

**COMMUNITY
LEGAL
SERVICES, INC.**

1424 CHESTNUT STREET
PHILADELPHIA, PA 19102
215-981-3700
FAX 215-981-0434

June 24, 1996

Joan D. Gmitter, Intake Supervisor
Equal Employment Opportunity Commission
The Bourse Building
21 S. 5th Street, Suite 400
Philadelphia, PA 19106

Re: [REDACTED]

Dear Ms. Gmitter:

Enclosed please find the following documents submitted on behalf of my client, [REDACTED]

- (1) Charge of Discrimination;
 - (2) Declaration of Charging Party;
 - (3) Letter brief in support of the charge of discrimination;
- and
- (4) Documents supporting the charge.

This charge alleges that Ms. [REDACTED] was fired for having a conviction record, despite a lack of business necessity for her termination. Such a policy or practice has a disparate impact on African-Americans and is recognized by EEOC policy statements to constitute a viable theory under Title VII. These policy statements are discussed in the enclosed letter brief.

This is probably the first of numerous charges that you can expect to see from our office on behalf of African-Americans and Hispanics fired or rejected based on their criminal histories. Our services are routinely sought by persons whose employment opportunities are affected by their criminal records. The demand for this problem to be addressed is only likely to increase as continuously increasing numbers of persons in this city have dealings with the criminal justice system and as persons with serious barriers to employment are required to find work because of the decreasing availability of public benefits. Having a criminal record is one such impediment to employment, but it can and should be treated as a barrier which implicates Title VII.


Letter to Equal Employment Opportunity Commission
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If you require further information, please feel free to contact me. EEOC is not authorized to contact my client without first obtaining my consent. My telephone number is (215) 981-3719.

Very truly yours,



SHARON M. DIETRICH

cc: William D. Cook, Enforcement Mgr. (w/o enclosures)
 (w/enclosures)

CHARGE OF DISCRIMINATION

AGENCY

CHARGE NUMBER

 FEPA

 EEOC

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

Pennsylvania Human Relations Commission

and EEOC

State or local Agency, if any

NAME (Indicate Mr., (Ms.) Mrs.)

HOME TELEPHONE (Include Area Code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

DATE OF BIRTH

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME

NUMBER OF EMPLOYEES, MEMBERS

TELEPHONE (Include Area Code)

about 60-70

STREET ADDRESS

CITY, STATE AND ZIP CODE

COUNTY

NAME

TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS

CITY, STATE AND ZIP CODE

COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

DATE DISCRIMINATION TOOK PLACE

EARLIEST

LATEST

 RACE COLOR SEX RELIGION NATIONAL ORIGIN
 RETALIATION AGE DISABILITY OTHER (Specify)

/ / 3/19/96

 CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I was hired by [REDACTED] ([REDACTED]) on February 19, 1996. I was fired by [REDACTED] on March 19, 1996.

I was told by [REDACTED], the Administrator, that the reason that I was fired was because I had not informed them about my criminal record. I had a single criminal conviction of a summary offense of harassment, which occurred in December, 1987 and to which I pled guilty on March 18, 1988.

I believe that I was discriminated against because of my race, African-American, in violation of Title VII of the Civil Rights Act of 1964, for the following reasons:

a) A policy of excluding persons from employment based upon their conviction records has an adverse impact on African-Americans; and

b) [REDACTED] cannot show a business necessity for firing me for my criminal conviction.

 I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

SIGNATURE OF COMPLAINANT

 SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
 (Day, month, and year)

Date 6/20/96

 [REDACTED]
 Charging Party (Signature)

Declaration of Charging Party

I, [REDACTED] believe that my former employer, the [REDACTED] (" [REDACTED] or "the nursing home") discriminated against me on the basis of race when it fired me for having a criminal conviction. In support of this charge, I allege the following:

1. I am an African-American woman who is thirty-three years old. I reside at [REDACTED]

[REDACTED] My telephone number is [REDACTED]

2. My complaint is against [REDACTED]

[REDACTED] which is located at [REDACTED],

[REDACTED] Their telephone number is [REDACTED]

3. [REDACTED] is a nursing home at which patients from the hospital are transferred for rehabilitation. My best estimate is that sixty to seventy people are employed there.

4. I was hired as a nursing assistant by [REDACTED]. I have the state certification required of nursing assistants. In addition, I have worked in nursing homes like [REDACTED] for about twelve years.

5. I started work for [REDACTED] on February 19, 1996. On a previous occasion, I had worked for several months in the same facility, then called the [REDACTED]

6. Before I was hired, [REDACTED] (black), the Director of Medical Records, gave me an application to fill out. Both Nicole and Sandy [REDACTED] the Director of Nursing, told me that it was not necessary to fill out the entire four-page application, so I filled out the parts I was asked to complete.

7. One of the questions on the application was "Have you ever been convicted of a crime?" There were two boxes that you could check to answer the question either "yes" or "no." I was not told to fill out this part of the application, so I did not check either box. There were also other questions that I did not answer.

8. Sandy called my one reference while I was applying for the job. After getting a good report on me from my reference, I was hired on the spot. I started orientation the beginning of the following week.

9. I went through orientation and worked at [REDACTED] for a month with no problems at all. In fact, Roxanne [REDACTED] (white), the Administrator, told me that I was a good worker.

10. On March 19, 1996, Roxanne and Sandy came to the nurses' station on my floor and called me in to the office about two hours after I had reported to work. In the office, I met with Roxanne, who asked whether I had a criminal record. I truthfully responded that I did, and I gave the dates and the circumstances of my only conviction. However, Roxanne did not want to listen to this information. Instead, she told me to leave immediately and not to return for work until she spoke to me again.

11. Roxanne told me to call back on March 20, 1996, at 1:00 p.m. to find out whether I should return to work. I did call her, but she did not return my call until around 9:00 p.m. At that time, she told me that I was fired for falsifying my application about my conviction, even though I had not falsified it.

12. My one conviction was for an incident that had occurred in December, 1987. On that occasion, I had a fight with a woman who was having a relationship with the man who was then my husband, after she called me a "bitch" while I was walking past her apartment on the way to my in-laws' home. The woman pressed charges against me. On March 18, 1988, I pled guilty to a summary offense of harassment; other charges against me based on that incident were withdrawn. I served three months of non-reporting probation and paid a \$65 fine.

13. In the twelve years I have worked in nursing homes, never before had anyone told me that my conviction for this incident was a problem in my line of work.

14. The only witness to the instructions I was given when filling out my application was my friend, [REDACTED]. She was also filling out an application. I believe that, like me, she did not fill out the entire application, based on the instructions given by Sandy. [REDACTED] was also hired to work at the nursing home as a nursing assistant and is still employed there.

15. There were no witnesses to my conversations with Roxanne on March 19th and 20th.

16. I do not know of others who may have been fired or rejected for having criminal convictions. I know of one person who works there whom I believe had a conviction for a much more serious offense than mine, but I was told that nothing came up when they checked her background. I do not know anyone who [REDACTED] is employing despite knowing that they have had criminal convictions.

17. I began working as a nursing assistant for [REDACTED] on May 30, 1996. However, I earn [REDACTED] per hour, compared to the [REDACTED] per hour I earned at [REDACTED]. At the very least, I want to return to my job at [REDACTED] and get back pay. I would also like damages and attorneys' fees.

I declare under penalty of perjury that the foregoing is true and correct.

[REDACTED]

Date: June 20, 1996

June 24, 1996

Equal Employment Opportunity Commission
The Bourse Building
21 S. 5th Street, Suite 400
Philadelphia, PA 19106

Re: [REDACTED]

To whom this may concern:

This is to elaborate on the charge of racial discrimination filed by my client, [REDACTED], against her former employer, [REDACTED] ("the nursing home"). The basis of Ms. [REDACTED]'s claim is that she was fired for having a criminal conviction despite a lack of business necessity for her termination -- a policy which has a racially disparate impact and violates Title VII.

The facts of this case

The following facts are drawn from Ms. [REDACTED]'s declaration, which is somewhat more detailed than this recitation. Ms. [REDACTED], an African-American woman, began working with [REDACTED] as a nursing assistant on February 19, 1996. Before she was hired, she turned in an application given to her by [REDACTED]. She was told that it was not necessary to complete the entire four-page application, so she filled out the portions that she was specifically asked to complete. Ms. [REDACTED] was not asked to answer the question, "Have you ever been convicted of a crime?" and she did not check either the "yes" or "no" box to respond to this question. (A blank [REDACTED] application is enclosed; we do not have a copy of Ms. [REDACTED]'s completed application.)¹

¹ Obviously, it would be easy for the nursing home to check one of the boxes and contend that Ms. [REDACTED] had done so, because a simple marking would not require someone to try to match her handwriting. We request that you ask [REDACTED] for a copy of the

On March 19th, Ms. [REDACTED] was called in to the office and asked by Roxanne [REDACTED] the Administrator, whether she had a criminal record. Ms. [REDACTED] responded that she did and gave exact dates regarding the single conviction on her record. Ms. [REDACTED] sent her home immediately. Despite having worked for a month with no problem and being told by Ms. [REDACTED] that she was a good worker, Ms. [REDACTED] was fired by Ms. [REDACTED] the next day, ostensibly for falsifying the information about her criminal record (even though she had not answered the question at all).

In the incident in question, Ms. [REDACTED] had been charged with criminal mischief, making terroristic threats, and harassment, in December, 1987. These charges arose from a fight with a woman who was involved in a relationship with Ms. [REDACTED] husband and who pressed charges against her. On March 18, 1988, Ms. [REDACTED] pled guilty to the summary offense of harassment; the other charges were dropped by the prosecutor. She was sentenced to three months of non-reporting probation and paid a \$65 fine. (A copy of the criminal transcript from this incident is enclosed.)

[REDACTED] was put on notice of the Title VII and other legal implications of its action by letter dated April 8, 1996, which sought Ms. [REDACTED] reinstatement (a copy is enclosed). No response to this letter has ever been received.

In Ms. [REDACTED] twelve years of working in nursing homes, she has never before had any difficulty obtaining or keeping her employment because of this summary offense.

The legal standards

Three EEOC policy statements bear upon the evaluation of exclusions of African-Americans from employment as a result of criminal convictions. The basic analysis of such a disparate impact claim is laid out in "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)" (Feb. 4, 1987) ("the February, 1987 Statement"), which can be found in the EEOC Compliance Manual, Vol. II, Appendix 604-A.

The February, 1987 Statement reiterates a prior position of the EEOC: that because a policy or practice of excluding persons from employment on the basis of their conviction records has an adverse impact on African-Americans, such a policy violates Title VII unless the employer demonstrates a justifying business necessity. To establish business necessity, the employer must show its justification by reference to three factors:

application before indicating its significance.

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

The February, 1987 Statement summarizes these factors as concerning the "job relatedness of the conviction" and "the time frame involved." It also explains that the first factor includes both the circumstances and the number of the offenses.

Proof of the disparate impact of a policy denying employment based upon criminal convictions is addressed in "Policy statement on the use of statistics in charges involving the exclusion of individuals with conviction records from employment" (July 29, 1987) ("the July, 1987 Statement"), contained in the EEOC Compliance Manual, Vol. II, Appendix 604-B. This statement contains a presumption of an adverse impact on African-Americans and Hispanics, based on national and regional conviction rate statistics. It is up to an employer who defends such a charge of discrimination to rebut the charging party's prima facie case of disparate impact created by national statistics by presenting more narrow local, regional or applicant flow data.

The most recent policy guidance on a related subject is "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. § 2000e et seq. (1982)" (Sept. 7, 1990) ("the 1990 Statement"), also contained in Section 604 of the EEOC Compliance Manual, Vol. II. While the 1990 Statement is not directly applicable to conviction situations because arrests do not constitute proof of the underlying criminal conduct alleged, the 1990 Statement is notable for its reaffirmation of the February and July, 1987 Statements.²

Analysis of this case

As discussed above, Ms. ██████ begins with a presumption, based on national data, that African-Americans are disparately impacted by the nursing home's policy of terminating workers

² It should be noted that the 1990 Statement was issued subsequent to the Supreme Court's decision on analysis of disparate impact claims in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989). That decision, of course, was late legislatively overruled by Section 105(a) of the Civil Rights Act of 1991, in a provision contained at 42 U.S.C. § 2000e-2(k).

because of criminal convictions.³ We are attempting to obtain local data on this subject as well. However, as noted above, the employer bears the burden of rebutting the presumption of a prima facie case by use of more specific data.

When the inquiry turns to [REDACTED]'s business necessity, the employer will be unable to meet its burden, based on the facts of this case. With respect to the nature and gravity of the offense, the following favor Ms. [REDACTED].

(1) The only offense on her record is a summary offense, not even a misdemeanor.

(2) As a result of the minimal nature of the offense, the sentence -- three months of non-reporting probation and a \$65 fine -- was de minimis.

(3) The motivation for the offense was extremely personal: she was engaged in a fight with the girlfriend of her then-husband. While this might show an unfortunate loss of temper, it is an understandable one. These circumstances causing the incident are not likely to be repeated often, and certainly not in the workplace.

(4) Not only are there no similar convictions on Ms. [REDACTED] record; there are no other convictions at all.

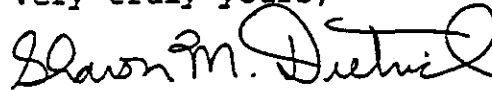
The time frame also supports Ms. [REDACTED]'s charge. The incident had occurred more than eight years before her termination by the nursing home, and the sentence had been completed more than seven years by that time. By contrast, in Example 2 in the 1990 Statement, the EEOC indicated that an arrest occurring five years previously was "not recent" for purposes of this type of analysis.

Finally, the nature of the job held by Ms. [REDACTED] does not support her termination, given the nature of the offense. Her work as a nursing assistant was not likely to engender the sort of emotional response leading to her fight with her husband's girlfriend. Additionally, Ms. [REDACTED]'s twelve years of successful employment in nursing homes demonstrates a lack of nexus between her job and the conviction.

³ If [REDACTED] denies having such a policy or practice, it should be required to explain both why it asked such a question on its application and why it terminated Ms. [REDACTED] for her summary offense. As noted by the 1990 Statement, "It is generally presumed that an employer only asks questions which he/she deems relevant to the employment decision."

In sum, ██████████'s termination of Ms. ██████████ from her employment because of her 1987 summary offense had a disparate impact based on her race that was not justified by business necessity. Accordingly, the EEOC should find that there is reasonable cause to believe that Title VII was violated in this instance.

Very truly yours,

A handwritten signature in cursive script that reads "Sharon M. Dietrich". The signature is written in black ink and is positioned directly below the typed name.

SHARON M. DIETRICH