IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3857

DOUGLAS EL,
Plaintiff/Appellant,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Defendant/Appellee.

BRIEF OF AMICI CURIAE ERSKIN BUTLER, STEVEN HOLLOWAY, HERBERT PAGE, RICHARD THOMAS, JR., AND COMMUNITY LEGAL SERVICES, INC.

Supporting Appellant Douglas El in Seeking Reversal in
An Appeal from the Order of Judgment entered in the
United States District Court for the Eastern District of
Pennsylvania

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Community Legal Services, Inc. is a non-profit organization. It does not have any parent corporations, nor does it issue any stock.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

Other Authorities (Continued)

STATEMENTS OF INTEREST

Erskin Butler is an African-American ex-offender who has been denied employment as a paratransit driver with an agency under contract to the Southeastern Pennsylvania Transportation Authority ("SEPTA") because of his criminal record. In 2004, Mr. Butler tried to apply for a paratransit driver job with Triage, Inc. ("Triage"), one of SEPTA's subcontractors, by submitting an application to Triage's screening agency, Alevistar Group LLC ("Alevistar"). A receptionist for Alevistar would not take an application from Mr. Butler, on the grounds that SEPTA would not allow Triage to hire any felons. Mr. Butler has a 1979 arson conviction, arising from charges brought by his landlord after he caused a fire in his apartment building. Mr. Butler served a sentence of probation for this offense. Mr. Butler's work history included several paratransit driver jobs – including prior employment with Triage – subsequent to his conviction. Currently, Mr. Butler is employed as an ambulance driver. Like the other individual amici represented by this brief, he has a race discrimination charge against SEPTA and the paratransit agency pending in the Equal Employment Opportunity Commission ("the EEOC").

Steven Holloway is an African-American who in 2003 was fired from his paratransit driver job with Anderson Travel, Inc. ("Anderson"), another SEPTA subcontractor, because of his criminal record. Like Mr. Butler, Mr. Holloway also

had prior work experience driving paratransit passengers. His criminal record consists of several misdemeanors arising from a single event in 1997, when he got into a confrontation with a man who had set his house on fire. Mr. Holloway worked for Anderson for three months without incident before being fired for his criminal record.

Herbert Page also was fired from a paratransit driver job in 2003 because of his criminal record, two sets of drug charges from 1994 for which he served no jail time. Triage hired Mr. Page knowing of his convictions and told him that they would not be a problem because they had occurred more than seven years before his application. But after around two months on the job without incident, Mr. Page was discharged for his criminal record, because, he was told, SEPTA would not permit him to work for Triage.

Richard Thomas, Jr. is not an ex-offender, but a victim of criminal identity theft who also has been fired from a paratransit job under subcontract from SEPTA because of his purported criminal record. Someone else has used Mr. Thomas' identity when arrested, and that person's offenses often show up on Mr. Thomas' criminal background checks. In 2002, Mr. Thomas worked for Triage for several weeks as a paratransit driver before the inaccurate criminal record was provided to Triage. Mr. Thomas provided his fingerprints to the Pennsylvania State Police, which

determined that he was indeed a victim of criminal identity theft. Triage permitted Mr. Thomas to return to work, and he worked for them several more months before resigning for another job. Mr. Thomas next worked for the Transportation Security Administration ("TSA") as an airport screener, with a high security clearance. In 2004, Mr. Thomas was hired again as a paratransit driver, this time by Anderson. Mr. Thomas worked for Anderson for over a month before being fired, again for the inaccurate criminal record. Mr. Thomas explained that he is a criminal identity theft victim, that he had cleared up this situation when he worked for Triage, and that he had security clearance to work for TSA, but Anderson nevertheless fired him for his purported criminal record.

Community Legal Services, Inc. ("CLS") is a legal services program, operated as a non-profit organization, that provides free legal assistance to low income Philadelphians, including in employment law cases. The problem most frequently presented to CLS by new clients seeking employment representation is that their criminal records have prevented their employment, constituting 287 of the 957 new requests for service in 2004. Faced with many cases of insidious employment discrimination against ex-offenders, CLS has turned to Title VII as a remedy for its clients' barrier to employment.

CLS has filed numerous Title VII race discrimination charges with the EEOC for ex-offenders against a variety of employers where the clients where denied work for convictions that occurred many years ago or otherwise were not job-related. Many of these charges have been against SEPTA and its paratransit subcontractors. CLS represents Mr. Butler, Mr. Holloway, Mr. Page and Mr. Thomas as well as several others with pending EEOC charges based on their denial of work as paratransit drivers because of their criminal records. Indeed, CLS filed the EEOC charge of Mr. El, the named plaintiff in this litigation.

CLS is interested in this litigation because so many of its clients seek to better their wages, benefits, working conditions, and job security by applying for work as paratransit drivers but are rejected based solely on their criminal records. On behalf of its hundreds of ex-offender clients, CLS is also interested in the proper application of the business necessity standard in Title VII cases involving criminal records.

ARGUMENT

I. Introduction

Never before has this Court addressed the application of the "business necessity" standard in Title VII race discrimination disparate impact cases brought by ex-offenders who are denied work based on their criminal convictions. The

seminal decisions on this issue, Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975), on appeal after remand, 549 F.2d 1158 (8th Cir. 1977), date back three decades. This Court's definition of "business necessity" in this context will be crucial to the thousands of ex-offenders who in recent years have faced intensified employment discrimination based upon their criminal records.

Applying its own generalized definition of "business necessity" established in Lanning v. Southeastern Pennsylvania Transportation Authority, 181 F.3d 478 (3d Cir. 1999), cert. denied, 528 U.S. 1131 (2000), on appeal after remand, 308 F.3d 286 (3d Cir. 2002), this Court should adopt the business necessity test for consideration of criminal convictions that was articulated in Green and that comprises the enforcement policy of the EEOC. That test requires consideration of the nature and gravity of the offenses, the passage of time since the offenses, and the nature of the job at issue. Amici urge this Court to reverse the district court's grant of summary judgment and remand for consideration of SEPTA's policy on its subcontractors' hiring of ex-offenders under the appropriate business necessity standard.

II. Growing Numbers of Ex-Offenders Face Employment Discrimination, Being Denied Jobs Because of Criminal Records.

Over the last decade, several notable trends relevant to the employment of ex-offenders have developed. First, the number of people convicted of crimes has

skyrocketed. Second, criminal background checks have become increasingly accessible and prevalent, permitting employers to identify the ex-offenders among their job applicants. Third, and directly related to the first two trends, the increasing number of ex-offenders have faced employment discrimination based on their criminal records.

Surprisingly, the exact number of Americans with criminal records appears to be unknown. One inexact measure is the number of persons with criminal records maintained by state central repositories, which as of 1999 exceeded 59 million.[1] This number had almost doubled between 1984 and 1999.[2] In 2001, 4.3 million United States residents were former prisoners.[3] However, large numbers of ex-offenders who served no prison or jail time also have convictions on their criminal records.[4]

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[1] U.S. Dept. of Justice, Bureau of Justice Statistics, Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update (2001), at 30.

[2] Id. at 31.

[3] 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 2.

[4] According to one report, 4.8 million people currently are on probation or parole, more than double the 2.1 million people who are currently incarcerated. The Sentencing Project, Facts on Prisons and Prisoners (Oct. 2005). Information about persons with convictions which did not include a sentence of incarceration is much less prevalent than information about persons who were imprisoned.

Whatever the precise numbers may be, ex-offenders indisputably are a significant and growing percentage of the population, in Pennsylvania as well as nationally.[5]

Equally uncontroversial, a disproportionate number of these ex-offenders are racial minorities. Taken together, African-Americans (39%) and Hispanics (18%) comprised a majority of those who had ever been imprisoned as of 2001.[6] 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%)[7].

While the number of ex-offenders has skyrocketed, so has employers' use of criminal background checks. The Bureau of Justice Statistics has noted the increased availability of criminal history record information outside of the criminal justice system, spurred in part by the attacks of September 11, 2001.[8] Much of this use can be attributed to employers. According to the Society for Human Resource

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[5] Pennsylvania has the ninth highest corrections population (which includes persons on probation and parole as well as those incarcerated) per 100,000 people in the United States, more than 12% higher than the national average. See State Corrections Statistics on the website of the National Institute of Corrections at http://www.nicic.org/WebTopic_346.htm.

[6] Bonczar, supra note 3, at 5.

[7] Id.

[8] U.S. Department of Justice, Bureau of Justice Statistics, Compendium of State Privacy and Security Legislation: 2002 Overview (Nov. 2003), at 9.

Management, 80 percent of its members surveyed performed criminal background checks in 2003, up from 51% in 1996.[9]

In Pennsylvania, employer access to criminal records has been expanding as a result of these records being made available by computer. The Pennsylvania State Police implemented a web-based system for criminal records requests in 2002; within a year, background checks had increased by more than 27%.[10] At present, the Administrative Office of Pennsylvania Courts is planning to make criminal record information even more accessible by having criminal court dockets available on its website instantaneously and at no cost.[11]

Given the accessibility of criminal background information, intense employment discrimination against ex-offenders based on their criminal records has followed, as verified by two recent studies. In Milwaukee, Wisconsin, testers who represented that they had criminal records applied for entry level jobs. The results

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[9] Society for Human Resource Management, Workplace Violence Survey (Jan. 2004), at 19.

[10] In the first year that the web-based system was in operation, the Pennsylvania State Police completed 567,209 background checks, up from 412,324 requests processed the previous year. Glenn May, Online Background Checks Booming, Pittsburgh Tribune-Review, Nov. 30, 2003.

[11] See, e.g., Mark Scolforo, Public to Get Say on How State Courts Post Records on Web, Phila. Inquirer, Sept. 22, 2005, at B12.

were that white applicants who said that they had criminal records were only half as likely to be called back than were similarly qualified white applicants without records. Among black applicants, those who said that they had criminal records were only one-third as likely to be called back than were comparable black applicants without records.[12] A survey of Los Angeles, California employers revealed that more than 40% of employers indicated that they "probably" or "definitely" would not hire an ex-offender for a job not requiring a college degree.[13] The remainder of the sparse research on how former prisoners fare in the job market confirms that they face high unemployment rates and low wages.[14]

Taken together, this research shows growing numbers of ex-offenders, most of whom are African-American or Hispanic, whose employment prospects are thwarted by their criminal records. This is the context in which this Court must consider under

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[12] Devah Pager, The Mark of a Criminal Record, 108 American Journal of Sociology 937, 955-58 (March 2003).

[13] Harry Holzer et al., The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles (National Poverty Center Working Paper Series Dec. 2004), at 7. By comparison, over 90 percent of those employers stated that they would probably hire other workers considered "hard to employ," such as welfare recipients. Id. at 8.

[14] See Amy L. Solomon et al., From Prison to Work: The Employment Dimensions of Prisoner Reentry, (Urban Institute Oct. 2004), at 14.

what circumstances an employer has a "business necessity" for rejecting job applicants and firing employees based on their criminal records.

III. An Employer Does Not Have a "Business Necessity" To Reject an Ex-Offender Unless It Has Considered the Nature and Gravity of His Offenses, the Time that Has Passed, and the Nature of the Job.

In Lanning, 181 F.3d at 481, this Court first determined the legal standard for "business necessity" in a Title VII disparate impact case brought subsequent to the enactment of the Civil Rights Act of 1991. It concluded that "an employer must demonstrate that its cutoff measures the **minimum qualifications necessary** for successful performance of the job in question." Id. at 489 (emphasis added). It is not sufficient that the qualities have "some relationship to the job in question." Id. Nor can an employer's justification that "more is better" (that is, applicants who meet higher standards are likely to perform the job better) carry the day, given that standard is to "measure the minimum qualifications necessary " where the disparate impact of the employer's policy has been demonstrated. Id. at 493. The issue presented by this case is how "minimum qualifications" are measured when criminal convictions are what is being screened.

The district court in this case acknowledged the applicability of the "minimum qualifications" standard of Lanning. El v. Southeastern Pennsylvania Transportation Authority, No. 02-CV-3591, slip op. at 10, 18 (E.D. Pa. July 12, 2005). However, the

district court found that SEPTA proved business necessity based upon the testimony of its experts that: (1) former prisoners are more likely than randomly selected adults to engage in criminal conduct; (2) prohibiting the employment of ex-offenders convicted of crimes of violence is appropriate, given that employers cannot predict with certainty whether such a person is a risk or not; and (3) the disabilities of paratransit riders create a high-risk environment for victimization. Id. at 17-18.

Despite its recitation of the proper standard, the district court's reasoning does not represent an application of the "minimum qualifications" standard. In essence, the court concluded that in the paratransit industry, a blanket rejection of persons convicted of crimes of violence is a business necessity. However, such a policy simply is not narrowly tailored or individualized enough to constitute a "minimum qualification."

The leading decisions on the business necessity for rejections based on convictions are Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975), on appeal after remand, 549 F.2d 1158 (8th Cir. 1977). In the first Green decision, the Eighth Circuit concluded that a policy that was an absolute bar to employment of

persons with convictions lacked business necessity and violated Title VII.[15] 523 F.2d at 2198-99. The court emphasized the need for individualized decision making under the "business necessity" standard:

> ... Although the reasons [the employer] advances for its absolute bar can serve as relevant considerations in the making of individual hiring decisions, they can in no way justify an absolute policy which sweeps so broadly... To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.

Id. at 2198.

On remand, the district court in Green entered an injunction prohibiting the automatic denial of employment based on a criminal conviction, but permitting the employer to consider convictions "**so long as defendant takes 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, 549 F.2d at 1160 (emphasis added). The Eighth Circuit affirmed this injunctive order as consistent with its prior decision. Id.

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[15] Other courts also have rejected the business necessity for absolute bars on the employment of persons with convictions. Carter v.Gallagher, 452 F.2d 315, 326 (8th Cir.), cert. denied, 406 U.S. 950 (1972); Field v. Orkin, No. 00-5913, 2001 WL 34368768 (E.D. Pa. Oct. 30, 2001)(Fullam, SJ); Washam v. J.C. Penney Co., Inc., 519 F. Supp. 554, 561 (D. Del. 1981)(Stapleton, J.); Dozier v. Chupka, 395 F. Supp. 836, 842-43 (S. D. Ohio 1975).

In 1985, the EEOC, then chaired by Clarence Thomas, promulgated a policy codifying the three factors set forth in the Green injunction as the business necessity standard for the consideration of convictions. EEOC Compl. Man. § 604 App. The EEOC's policy guidance on convictions characterizes the first and third factors as bearing upon the job-relatedness of the conviction, and the second factor as covering the time frame involved. It also elaborated that 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." Id.[16]

The three business necessity factors – the nature and gravity of the offenses, the time that has passed, and the nature of the job – are an appropriate articulation of this Court's "minimum qualifications" standard in the context of criminal convictions. Although employers may be more comfortable establishing lifetime bans on employing persons convicted of all or certain crimes, such absolute bans will be overbroad.

Mr. El's case is an example of why absolute bans are not narrowly enough tailored to meet the employer's goal, in this case the avoidance of victimization of

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[16] These three factors were reiterated by EEOC in its most recent policy statement on criminal records, Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as Amended, 42 U.S.C. § 200e et. seq., 1990 WL 1104708 (EEOC Guidance).

vulnerable paratransit riders by their drivers. To be sure, paratransit implicates public safety concerns, and paratransit employers often will be justified in rejecting persons with murder convictions from such jobs. But Mr. El's murder conviction was **four decades old** at the time he applied for his paratransit job. The extraordinary passage of time since Mr. El's conviction surely mitigated the seriousness of his offense when his risk to paratransit riders is assessed. However, SEPTA's policy did not permit the consideration of the fact that Mr. El had lived at least half a lifetime since he committed the crime without repeating it, or any other crime of violence. Nor did SEPTA's policy permit the paratransit contractor to consider factors such as Mr. El's young age at the time of the crime or the gang-related circumstances of the crime. This lack of individualized consideration of Mr. El's circumstances cannot meet the "minimum qualifications" standard for SEPTA to establish business necessity.

IV. Conclusion

Despite articulating the "minimum qualifications" standard of Lanning as controlling, the district court did not adequately explore whether SEPTA's policy was in fact drawn narrowly enough to meet that standard. It did not apply the test crafted in Green and in the EEOC policy on convictions, which would have required an individualized consideration of the circumstances of Mr. El and the other members of the purported class. Instead, the court's analysis, relying heavily on SEPTA's

justification for a policy that it admits creates a lifetime disqualification for some ex-offenders, reads more like it was applying the "readily justifiable" standard rejected in Lanning, 181 F.3d at 493. But the district court may not "wholly defer[] to an employer's justification as to what is desirable in an employee...." Id. at 490. Because the policy is overbroad, the district court's decision should be reversed and remanded.

Respectfully submitted,

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Dated: December 13, 2005

COMBINED CERTIFICATION

1. **Certification of Bar Membership**

I hereby certify that Sharon M. Dietrich, counsel for Amici Curiae, is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. **Certification of Service**

I hereby certify that, on this 13th day of December, 2005, I served two true and correct copies of the foregoing Brief by mail on: Robert J. Haurin, Esquire, Saul H. Krenzel and Associates, The Robinson Building, Suite 800, 42 South 15th Street, Philadelphia, PA 19102; David J. Cohen, Esquire, Spector, Roseman & Kodroff, P.C., 1818 Market Street, Suite 2500, Philadelphia, PA 19103; and Wayne A. Ely, Esquire, Timothy M. Kolman and Associates, 225 N. Flowers Mill Road, Langhorne, PA 19047.

I hereby certify that, on this 13th day of December, 2005, I caused ten true and correct copies of the foregoing Brief to be mailed to: Office of the Clerk, United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, PA 19106.

I hereby certify that, on this 13th day of December, 2005, I e-mailed an

electronic copy of the foregoing Brief, in a single .PDF file, to the Office of the Clerk, United States Court of Appeals for the Third Circuit at the following e-mail address: <electronic briefs@ca3.uscourts.gov>

3. **Certification of Identical Compliance of Briefs**

Pursuant to 3d Cir. LAR 31.1(c), I hereby certify that the electronic and hard copies of Brief of Amici Curiae in the instant matter contain identical text.

4. **Certification of Virus Check**

I hereby certify that a virus check of the electronic .PDF version of the Brief was performed using Symantec Antivirus software, and the .PDF file was found to be virus free.

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