

Compliance Manual Vol. II 3604 app. A



NOTICE

NUMBER
N-915
DATE
2/4/87

1. **SUBJECT:** Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982).
2. **PURPOSE:** This policy statement sets forth the Commission's revised procedure for determining the existence of a business necessity justifying, for purposes of Title VII, the exclusion of an individual from employment on the basis of a conviction record.
3. **EFFECTIVE DATE:** February 27, 1987.
4. **EXPIRATION DATE:** September 15, 1987.
5. **ORIGINATOR:** Office of Legal Counsel.
6. **INSTRUCTIONS:** File behind page 604-36 of EEOC Compliance Manual, Volume II, Section 604, Theories of Discrimination.
7. **SUBJECT MATTER:**

At the Commission meeting of November 26, 1985, the Commission approved a modification of its existing policy with respect to the manner in which a business necessity is established for denying an individual employment because of a conviction record. The modification, which is set forth below, does not alter the Commission's underlying position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks ^{1/} and Hispanics ^{2/} in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity. ^{3/}

However, the Commission has revised the previous requirements for establishing business necessity ^{4/} in the following manner. Where a charge involves an

^{1/} See, e.g., Commission Decision No. 72-1497, OCH EEOC Decisions (1973) ¶ 6352, and Commission Decisions Nos. 74-89, 78-10, 78-35, and 80-10, OCH EEOC Decisions (1983) ¶¶ 6418, 6715, 6720, and 6822, respectively.

^{2/} See Commission Decision No. 78-03, OCH EEOC Decisions (1983) ¶ 6714.

^{3/} See, e.g., Commission decisions cited *supra* notes 1-2.

^{4/} Prior to this modification, for an employer to establish a business necessity justifying excluding an individual from employment because of a conviction record, the evidence had to show that the offense for which the applicant or employee was convicted was job-related. If the offense was not job-related, a disqualification based on the conviction alone violated Title VII. However, even if the offense were determined to be job-related, the employer had to examine other relevant factors to determine whether the conviction affected the individual's ability to perform the job in a manner consistent with the safe and efficient operation of the employer's business. The factors identified by the Commission to be considered by an employer included:

[footnote continues]

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allegation that the Respondent employer 5/ failed to hire or terminated the employment of the Charging Party as a result of a conviction policy or practice that has an adverse impact on the protected class to which the Charging Party belongs, the Respondent must show that it considered these three factors to determine whether its decision was justified by business necessity:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought. 6/

4/ Cont'd

1. The number of offenses and the circumstances of each offense for which the individual was convicted;
2. The length of time intervening between the conviction for the offense and the employment decision;
3. The individual's employment history; and
4. The individual's efforts at rehabilitation.

See, e.g., Commission Decision No. 78-35, CCH EEOC Decisions (1983) ¶ 6720.

Thus, under the previous procedure, business necessity was established by means of a two-step process: first, by showing that the conviction was job-related; then, by separately demonstrating that the conviction would affect the individual's ability to safely and efficiently perform the job upon consideration of the four factors enumerated above.

5/ Although the term "employer" is used herein, the Commission's position on this issue applies to all entities covered by Title VII. See, e.g., Commission Decision No. 77-23, CCH EEOC Decisions (1983) ¶ 6710 (union's policy of denying membership to persons with conviction records unlawfully discriminated against Blacks).

6/ The Commission's revised business necessity analysis follows a decision by the United States Court of Appeals for the Eighth Circuit in the Green v. Missouri Pacific Railroad Company case. Green, 523 F.2d 1290, 10 EPD ¶ 10,314 (8th Cir. 1975), is the leading Title VII case on the issue of conviction records. In that case, the court held that the defendant's absolute policy of refusing employment to any person convicted of a crime other than a minor traffic offense had an adverse impact on Black applicants and was not justified by business necessity. On a second appeal in that case, following remand, the court upheld the district court's injunctive order prohibiting the defendant from using an applicant's conviction record as an absolute bar to employment but allowing it to consider a prior criminal record as a factor in making individual hiring decisions as long as the defendant took into account "the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied." Green v. Missouri Pacific Railroad Company, 549 F.2d 1158, 1160, 13 EPD ¶ 11,579 (8th Cir. 1977).

This procedure condenses the Commission's previous standard for business necessity, substituting a one-step analysis for the prior two-step procedure and retaining some but not all of the factors previously considered. 7/ The modification principally eliminates the need to consider an individual's employment history and efforts at rehabilitation. However, consideration is still given to the job-relatedness of a conviction, covered by the first and third factors, and to the time frame involved, covered by the second factor. Moreover, the first factor encompasses consideration of the circumstances of the offense(s) for which an individual was convicted as well as the number of offenses.

The Commission continues to hold that, where there is evidence of adverse impact, an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII. 8/ The Commission's position on this issue is supported by the weight of judicial authority. 9/

It should be noted that the modified procedure does not affect charges alleging disparate treatment on a prohibited basis in an employer's use of a conviction record as a disqualification for employment. A charge brought under the disparate treatment theory of discrimination is one where, for example, an employer allegedly rejects Black applicants who have conviction records but does not reject similarly situated White applicants.

With respect to conviction charges that are affected by this modification—that is, those raising the issue of adverse impact—Commission decisions that apply the previous standard are no longer available as Commission decision precedent for establishing business necessity. To the extent that such prior decisions are inconsistent with the position set forth herein, they are expressly overruled.

Questions concerning the application of the Commission's revised business necessity standard to the facts of a particular charge should be directed to the Regional Attorney for the Commission office in which the charge was filed.

2/4/87
Date//

Approved: 

Clarence Thomas
Chairman

7/ See discussion supra note 4.

8/ See, e.g., Commission Decision No. 78-35, CCH EEOC Decisions (1983) ¶ 6720.

9/ See Green, 523 F.2d at 1298; Carter v. Gallagher, 452 F.2d 315, 3 EPD ¶ 8335 (8th Cir. 1971), cert. denied, 406 U.S. 950, 4 EPD ¶ 7818 (1972) (brought under 42 U.S.C. §§ 1981 and 1983); and Richardson v. Hotel Corporation of America, 332 F. Supp. 519, 4 EPD ¶ 7666 (E.D. La. 1971), aff'd mem., 468 F.2d 951, 5 EPD ¶ 8101 (5th Cir. 1972). See also Hill v. United States Postal Service, 527 F. Supp. 1283 (S.D.N.Y. 1981); Craig v. Department of Health, Education, and Welfare, 508 F. Supp. 1055 (W.D. Mo. 1981); and Cross v. United States Postal Service, 483 F. Supp. 1050 (E.D. Mo. 1979), aff'd in relevant part, 639 F.2d 403, 25 EPD ¶ 31,594 (8th Cir. 1981).