

Statement of Janet Ginzberg

Before the Equal Employment Opportunity Commission

November 20, 2008

Chair Earp and Commissioners of the EEOC, thank you for this opportunity to speak with you on the subject of the growth of criminal background checks in employment. This subject is perhaps the least acknowledged significant employment problem hindering millions of Americans from supporting their families and themselves.

My name is Janet Ginzberg. I am a Senior Staff Attorney in the Employment Unit of Community Legal Services, Inc. (CLS), in Philadelphia, PA. Our unit represents low-income citizens of Philadelphia in a variety of job-related issues, such as discrimination, wage claims, Family Medical Leave, welfare-to-work, disability benefits and barriers to employment. Among these barriers to employment, the most significant one is criminal records. Every year, our office sees hundreds of ex-offenders who are trying hard to obtain or keep employment but whose records—many as old as five, ten, even twenty years—are preventing them from doing so.

The statistics about the growth of the criminal justice system are staggering. Moreover, it is evident that criminal records have a disproportionate impact on racial minorities. Taken together, African-Americans (39%) and Hispanics (18%) comprised a majority of those who had ever been imprisoned as of 2001.¹ Almost 17% of adult black males had ever served prison time, a rate twice that of Hispanic males (7.7%) and six times that of white males (2.6%).² For these reasons, we are extremely grateful that the EEOC has long recognized and sought to ameliorate discrimination against people with criminal records—and that it continues to do so.

I have been asked to speak about two litigation issues: the impact of the El v. SEPTA decision, decided in March of 2007, and disparate impact. I will discuss the El decision first.

Impact of El v. SEPTA

In El v. Southeastern Pennsylvania Transportation Authority, 479 F.3d 232 (3d. Cir. 2007), the court found that the plaintiff, who had a 47 year old murder conviction, had not as a factual matter rebutted the transportation authority's criminal record hiring policy for its paratransit subcontractors. Aside from its holding concerning the application of SEPTA's policy to Mr. El and the factual record in the case, the decision was very instructive for the crafting of criminal records policies that will pass muster under Title VII. The Third Circuit thoroughly analyzed the history of Title VII's business necessity

¹ Thomas P. Bonczar, Prevalence of Imprisonment in the U.S. Population, 1974-2001 (U.S. Dept. of Justice, Bureau of Justice Statistics Aug. 2003), at 3.

² Id.

defense in disparate impact cases and determined that the standard that it had previously articulated – “that discriminatory hiring policies accurately but not perfectly distinguish between applicants’ ability to perform successfully the job in question” – could be adapted to the context of criminal conviction policies.

The court concluded that Title VII requires that criminal record policies “accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.” In footnotes describing the application of its test, the court distinguished between applicants who pose “minimal level of risk” and those who do not, making clear that an employer cannot reject persons with criminal records on the grounds that the level of risk cannot be brought down to zero. The EI court did not adopt the EEOC Policy Guidance on the Issue of Conviction Records as the standard, indicating that it was not entitled to great deference. The court suggested that while the policy guidance codified the Green decision, it lacked the thorough and persuasive analysis that entitled it to deference. Finally, the EI court gave some idea of the nature of the analysis that it expects employers to engage in when constructing criminal record policies. Notably, the court had previously indicated that business necessity case law requires “some level of empirical proof that challenged hiring criteria accurately predicted job performance.”

The EI decision, then, presents several lessons. (1) Employers may refuse to hire some persons with criminal records, despite the racially disparate impact. (2) However, to avoid violating Title VII, they must carefully craft their criminal record exclusionary policies, based on empirical evidence as to whether a person with a criminal record presents more than a minimal risk. In my experience, relatively few employers are crafting criminal record policies with anything approaching this degree of care. To the contrary, absolute bars are more the norm. With smaller employers, these policies are often explicit; with larger, more sophisticated, employers, though they claim to make more individualized assessments, these absolute bars often emerge more as unstated policies or practices.

From the perspective of attorneys who are litigating discrimination cases involving the use of criminal records in employment decisions, the EI case highlighted another crucial practical lesson: these cases cannot be won without sufficient expert evidence to address the issue of whether an individual—or a class of individuals being barred by a bright line policy—poses an unacceptable level of risk.

A great deal has changed since the Commission’s last policy statements on conviction records were issued twenty years ago. The number of criminal convictions has escalated significantly; criminal background checks have proliferated; and intense employment discrimination against people with criminal records—which in many instances may be racially based—has drastically affected the ability of many to obtain employment. The EI decision highlighted certain shortcomings of those twenty-year-old policy statements, and we urge the Commission to update these statements so that they establish fair and reasonable standards for employer consideration of criminal records. A revised guidance that reflects the EI decision would greatly enhance the ability of my organization and

other advocates to adequately utilize Title VII for the protection of people with criminal records.

Disparate Impact

The issue of disparate impact in Title VII litigation regarding criminal records and employment is a complicated one, and one that was never reached in the EI decision. In traditional disparate impact cases, the plaintiff must initially show that a facially neutral policy results in a discriminatory pattern. The plaintiff can meet his or her burden by identifying a particular practice that creates a disparate impact on a protected group through statistical evidence, although the statistical evidence in question must be of a kind and degree sufficient to show that the practice in question has *caused* the disparate impact. In other words, the plaintiff must show a *causal* connection between the policy and the racially unequal result.

Once the employee has established a prima facie case, the burden shifts to the employer to show that the employment practice is job-related and consistent with business necessity. A plaintiff can still prevail even if business necessity is demonstrated if there is a less discriminatory alternative practice that the employer has not adopted.

Significantly, because African-Americans and Latinos are more likely than Whites to have criminal records, disparate impact is presumed under the EEOC Guidance on the Issue of Conviction Records. This presumption is a valid and important one, and one that is essential for individuals in the EEOC investigative process. We hope that this presumption will continue in effect in any new guidance issued by the EEOC.

In the event that litigation is ultimately brought, the court will require the plaintiff to provide the necessary evidence sufficient to establish a prima facie case for disparate impact. In the context of criminal records and employment, the plaintiff, through an expert witness, should be able to demonstrate disparate impact by showing:

- The hiring policy at issue in conjunction with the defendant's personnel records
- National data sources from the U.S. Bureau of Justice Statistics demonstrating that minorities are substantially more likely to have convictions than whites

For purposes of both the investigative process and litigation, it is important to address the general defenses thus far raised by employers regarding this statistical evidence:

First, employers often assert that the proper data source is not the national statistics, but rather their "applicant flow data," or the actual number of people who applied for jobs with them and were turned down because of their convictions. Their position is that assumptions cannot be drawn from national race and conviction statistics about their own hiring practices. However, their position is a specious one. The applicant flow data is often rife with inaccuracies, in part because it fails to capture who is *not applying* to that

particular employer because of the employer's criminal record policy. Moreover, the data is often skewed by false positives arising from people who did not admit to having convictions when first hired by the employer. The national statistics comparing convictions along racial lines provide a more accurate and relevant snapshot of those affected by policies restricting hiring of people with criminal records. This is particularly true with large employers; with a large enough statistical sample, the data will not materially deviate from the national data.

Another common defense put forth by employers to rebut plaintiffs' prima facie cases of disparate impact is known as the "bottom line" defense, which asserts that their hiring policy cannot be having a racially unequal effect because its workforce consists predominantly of African Americans and/or Hispanics, or that their composition is comparable to or better than their representation in the geographic region or labor market. It is important to note that this defense was rejected by the U.S. Supreme Court in Connecticut v. Teal (457 U.S. 440 (1982)) and should not be considered by the Commission or the courts in disparate impact determinations.

Final Thoughts

In the wake of the EI decision and in light of the increasing impact of criminal records on the ability of many people to find work and support themselves and their families, the Commission has a unique and meaningful opportunity to establish updated guidelines and enforce the Title VII legal standards applicable to criminal records. It could further advance these important objectives by providing education to employers about their obligations and limitations under Title VII, as well as to workers about their rights.

Thank you again for your important work and continued support in this area. On behalf of the hundreds of people with criminal records that my organization represents every year, I thank you for the opportunity to speak today.