

STEMMING THE TIDE: USING PARTNERSHIPS TO ELIMINATE BARRIERS BASED ON CRIMINAL RECORDS

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Brief Description:

Employment discrimination is one of the most serious barriers faced by persons with criminal records (PCRs). Fortunately, there are some legal remedies, the most notable of which is Title VII. My presentation will help you assist PCRs in filing race discrimination charges with the Equal Employment Opportunity Commission (EEOC).

Topical Outline:

- I. Availability of criminal records: Over the last decade, the availability of criminal records to employers has exploded. As a result, persons with criminal records (PCRs) have encountered ever greater difficulty finding and keeping work.
 - a. Demand: Society for Human Resource Management – as of 2003, 80% of their members performed criminal background checks.
 - b. Supply: Technology and the emergence of commercial vendors have contributed to the increased accessibility.
 - c. Effect: both research and experience have shown extensive employment discrimination against PCRs.

- II. Hiring bans on PCRs can establish race discrimination claims.
 - a. Disparate impact theory: Under Title VII, if a facially neutral policy has a racially disparate impact, an employer will be required to prove “business necessity” for it.
 - b. Case law: A Title VII claim has been found in cases where employers rejected PCRs based on their records, especially if there is an absolute ban no matter what the criminal record.
 - i. Arrests: Leading authority is Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9th Cir. 1972).

- ii. Convictions: Leading authority is Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975), on appeal after remand, 549 F.2d 1158 (8th Cir. 1977).
- c. EEOC policy guidances
 - i. Burden of proof on disparate impact: EEOC presumes it for African Americans and Hispanics.
 - ii. Business necessity: Employer must show consideration of the following three factors when considering a conviction.
 1. The nature and gravity of the offenses or offenses;
 2. The time that has passed since the conviction and/or completion of sentences;
 3. The nature of the job for which the applicant has applied.
 - iii. Arrests: Fourth criteria – The employer must evaluate the likelihood that the person engaged in the conduct for which he or she was arrested. EEOC says that employers are rarely justified in considering arrests where there was no conviction.

III. Filing an EEOC charge

- a. Adapt the model in the materials: Assume that you will need to explain the theory to EEOC – this is not a standard race discrimination charge, and some EEOC offices may not be familiar with it.
- b. What happens next? Investigation; possible mediation; finding.
- c. Should you take the case to court? That's a commitment of a whole other magnitude.

IV. What if the client isn't African-American or Hispanic?

- a. There is precedent for filing a Title VII charge for a white PCR. Field v. Orkin, No. 00-5913, 2001 WL 34368768 (E.D. Pa. Oct. 30, 2001) (citing Angelino v. New York Times Co., 200 F.3d 73, 90 & n. 23 (3d Cir. 1999)).
- b. Check state law to see whether there are statutes protecting PCRs.

V. Why file EEOC charges for PCRs?

- a. Get remedies, including possibly jobs and/or back pay, for clients.
- b. Educate employers that they do not have unfettered discretion to turn down PCRs.
- c. Educate your local EEOC office that these claims exist under Title VII and should be a high priority.

Notes:

Bibliography & Website Links:

1. Amy E. Hirsch, et al., Every Door Closed: Barriers Facing Parents with Criminal Records (Center for Law and Social Policy and Community Legal Services Inc. 2002) (available at http://www.clasp.org/publications/every_door_closed.pdf).
2. Workshop materials
 - a. EEOC policy guidances
 - b. Amicus brief in El v. Southeastern Pennsylvania Transportation Authority
 - c. Sample EEOC charge, declaration, and letter brief