

IN PRACTICE

## EMPLOYMENT LAW

### Use of Criminal Records in Employment Decisions May Violate Title VII

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*Interviewer: Do you have a criminal record?*

*Rocky: Nothin' worth braggin' about.*  
— Rocky II (1979)

At the end of April 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued an enforcement guidance document regarding the use of arrest or conviction records in employment decisions (available at [www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf)). In that document, the EEOC concluded that an employer who uses an applicant's criminal history as a basis for making employment decisions may in some instances violate Title VII of the Civil Rights Act of 1964. Below is a summary of the EEOC's findings and a discussion of employer best practices as recommended by the EEOC.

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It should be noted that this article addresses Title VII only. Numerous other laws may apply, including state laws that impose greater restrictions. In addition, federal law prohibits individuals with criminal records from serving in certain positions or holding particular licenses. The applicability of these other laws is beyond the scope of this piece.

#### Background

The EEOC began its analysis by noting the disproportionate number of African Americans and Hispanics subject to arrest and incarceration. The EEOC noted that, while 1 in 17 white men are expected to serve time in prison during their lifetime, "this rate climbs to 1 in 6 for Hispanic men and to 1 in 3 for African American men." In addition, African Americans and Hispanics are arrested at a rate that is between two and three times their proportion of the general population. Finally, the EEOC noted that many state and federal criminal record databases were incomplete or inaccurate, and therefore served as an unreliable basis for making hiring decisions. Because they often fail to report the final disposition of the arrest, arrest records are particularly unreliable.

#### EEOC Guidance

Due to the disproportionate number of African Americans and Hispanics subject to arrest and incarceration, the EEOC concluded that an employment policy that excludes candidates with a criminal history has a disparate impact based on the candidates' race and/or national origin. Where a neutral policy or practice disproportionately impacts a Title VII-protected group, this may support a disparate impact claim under Title VII. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (first case recognizing Title VII disparate claim). Unless an employer can demonstrate that such a policy is job-related and consistent with business necessity, it will not survive a challenge under Title VII.

The EEOC stated that an employment policy that permanently bars from employment individuals convicted of any crime, no matter how remote in time, will not survive a challenge under Title VII. See, e.g., *Green v. Missouri Pacific Railroad*, 523 F.2d 1290, 1293 (8th Cir. 1975) (holding that it was discriminatory under Title VII for an employer to "follow[] the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense."). The EEOC agreed with the *Green* court that it could not "conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."

The EEOC gave examples of several other policies that would likely not survive a challenge under Title VII. One

example was a company whose online job application process automatically terminates when the applicant “answers affirmatively to the question ‘have you ever been convicted of a crime?’” The EEOC noted that, where a company had no stated basis for the adoption of this policy and no data demonstrating “that convictions for all offenses render all applicants unacceptable risks in all of its jobs,” it would not be able to demonstrate that such a “blanket exclusion” was consistent with business necessity. Similarly, where an African-American male was stopped while driving to church in a predominantly white town and then arrested but not ultimately charged or convicted, his employer’s implementation of its policy of denying promotions to individuals with arrest records would not survive a challenge under Title VII.

The EEOC examined another hypothetical scenario involving an African-American male named Leo. Twenty years earlier as a teenager, Leo had pleaded guilty to a misdemeanor assault charge. Leo had enjoyed a successful three-year tenure as an account executive at a PR agency. However, after a change in ownership, the company adopted a blanket policy prohibiting the employment of any individual with a prior criminal conviction. The stated rationale for the policy was the desire to employ only the “best of the best” and the belief that a quality workforce is the key driver of profitability. Nevertheless, the company had adduced no objective evidence to support its zero tolerance policy. The EEOC therefore concluded that, assuming Leo could demonstrate disparate impact, the company’s policy would likely violate Title VII.

The EEOC noted that even more narrowly crafted policies may not survive a challenge under Title VII. It examined the case of Jamie, an African-American male, who worked for a shredding company for five years. The company’s business was the transport and shredding of discarded files and sensitive materials from offices. Jamie, who had received high marks during his employment for reliability, trustworthiness and honesty, had also pleaded guilty to misdemeanor insurance fraud

five years ago. A competitor then took over the company and implemented a policy prohibiting the employment of anyone convicted of any crime related to theft or fraud in the past five years. Because the policy did not permit individuals to demonstrate why this prohibition should not be applied to them, Jamie’s prior reliable and honest performance was not considered. Rather, he was summarily terminated. The EEOC stated that, assuming Jamie could demonstrate disparate impact based on race (African American), it would find reasonable cause to believe that Title VII was violated.

In contrast, where an employer can demonstrate that its policy is required for the position, consistent with business necessity, narrowly tailored and affords individualized assessment, the policy will not run afoul of Title VII. The EEOC examined the policy of a hypothetical community center that prohibited anyone convicted in the past four years of a theft crime — e.g., burglary, robbery, larceny, identity theft — from working in a position with access to personal financial information. The community center based this rule “on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes.” In addition, the community center “offer[ed] an opportunity for individuals identified for exclusion to provide information showing that the exclusion should not be applied to them.” Noting that the policy is narrowly tailored, for a limited time period, based on objective data and affords “individuals an opportunity to explain special circumstances regarding their criminal conduct,” the EEOC stated that it would “not find reasonable cause to believe that discrimination occurred because the policy is job related and consistent with business necessity.”

#### **Employer Best Practices**

The EEOC concluded with its recommended best practices for employers. In addition to advising employers to train managers, hiring officials and decision makers about Title VII and its prohibition on employment discrimination, the EEOC also made several specific recommenda-

tions regarding the use of arrest or conviction records in employment decisions.

First, the EEOC advised employers not to inquire about an applicant’s prior criminal convictions on initial job applications. In addition, it recommended eliminating policies or practices that exclude people from employment based on any prior criminal conviction. Instead, the EEOC advised employers to develop a narrowly tailored policy that considers the nature and gravity of the crime; the time elapsed since the offense occurred; and the essential requirements of the position. The EEOC counseled employers to consider less discriminatory alternative practices which still serve their goals. It also advised employers to ensure that they keep information concerning individuals’ criminal records confidential.

Finally, the EEOC suggested that employers provide notice to individuals who have been excluded based on a criminal conviction and offer an opportunity for these individuals to demonstrate why the exclusion should not be applied. The EEOC recommended that the employer review this additional information to determine whether it warrants making an exception. The EEOC noted that, in making such an individualized assessment, employers should consider a variety of factors including: the number of offenses for which the individual was convicted; the individual’s age at the time of conviction or release from prison; rehabilitation efforts; and his or her prior employment history.

#### **Conclusion**

As the above demonstrates, a policy that bars the hiring of individuals with a prior criminal or arrest record will not survive a challenge under Title VII. However, where an employer crafts a narrowly tailored policy specifically designed for the position, and which affords an individual the opportunity to explain the circumstances surrounding his or her criminal conduct, such a policy should not be deemed discriminatory. Particularly if the employer adheres to the EEOC’s recommended best practices, it should not face liability under Title VII. ■