

Jailhouse Blues: The Potential Pitfalls of Employee Criminal Background Checks

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I. Introduction

In a lifetime of crime, Willie Sutton robbed banks of almost \$2,000,000.00. From 1934 through 1947 he was one of the nation's most successful bank robbers. He made the FBI's Ten Most Wanted list in 1950, after escaping from prison disguised in a prison guard's uniform. He's famous for a comment he supposedly made to a reporter who asked him why he robbed banks. His now legendary reply was "because that's where the money is."

With his long history of arrests, convictions and prison time, what are the chances Willie Sutton would be hired today if he decided to go straight and fill out a job application for a sales job in retail, or even more unlikely, applied for a job as a bank teller? It's no longer as easy a question as many employers might think.

II. New EEOC Enforcement Guidelines

On April 25, 2012, the United States Equal Employment Opportunity Commission ("EEOC") issued revised enforcement guidance on the extent to which employers may rely on an individual's criminal history in making hiring or other employment selection decisions. The guidelines made it clear that an improper reliance on such information may constitute a violation of Title VII of the Civil Rights Act of 1964 ("Title VII").¹

The guidelines impose additional duties on employer's to establish that any reliance on such information is legitimately "job related." To borrow from Willie Sutton's famous phrase, employers using criminal background histories in making hiring decisions now have to proceed very carefully, "because that's where the liability is."

Employers have typically used criminal background checks as a hedge against employee theft, and in more recent years as a response to the increase in workplace violence. The practice has become increasingly commonplace, in part because of the substantial jump in the number of Americans who have found themselves in the criminal justice system:

¹ EEOC's "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" is available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The EEOC also has issued a Question-and-Answer document to provide employers with additional compliance information. That document is available at http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.

In 1991, only 1.8% of the adult population had served time in prison. After ten years, in 2001, the percentage rose to 2.7% (1 in 37 adults). By the end of 2007, 3.2% of all adults in the United States (1 in every 31) were under some form of correctional control involving probation, parole, prison, or jail. The Department of Justice's Bureau of Justice Statistics (DOJ/BJS) has concluded that, if incarceration rates do not decrease, approximately 6.6% of all persons born in the United States in 2001 will serve time in state or federal prison during their lifetimes.²

The EEOC guidelines acknowledge that "[i]t is legal and in most cases, prudent for employers to use criminal records in employment related decisions" However, the EEOC has long taken the position that making employment decisions solely based on an applicant's criminal record may violate Title VII when such reliance disproportionately and unjustifiably excludes people of a particular race or national origin and is not job related and consistent with business necessity, *i.e.*, "disparate impact" discrimination.

The stated rationale for the EEOC's position is that employers' reliance on criminal records as a factor in hiring decisions disproportionately affects minorities, who statistically have higher rates of arrest and criminal conviction. According to U.S. Department of Justice statistics, African-Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population. Assuming that current incarceration rates remain unchanged, about 1 in 17 white men are expected to serve time in prison during their lifetime; by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African-American men.

The EEOC guidelines also make clear that use of criminal histories also could support a claim of disparate treatment discrimination, including when decisions are made based on stereotypes about classes of individuals, or if criminal records are used to exclude applicants of one race, but not applicants of another race.

III. The Employer's Dilemma

It's important to note that currently, no federal law prohibits the consideration of criminal convictions in making employment decisions, and the EEOC's guidelines concedes that point. It's also worth noting that the EEOC has no actual authority to issue binding guidelines because Congress intentionally withheld rulemaking authority from the EEOC when it passed the Civil Rights Act of 1964. The issuance of the guidelines also has come under criticism over complaints there was inadequate opportunity for employers and business groups to offer

² See THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 3-5 (2003), ("Between 1974 and 2001 the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000.").

comments on the pros and cons of the guidelines before they were issued. Some employers view the guidelines as the EEOC's effort to create a protected "criminal class" under Title VII. In the short time since the guidelines were implemented, federal legislation has been proposed to bar funding to the EEOC for implementation and enforcement of the guidelines.

However, employers have little choice but to take seriously this latest position of the EEOC, because the guidelines expressly note that the EEOC will use its enforcement authority to investigate cases of disparate impact related to criminal background check policies. In this instance, the threat of liability, or at least the threat of costly litigation is not hypothetical.

In January 11, 2012, Pepsi Beverages agreed to pay \$3.13 million and provide job offers and training to resolve a charge of race discrimination filed in the Minneapolis Area Office of the EEOC. Prior to the settlement, the EEOC issued a finding of reasonable cause to believe that the criminal background check policy formerly used by Pepsi discriminated against African-Americans in violation of Title VII.

According to the EEOC, its investigation revealed that more than 300 African-Americans were adversely affected when Pepsi applied a criminal background check policy that disproportionately excluded black applicants from permanent employment. Under Pepsi's former policy, job applicants who had been arrested pending prosecution were not hired for a permanent job even if they had never been convicted of any offense. The EEOC reported that Pepsi's policy also denied employment to applicants from employment who had been arrested or convicted of certain minor offenses, and took the position that using such records was illegal because it was not relevant to the job in question.

However, what if an employer, trying to comply with the EEOC guidelines, knowingly hires an employee with a criminal background and that employee later injures a co-worker, customer or other individual in the course and scope of his employment? As a general proposition, "an employer who hires an employee with knowledge of the employee's prior criminal record may be held liable, on a direct-negligence theory, for the latter's tortious conduct."³ Under Mississippi law, "an employer will be liable for negligent hiring or retention of his employee when an employee injures a third party if the employer knew or should have known of the employee's incompetence or unfitness."⁴ The law in other states is essentially the same.⁵ In the recent Mississippi case of *Parmenter v. J & B Enterprises, Inc.*, the employer escaped liability for an employer's assault on a patron, precisely because of actions taken by the employer that would seem to run afoul of the EEOC's new guidelines:

³ See 48 A.L.R.3d 359.

⁴ *Parmenter v. J & B Enterprises, Inc.*, 2012 WL 539949 *7 (Miss. Ct. App. Feb. 21, 2012), quoting *Doe v. Pontotoc County Sch. Dist.*, 957 So.2d 410, 416-17 (¶ 16) (Miss.Ct.App. 2007). See also *American Guarantee and Liability Ins. Co. v. 1906 Co.*, 273 F.3d 605 (5th Cir. 2001) (under Mississippi law, employer may be held liable for negligently hiring employee who intentionally injures another if, prior to injury, employer knew or should have known of employee's propensity for conduct in question) (applying Mississippi law); *L.T. ex rel. Hollins v. City of Jackson*, 145 F. Supp. 2d 750 (S.D. Miss. 2000) (under Mississippi law, if employer knew or should have known of employee's propensity for misbehavior, then employer may be liable for negligent hiring or retention).

⁵ See *Walter Champion Co. v. Dodson*, 252 Ga. App. 62, 555 S.E.2d 519 (2001) (To show that employer was negligent in retaining employee with violent and criminal propensities, plaintiff must show that employer knew or should have known of those dangerous propensities alleged to have resulted in plaintiff's injuries).

In the instant case, Katina Daugherty, the former manager and supervisor, testified that criminal background checks are conducted on all applicants before the interview. If an applicant had a criminal record or a history of violence, that applicant would not be hired. Daugherty also testified that Jones was “not a violent person at all,” and she never saw Jones assault, attack, or curse at anyone. Upon review of the record, we find Parmenter failed to produce any evidence to show Jones had a criminal record or any violent tendencies, and there is nothing to indicate actual or constructive knowledge by J & B Enterprises. Therefore, the issue of negligent hiring is without merit.⁶

Further complicating matters, while the EEOC’s new guidelines generally acknowledge that federal requirements barring applicants with criminal histories from certain jobs is a defense for employers subject to and complying with those requirements, it makes clear that reliance on state-based requirements that are inconsistent with Title VII will not be a defense to a Title VII claim, placing those employers subject to such state requirements in a “Catch-22” predicament. Just one example of such a state-based requirement can be found in Mississippi’s statutory law as to the hiring of licensed or non-instructional employees in the public school.⁷ That state law expressly requires that criminal background checks be obtained and fingerprinting be conducted, and that the results can disqualify employment:

If such fingerprinting or criminal record checks disclose a felony conviction, guilty plea or plea of nolo contendere to a felony of possession or sale of drugs, murder, manslaughter, armed robbery, rape, sexual battery, sex offense listed in Section 45-33-23(g), child abuse, arson, grand larceny, burglary, gratification of lust or aggravated assault which has not been reversed on appeal or for which a pardon has not been granted, the new hire shall not be eligible to be employed at such school. Any employment contract for a new hire executed by the superintendent of the local school district or any employment of a new hire by a superintendent/director of a new school under the purview of the Mississippi Board of Education shall be voidable if the new hire receives a disqualifying criminal record check.⁸

While such conflicts may ultimately be resolved or clarified by the courts, in the short term it forces employers to perform a balancing act between the threat of liability under the EEOC guidelines, and the threat of liability under state-based tort law or possible business losses from theft as the result of hiring individuals with criminal backgrounds.

⁶ *Parmenter v. J & B Enterprises, Inc.*, 2012 WL 539949 *7-8 (Miss. Ct. App. Feb. 21, 2012).

⁷ See MISS. CODE ANN. § 37-9-17(2).

⁸ See MISS. CODE ANN. § 37-9-17(3).

IV. Compliance with the EEOC Guidelines

The overall theme of the EEOC guidelines is that the general and intuitive assumption that those with criminal records are more likely to commit crimes is not enough to prove that employment exclusions based on a criminal history are: (1) job related and (2) consistent with business necessity. Instead, the guidelines forcefully suggest that employers should develop targeted screening policies that allow them to analyze each hiring decision based on the individual's particular criminal history, and then providing an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied to the individual is job related and consistent with business necessity.

For an employer to avoid Title VII disparate impact liability for excluding an individual with a criminal record, the EEOC's guidelines reiterate the standard from *Green v. Missouri Pacific Railroad*⁹, namely that an employer must show that it considered three general factors: (1) the nature and gravity of the offense, (2) the amount of time since the conviction, and (3) the relevance of the offense to the type of job being sought. Each of these general factors is subject to more detailed considerations by employer's implementing such a policy.

- **The Nature and Gravity of the Offense or Conduct**

Careful consideration of the nature and gravity of the offense or conduct is the first step in determining whether a specific crime may be relevant to concerns about risks in a particular position. The nature of the offense or conduct may be assessed with reference to the harm caused by the crime (e.g., theft causes property loss). The legal elements of a crime also may be relevant. For example, a conviction for felony theft may involve deception, threat, or intimidation. With respect to the gravity of the crime, offenses identified as misdemeanors may be less severe than those identified as felonies.

- **The Amount of Time Since the Conviction or Criminal Conduct**

Employer policies typically specify the duration of a criminal conduct exclusion. While the *Green* court did not endorse a specific timeframe for criminal conduct exclusions, it did acknowledge that permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard. Whether the duration of an exclusion will be sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case. Relevant and available information to make this assessment might include studies demonstrating how much the risk of recidivism declines over a specified time.¹⁰

⁹ 549 F.2d 1158, 1160 (8th Cir. 1977).

¹⁰ Studies indicate that recidivism rates tend to decline as ex-offenders' ages increase. See PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002) <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (finding that, although 55.7% of ex-offenders aged 14 - 17 released in 1994 were reconvicted within three years, the percentage declined to 29.7% for ex-offenders aged 45 and older who were released the same year).

- **The Relevance of the Offense to the Type of Job Being Sought**

Finally, it is important to identify the particular job(s) subject to the exclusion. While a factual inquiry may begin with identifying the job title, it also encompasses the nature of the job's duties (e.g., data entry, lifting boxes), identification of the job's essential functions, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job's duties are performed (e.g., out of doors, in a warehouse, in a private home). Linking the criminal conduct to the essential functions of the position in question may assist an employer in demonstrating that its policy or practice is job related and consistent with business necessity because it bears a demonstrable relationship to successful performance of the jobs for which it was used.

Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

The individual's showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Under the EEOC guidelines, other examples of relevant individualized evidence could include:

- The facts or circumstances surrounding the offense or conduct
- The number of offenses for which the individual was convicted
- Older age at the time of conviction, or release from prison
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct
- The length and consistency of employment history before and after the offense or conduct
- Rehabilitation efforts, e.g., education/training
- Employment or character references and any other information regarding fitness for the particular position
- Whether the individual is bonded under a federal, state, or local bonding program

If the individual does not respond to the employer's attempt to gather additional information about his background, the EEOC guidelines state that an employer may make its employment decision without the information.

While the new guidelines do not forbid criminal background checks by employers, blanket employment exclusions are proscribed and "[a] policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law." The guidelines also sharply differentiate between an employer's reliance on a record of arrests as opposed to a record of convictions. EEOC's guidance states that reliance on an arrest as a basis for exclusion (as opposed to actual conduct underlying the arrest) will not satisfy Title VII's requirement that the policy be job related and consistent with business necessity.

This is because the EEOC takes the position that the fact of an arrest does not establish that criminal conduct has occurred and that arrests are not proof of criminal conduct. This is because many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.

Another reason the EEOC guidelines advise employers not to rely on arrest records is that they may not report the final disposition of the arrest (e.g., not prosecuted, convicted, or acquitted). Arrest records also may include inaccuracies or may continue to be reported even if expunged or sealed.

Another aspect of the EEOC guidelines likely to raise the hackles of employers is the EEOC's recommendation that employers not ask about criminal histories on job applications. Unlike the Americans with Disabilities Act, which prohibits inquiries about medical conditions pre-hire, Title VII contains no similar prohibition. Nevertheless, many convict-advocacy groups have sought to exclude inquiries about convictions pre-hire (an effort sometimes referred to as "ban the box" in reference to a box checked on an application regarding the existence of a criminal history).

V. Case Examples under the EEOC Guidelines

For employers, issues involving an applicant or employee's criminal background history are almost always going to be highly fact intensive. The EEOC guidelines offer few bright-line rules, other than a stated prohibition against blanket exclusion policies based on arrests or convictions. However, the EEOC does offer a series of case examples that could be helpful to employers in crafting their own policies.¹¹ Some of these examples are based on actual cases while others are purely hypothetical.

Example 1: Exclusion Is Not Job Related and Consistent with Business Necessity.

The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including "have you ever been convicted of a crime?" If the applicant answers "yes," the online application process automatically terminates, and the applicant sees a screen that simply says "Thank you for your interest. We cannot continue to process your application at this time."

¹¹ See n.1.

The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work, to delivery, to management positions. If a Title VII charge were filed based on these facts, and there was a disparate impact on a Title VII-protected basis, the EEOC would find reasonable cause to believe that the blanket exclusion was not job related and consistent with business necessity because the risks associated with all convictions are not pertinent to all of the Company's jobs.

Example 2: Exclusion Is Not Job Related and Consistent with Business Necessity.

Leo, an African American man, has worked successfully at PR Agency as an account executive for three years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The policy does not allow for any individualized assessment before exclusion. The new owners, who are highly respected in the industry, pride themselves on employing only the "best of the best" for every position. The owners assert that a quality workforce is a key driver of profitability.

Twenty years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. During the intervening twenty years, Leo graduated from college and worked successfully in advertising and public relations without further contact with the criminal justice system. At PR Agency, all of Leo's supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, once the new ownership of PR Agency learns about Leo's conviction record through a background check, it terminates his employment. It refuses to reconsider its decision despite Leo's positive employment history at PR Agency.

Leo files a Title VII charge alleging that PR Agency's conviction policy has a disparate impact based on race and is not job related for the position in question and consistent with business necessity. After confirming disparate impact, the EEOC considers PR Agency's defense that it employs only the "best of the best" for every position, and that this necessitates excluding everyone with a conviction. PR Agency does not show that all convictions are indicative of risk or danger in all its jobs for all time, under the Green factors. Nor does PR Agency provide any factual support for its assertion that having a conviction is necessarily indicative of poor work or a lack of professionalism. The EEOC concludes that there is reasonable cause to believe that the Agency's policy is not job related for the position in question and consistent with business necessity.

Example 3: Targeted Screen with Individualized Assessment Is Job Related and Consistent with Business Necessity.

County Community Center rents meeting rooms to civic organizations and small businesses, party rooms to families and social groups, and athletic facilities to local recreational sports leagues. The County has a targeted rule prohibiting anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial information for at least four years after the conviction or release from

incarceration. This rule was adopted by the County's Human Resources Department based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes. The Community Center also offers an opportunity for individuals identified for exclusion to provide information showing that the exclusion should not be applied to them.

Isaac, who is Hispanic, applies to the Community Center for a full-time position as an administrative assistant, which involves accepting credit card payments for room rentals, in addition to having unsupervised access to the personal belongings of people using the facilities. After conducting a background check, the County learns that Isaac pled guilty eighteen months earlier, at age twenty, to credit card fraud, and that he did not serve time in prison. Isaac confirms these facts, provides a reference from the restaurant where he now works on Saturday nights, and asks the County for a "second chance" to show that he is trustworthy. The County tells Isaac that it is still rejecting his employment application because his criminal conduct occurred eighteen months ago and is directly pertinent to the job in question. The information he provided did nothing to dispel the County's concerns.

Isaac challenges this rejection under Title VII, alleging that the policy has a disparate impact on Hispanics and is not job related and consistent with business necessity. After confirming disparate impact, the EEOC finds that this screen was carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that the policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct. Thus, even though the policy has a disparate impact on Hispanics, the EEOC does not find reasonable cause to believe that discrimination occurred because the policy is job related and consistent with business necessity.

Example 4: Targeted Exclusion Without Individualized Assessment Is Not Job Related and Consistent with Business Necessity.

"Shred 4 You" employs over 100 people to pick up discarded files and sensitive materials from offices, transport the materials to a secure facility, and shred and recycle them. The owner of "Shred 4 You" sells the company to a competitor, known as "We Shred." Employees of "Shred 4 You" must reapply for employment with "We Shred" and undergo a background check. "We Shred" has a targeted criminal conduct exclusion policy that prohibits the employment of anyone who has been convicted of any crime related to theft or fraud in the past five years, and the policy does not provide for any individualized consideration. The company explains that its clients entrust it with handling sensitive and confidential information and materials; therefore, it cannot risk employing people who pose an above-average risk of stealing information.

Jamie, who is African American, worked successfully for "Shred 4 You" for five years before the company changed ownership. Jamie applies for his old job, and "We Shred" reviews Jamie's performance appraisals, which include high marks for his reliability, trustworthiness, and honesty. However, when "We Shred" does a background check, it finds that Jamie pled guilty to misdemeanor insurance fraud five years ago, because he exaggerated the costs of several home repairs after a winter storm. "We Shred" management informs Jamie that his guilty plea is evidence of criminal conduct and that his employment will be terminated. Jamie asks

management to consider his reliable and honest performance in the same job at "Shred 4 You," but "We Shred" refuses to do so. The employer's conclusion that Jamie's guilty plea demonstrates that he poses an elevated risk of dishonesty is not factually based given Jamie's history of trustworthiness in the same job. After confirming disparate impact based on race (African American), the EEOC finds reasonable cause to believe that Title VII was violated because the targeted exclusion was not job related and consistent with business necessity based on these facts.

Example 5: Exclusion Is Not Job Related and Consistent with Business Necessity.

Your Bank has a rule prohibiting anyone with convictions for any type of financial or fraud-related crimes within the last twenty years from working in positions with access to customer financial information, even though the federal ban is ten years for individuals who are convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from serving in such positions.

Sam, who is Latino, applies to Your Bank to work as a customer service representative. A background check reveals that Sam was convicted of a misdemeanor for misrepresenting his income on a loan application fifteen years earlier. Your Bank therefore rejects Sam, and he files a Title VII charge with the EEOC, alleging that the Bank's policy has a disparate impact based on national origin and is not job related and consistent with business necessity. Your Bank asserts that its policy does not cause a disparate impact and that, even if it does, it is job related for the position in question because customer service representatives have regular access to financial information and depositors must have "100% confidence" that their funds are safe. However, Your Bank does not offer evidence showing that there is an elevated likelihood of committing financial crimes for someone who has been crime-free for more than ten years.

After establishing that the Bank's policy has a disparate impact based on national origin, the EEOC finds that the policy is not job related for the position in question and consistent with business necessity. The Bank's justification for adding ten years to the federally mandated exclusion is insufficient because it is only a generalized concern about security, without proof.

Example 6: State Law Exclusion Is Job Related and Consistent with Business Necessity.

Elijah, who is African American, applies for a position as an office assistant at Pre-School, which is in a state that imposes criminal record restrictions on school employees. Pre-School, which employs twenty-five full- and part-time employees, uses all of its workers to help with the children. Pre-School performs a background check and learns that Elijah pled guilty to charges of indecent exposure two years ago.

After being rejected for the position because of his conviction, Elijah files a Title VII disparate impact charge based on race to challenge Pre-School's policy. The EEOC conducts an investigation and finds that the policy has a disparate impact and that the exclusion is job related for the position in question and consistent with business necessity because it addresses serious

safety risks of employment in a position involving regular contact with children. As a result, the EEOC would not find reasonable cause to believe that discrimination occurred.

Example 7: State Law Exclusion Is Not Consistent with Title VII.

County Y enforces a law that prohibits all individuals with a criminal conviction from working for it. Chris, an African American man, was convicted of felony welfare fraud fifteen years ago, and has not had subsequent contact with the criminal justice system. Chris applies to County Y for a job as an animal control officer trainee, a position that involves learning how to respond to citizen complaints and handle animals. The County rejects Chris's application as soon as it learns that he has a felony conviction.

Chris files a Title VII charge, and the EEOC investigates, finding disparate impact based on race and also that the exclusionary policy is not job related and consistent with business necessity. The County cannot justify rejecting everyone with any conviction from all jobs. Based on these facts, County Y's law "purports to require or permit the doing of an act which would be an unlawful employment practice" under Title VII.

Example 8: Consideration of Federally Imposed Occupational Restrictions.

John Doe applies for a position as a truck driver for Truckers USA. John's duties will involve transporting cargo to, from, and around ports, and Truckers USA requires all of its port truck drivers to have a TWIC. The Transportation Security Administration (TSA) conducts a criminal background check and may deny the credential to applicants who have permanently disqualifying criminal offenses in their background as defined by federal law.

After conducting the background check for John Doe, TSA discovers that he was convicted nine years earlier for conspiracy to use weapons of mass destruction. TSA denies John a security card because this is a permanently disqualifying criminal offense under federal law. John, who points out that he was a minor at the time of the conviction, requests a waiver by TSA because he had limited involvement and no direct knowledge of the underlying crime at the time of the offense. John explains that he helped a friend transport some chemical materials that the friend later tried to use to damage government property.

TSA refuses to grant John's waiver request because a conviction for conspiracy to use weapons of mass destruction is not subject to the TSA's waiver procedures. Based on this denial, Truckers USA rejects John's application for the port truck driver position. Title VII does not override Truckers USA's policy because the policy is consistent with another federal law.

Example 9: Arrest Record Is Not Grounds for Exclusion.

Mervin and Karen, a middle-aged African American couple, are driving to church in a predominantly white town. An officer stops them and interrogates them about their destination. When Mervin becomes annoyed and comments that his offense is simply "driving while Black," the officer arrests him for disorderly conduct. The prosecutor decides not to file charges against Mervin, but the arrest remains in the police department's database and is reported in a

background check when Mervin applies with his employer of fifteen years for a promotion to an executive position. The employer's practice is to deny such promotions to individuals with arrest records, even without a conviction, because it views an arrest record as an indicator of untrustworthiness and irresponsibility. If Mervin filed a Title VII charge based on these facts, and disparate impact based on race were established, the EEOC would find reasonable cause to believe that his employer violated Title VII.

Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes.

Example 10: Employer's Inquiry into Conduct Underlying Arrest.

Andrew, a Latino man, worked as an assistant principal in Elementary School for several years. After several ten and eleven-year-old girls attending the school accused him of touching them inappropriately on the chest, Andrew was arrested and charged with several counts of endangering the welfare of children and sexual abuse. Elementary School has a policy that requires suspension or termination of any employee who the school believes engaged in conduct that impacts the health or safety of the students. After learning of the accusations, the school immediately places Andrew on unpaid administrative leave pending an investigation.

In the course of its investigation, the school provides Andrew a chance to explain the events and circumstances that led to his arrest. Andrew denies the allegations, saying that he may have brushed up against the girls in the crowded hallways or lunchroom, but that he doesn't really remember the incidents and does not have regular contact with any of the girls. The school also talks with the girls, and several of them recount touching in crowded situations. The school does not find Andrew's explanation credible. Based on Andrew's conduct, the school terminates his employment pursuant to its policy.

Andrew challenges the policy as discriminatory under Title VII. He asserts that it has a disparate impact based on national origin and that his employer may not suspend or terminate him based solely on an arrest without a conviction because he is innocent until proven guilty. After confirming that an arrest policy would have a disparate impact based on national origin, the EEOC concludes that no discrimination occurred. The school's policy is linked to conduct that is relevant to the particular jobs at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest. The Commission finds no reasonable cause to believe Title VII was violated.

Example 11: Disparate Treatment Based on Race.

John, who is White, and Robert, who is African American, are both recent graduates of State University. They have similar educational backgrounds, skills, and work experience. They each pled guilty to charges of possessing and distributing marijuana as high school students, and neither of them had any subsequent contact with the criminal justice system.

After college, they both apply for employment with Office Jobs, Inc., which, after short intake interviews, obtains their consent to conduct a background check. Based on the outcome of the background check, which reveals their drug convictions, an Office Jobs, Inc., representative decides not to refer Robert for a follow-up interview. The representative remarked to a co-worker that Office Jobs, Inc., cannot afford to refer “these drug dealer types” to client companies. However, the same representative refers John for an interview, asserting that John’s youth at the time of the conviction and his subsequent lack of contact with the criminal justice system make the conviction unimportant. Office Jobs, Inc., has treated John and Robert differently based on race, in violation of Title VII. Title VII prohibits “not only decisions driven by racial [or ethnic] animosity, but also decisions infected by stereotyped thinking” Thus, an employer’s decision to reject a job applicant based on racial or ethnic stereotypes about criminality – rather than qualifications and suitability for the position – is unlawful disparate treatment that violates Title VII.

Example 12: Disparate Treatment Based on National Origin.

Tad, who is White, and Nelson, who is Latino, are both recent high school graduates with grade point averages above 4.0 and college plans. While Nelson has successfully worked full-time for a landscaping company during the summers, Tad only held occasional lawn-mowing and camp-counselor jobs. In an interview for a research job with Meaningful and Paid Internships, Inc. (MPII), Tad discloses that he pled guilty to a felony at age 16 for accessing his school’s computer system over the course of several months without authorization and changing his classmates’ grades. Nelson, in an interview with MPII, emphasizes his successful prior work experience, from which he has good references, but also discloses that, at age 16, he pled guilty to breaking and entering into his high school as part of a class prank that caused little damage to school property. Neither Tad nor Nelson had subsequent contact with the criminal justice system.

The hiring manager at MPII invites Tad for a second interview, despite his record of criminal conduct. However, the same hiring manager sends Nelson a rejection notice, saying to a colleague that Nelson is only qualified to do manual labor and, moreover, that he has a criminal record. In light of the evidence showing that Nelson’s and Tad’s educational backgrounds are similar, that Nelson’s work experience is more extensive, and that Tad’s criminal conduct is more indicative of untrustworthiness, MPII has failed to state a legitimate, nondiscriminatory reason for rejecting Nelson. If Nelson filed a Title VII charge alleging disparate treatment based on national origin and the EEOC’s investigation confirmed these facts, the EEOC would find reasonable cause to believe that discrimination occurred.

VI. Employer Best Practices Under EEOC Guidelines

The following steps would place an employer’s criminal background policy in accord with the EEOC’s guidelines.

- Your application should not ask questions about criminal history. Rather, don’t inquire into criminal history until a conditional decision to hire has been made. (As noted above, there is currently no legal prohibition against inquiring into criminal history on a job application)

- Limit criminal background checks to seeking information only on crimes that you have identified as job related and consistent with business necessity.
- Eliminate blanket policies or practices that exclude people from employment based on any criminal record, except to the extent required for employment with the federal government.
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
 - Identify essential job requirements and the actual circumstances under which the jobs are performed.
 - Determine the specific offenses that may demonstrate unfitness for performing such jobs.
 - Identify the criminal offenses based on all available evidence.
 - Determine the duration of exclusions for criminal conduct based on all available evidence.
 - Record the justification for the policy and procedures.
 - Note and keep a record of any consultations and research considered in crafting the policy and procedures.
- In determining the crimes that will likely result in refusal of employment, analyze a) the nature and gravity of the offense or conduct, including the harm caused, the specific elements of the crime, and whether it was a felony or misdemeanor; b) the time that has passed since the offense or conduct and/or completion of the sentence; and c) the nature of the job held or sought. When considering these factors, you should review the job description and essential functions of each position.
- Do not use records of arrests that did not result in conviction unless you independently verify that the underlying circumstances suggest guilt or unfitness and are closely tied to the job in question.
- Include an individualized assessment. Prior to making a decision to not hire based on a criminal history, interview the applicant about the circumstances to determine if there are mitigating factors or mistakes in the information. Allow the applicant to provide information on the following:
 - The facts or circumstances surrounding the offense or conduct.
 - The number of offenses for which the individual was convicted.
 - Older age at the time of release from prison.

- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct.
 - The length and consistency of employment history before and after the offense or conduct.
 - Rehabilitation efforts, e.g., education/training.
 - Employment or character references and any other information regarding fitness for the particular position.
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
 - Document the reasons you considered certain convictions to be job related and consistent with business necessity for each position. This can be time-consuming and tedious (especially if your Company has a large number of different positions), but will strengthen your case if the Commission decides to investigate your Company's policy.
 - When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
 - If federal laws prohibit hiring for particular positions based on a criminal history, do not have a policy that is more restrictive for those positions. For example, if federal law prohibits hiring an individual with a conviction in the last ten years, do not have a policy based on convictions in the last fifteen years.
 - Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.
 - Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

VII. Conclusion

Employers who carefully craft targeted screening policies for applicants and employees with criminal backgrounds should be able to avoid having to sing the "Jailhouse Blues" yet maintain the level of security and safety necessary for the workplace. As for Willie Sutton, he had the last laugh. After he was released on parole in 1969 he ended up back in a job where the "money was." In the years after he was released, he actually ended up working for a bank, trading in on his notoriety by appearing in television commercials for a Connecticut bank's credit card business.