complexity (in a good sense) of Freeman's background check policies, there is a good take-away for employers. Having a clear policy on background checks, one which is appropriately tailored to the positions at issue and involves a multi-faceted, multi-step process allowing for a real analysis of the applicant, the background check results, and the position, is an excellent first step to protect against disparate impact or even discrimination claims.