

**Employer Credit-History Checks and Criminal Record Checks of
Job Applicants for Hiring Decisions:
The Illegality under Title VII Disparate Impact Doctrine**

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PART I: EMPLOYER CREDIT CHECKS OF JOB APPLICANTS

The legality under Title VII of employer use of credit-history checks as a job criterion or investigative tool is a question best answered in several parts. First, are employee credit-history checks a sufficiently widespread practice to merit the issuance of written guidance by the EEOC? Second, are employee credit-history checks an employment practice that has a disproportionately negative impact on African-Americans (and other protected groups as well)? Third, are employee credit-history checks a practice that is job-related and consistent with business necessity? Fourth, and perhaps most broadly, would barring the use of employee credit-history information in determining employment suitability comport with the goals and purposes of Title VII? Each question will be answered in turn below.

(1) Are Employee Credit Checks a Widespread Practice?

Yes, the practice is very, and increasingly, widespread. A 2004 study by the Society of Human Resource Management found that “[m]ore employers [we]re using credit checks in 2003 (35%) compared to in 1996 (19%)” as a way to “investigate the backgrounds of potential employees.”¹

Credit checks may be especially widespread in certain industries. For example, a 2002 academic study from the University of Florida similarly found that 40.7% of retail employers

¹ Evren Esen, *SHRM Workplace Violence Survey* (Society for Human Resource Management, January 2004) at 19. This study by the 175,000-member Society for Human Resource Management surveyed a range of businesses “similar to the SHRM membership population.” The survey stated that it covered “a greater percentage of HR professionals from small and medium organizations compared to SHRM membership. *Id.* at vii. But SHRM defines “small and medium” to include some relatively sizeable employers – “small” means fewer than 100 employees while “medium” means 100-499 employees, *id.* at vii) – presumably because *truly* small businesses (e.g., those likely to be excluded from Title VII coverage as having fewer than 15 employees), are highly unlikely to have “HR professionals” who would be members of professional organizations like the SHRM. Accordingly, the vast majority of employers surveyed would seem to be within Title VII coverage, with many employing hundreds of workers or more.

used “credit history checks as “screening measures” for new employee hiring.²

In short, a substantial and, in recent years, increasing number of employers are screening out job applicants for having a negative credit history.

(2) Do Employee Credit Checks Have a Disparate Impact by Race?

Yes, there is a correlation between the quality of one’s credit record and one’s race. A 2000 study by Freddie Mac found striking race-credit correlations:

	<i>percent of group whose credit record is:</i>		
<u>Racial Group</u>	<u>“bad”</u>	<u>“indeterminate”</u>	<u>“good”</u>
African Americans	48%	16%	36%
Hispanics	34%	15%	51% ³
Whites	27%	12%	61% ⁴

Notably, the same Freddie Mac study showed, the *race*-credit correlation is even stronger than the *income*-credit correlation:

<u>Annual Income</u>	<u>percent of group with “bad” credit record</u>
Under \$25,000	36%
\$25,000-\$44,999	33%
\$45,000-\$64,999	25%
\$65,000-\$75,000	22% ⁵

In other words, *low-wage* workers (assume \$14,000 per year, 40 weekly hours of work at \$7 per hour) have “bad” credit records at only a 13% higher rate than those earning five times as much (\$70,000 per year) – but *African-Americans* have “bad” credit records at a 21% higher rate than Whites.⁶ This 21% white/black disparity in likelihood of bad credit is almost exactly the same magnitude as the 22% white/black disparity in likelihood of holding a high school diploma of *Griggs v. Duke Power Co.*, in which the Court disallowed a requirement of a high school diploma for certain manual labor jobs because 34% of white males but only 12% of African-

² Richard C. Hollinger & Jason L. Davis, *2002 National Retail Security Survey Final Report* (University of Florida Security Research Project, 2003) at 13.

³ Both African Americans and Hispanics appear to have statistically significantly lower credit than their White counterparts.

⁴ Freddie Mac National Consumer Credit Survey (2000).

⁵ *Id.*

⁶ The finding of a racial correlation does not appear to “control” for income, *i.e.*, it does not tell us how much of the race-credit correlation is due to African-Americans having, on average, lower incomes than whites. The sheer magnitude of the white/black *credit* disparity, and the fact that it is greater than the white/black *income* disparity, implies that income cannot explain the entire race-credit correlation.

American males had high school diplomas in the state.⁷

The finding of a racial correlation does not appear to “control” for income, *i.e.*, it does not tell us how much of the race-credit correlation is due to African-Americans having, on average, lower incomes than whites – but white/black income disparities appear insufficient to explain the race-credit correlation. For example, the difference between the average African-American family income (\$26,500) and white family income (\$47,100)⁸ would predict only an 8-point difference in the percent of “bad” credit records – not the 21-point white/black gap we actually see. Moreover, even if the race-credit correlation did trace to income or other non-race factors, that would not diminish the racially disparate impact of relying on credit record: the practice still screens out African-Americans, and the entire point of disparate impact doctrine is to target employment practices whose effects simply *correlate with race*; the employment practice – whether a physical test, a diploma requirement, or something else – need not be *based on race* to be unlawfully discriminatory.⁹

The correlation between credit record and race is only exacerbated by the fact that various credit “problems” correlate with race.

- ***Certain jobs*** are a minus for one’s credit record; for example, “a credit-scoring system may place a low score on occupations such as migratory work or low paying service jobs. . . . [I]f a majority of these workers in the geographic area are racial minorities, this job classification can have an unfair effect. . . .”¹⁰
- ***Bankruptcy filing*** harms one’s credit rating substantially, and “African Americans make up a disproportionate percentage of debtors” in bankruptcy.¹¹
- ***Lending discrimination*** means that African-American borrowers obtain loans (1) far less often and (2) on worse terms. “A 1991 Federal Reserve study of 6.4 million home mortgage applications by race and income confirmed suspicions of bias in lending by

⁷ 401 U.S. 424 (1971).

⁸ *Economic Report of the President* (U.S. Gov’t Printing Office, 1998) at 124. The average Hispanic family income (\$26,200) is about the same as for African-Americans, so the same point holds true.

⁹ “Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory. Every individual employee is protected against both discriminatory treatment and “practices that are fair in form, but discriminatory in operation.” *Connecticut v. Teal*, 457 U.S. 440, 455-456 (1982) (*quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

¹⁰ Kenneth G. Gunter, *Computerized Credit Scoring's Effect on the Lending Industry*, 4 N.C. BANKING INST. 443 (2000) (citations omitted).

¹¹ Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 3 (2005) (citing Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347, 385 (2002)).

reporting a widespread and systemic pattern of institutional discrimination in the nation's banking system": regardless of where the home is located, African-Americans are denied loans two to three times more often than whites, even high-income African-Americans are denied loans more often than low-income whites, and African-Americans who *do* obtain mortgages pay rates 5.4 to 9.2 points higher than whites.¹² Worse borrowing terms and being denied loans both make it harder to establish the sort of record of paying back debts promptly that establishes a good credit rating.

In short, given the prevalence of employers checking employee credit records that correlate with race, numerous employees are screened out of jobs based on "a particular employment practice that causes a disparate impact on the basis of race" – what Title VII requires as the threshold showing for a disparate impact claim.¹³

Of course, most job applicants screened out of jobs for unlawful reasons *never know why*; an applicant rejected for having an insufficiently positive credit record typically will not know that a never-disclosed employer credit-history check is the reason.¹⁴ This is an example of why there are far fewer lawsuits alleging *hiring* discrimination than alleging *firing* discrimination,¹⁵ even though the former is, in many ways, more troubling, as a barrier to excluded groups ever entering the door of the workplace. Accordingly, EEOC intervention is especially warranted when a widespread practice imposes a disparate impact on the hiring of workers in racial minorities.

(3) Are Credit Checks Job-Related and Consistent With Business Necessity?

(a) The Legal Standard

Once the plaintiff "demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race," it is the defendant's burden of proof to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."¹⁶ This standard was codified into Title VII but originated from *Griggs*

¹² MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 19, 137-142 (1995).

¹³ 42 U.S.C.A. § 2000e-2(k)(1)(A)(i).

¹⁴ One notable exception is Lisa Bailey. Ms. Bailey "worked for five months at Harvard University as a temp entering donations into a database. When the university made the job a salaried position, Ms. Bailey, who is black, saw a chance to lift herself out of dead-end jobs. Bailey's superiors encouraged her to apply, she says, but turned her down after discovering her bad credit history." Ben Arnoldy, *The Spread of the Credit Check as Civil Rights Issue: Minorities are Starting to Fight Employers Over the Use of Credit History in Hiring*, *The Christian Science Monitor*, Jan. 18, 2007; Andrea Coombes, *Are Employers' Credit Checks Discriminatory?*, *CBS Market Watch*, Jan. 17, 2004.

¹⁵ John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *STAN. L. REV.* 983, 1027 (1991) (finding that six times as many Title VII lawsuits allege discriminatory discharge as allege discriminatory failure to hire).

¹⁶ 42 U.S.C.A. § 2000e-2(k)(1)(A)(i).

v. Duke Power Co., which rejected two job requirements because “neither . . . is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted . . . without meaningful study of their relationship to job-performance ability.”¹⁷ The Court later fleshed out this requirement in *Albemarle Paper Co. v. Moody*: “Job relatedness cannot be proved through vague and unsubstantiated hearsay,” but instead must be shown by a study “validating” the use of the job requirement as a criterion for the specific job in question.¹⁸ In *Albemarle*, the employer’s study purported to validate the test for only three of the eight jobs for which it was used, which was insufficient because “[a] test may be used in jobs other than those for which it has been professionally validated only if there are ‘no significant differences’ between the studied and unstudied jobs.”¹⁹

Thus, to defend a practice of employee credit checks, an employer would have to prove that it undertook a “meaningful study” that “validates” that credit record “bear[s] a demonstrable relationship to successful performance” – a standard courts have been applying strictly in post-1991 cases. The high level of validation that disparate impact law requires of job requirements is illustrated well by *Lanning v. SEPTA*, a case that is especially instructive because the Third Circuit issued two successive opinions – the first one rejecting the employer’s effort at validating the test, but the second one accepting the proof the employer had offered on remand.²⁰

- The first *Lanning* opinion rejected, for its disparate impact on women, a requirement that transit police officers have a certain aerobic capacity and be able to run 1.5 miles in 12 minutes. The defendant set its requirement only after its expert proved a correlation between aerobic capacity and officer performance (*e.g.*, numbers of arrests and commendations), but “to show the business necessity of a discriminatory cutoff score[,] an employer must demonstrate that its cutoff measures the minimum qualifications necessary for successful performance of the job in question.”²¹ Even if running is important, the chosen cutoff was a judgment call, and “[a] business necessity standard that wholly defers to an employer’s judgment as to what is desirable . . . is completely inadequate.”²² The court expressly rejected the idea of deference to any “‘readily justifiable’” chosen cutoff:

The general import of [defendant’s validation] studies that the higher an officer’s aerobic capacity, the better the officer is able to perform the job. . . . [T]his conclusion alone does not validate . . . [defendant’s] cutoff under the Act’s business necessity standard. At best, these studies show that aerobic capacity is related to the job. . . . *A study showing that “more is better,” however, has no bearing on the appropriate cutoff to reflect the minimal qualifications necessary*

¹⁷ 401 U.S. at 431 (emphases added).

¹⁸ 422 U.S. 405, 428 (1975).

¹⁹ 422 U.S. 405, 428 (1975).

²⁰ *Lanning v. SEPTA*, 181 F.3d 478 (3d Cir. 1999) (reversing judgment for employer), *later op.*, 306 F.3d 286 (3d Cir. 2002) (upholding judgment for employer after second trial).

²¹ 181 F.3d at 489 (emphasis added).

²² 181 F.3d at 490.

to perform successfully the job in question.²³

- The second *Lanning* opinion upheld a defense judgment because highly *job-specific* “studies indicated that individuals who fail the test will be much less likely to successfully execute critical policing tasks. . . . [Those] who passed the run test had a [job] success rate . . . from 70% to 90%. The success rate of the individuals who failed . . . ranged from 5% to 20%.”²⁴ Thus, “experts set the . . . cutoff at 12 minutes for objective reasons, with the studies showing that the *projected rate of success* of job applicants *dropped off markedly*” for those who failed.²⁵

(b) **Credit as Neither Job-Related Nor Consistent with Business Necessity**

(i) **Lack of Any Employment Validation**

There is a complete absence of evidence that employee credit checks are job-related at all, much less consistent with business necessity, for *any* job – and there is substantial evidence that the credit records that employers check are based on factors substantially *unrelated* to any aspect of the performance of any job. To our knowledge, credit checks as a basis for employment decisions is a practice validated by *no* studies, much less by studies meeting the strict standard for proving justified a job requirement imposing a disparate impact. The Supreme Court in *Albemarle* (*see supra*) disapproved of taking a requirement validated for *one job* and applying it more broadly as a requirement for *other jobs* at the *same employer*; it is hard to see how it would approve of a requirement validated only for non-employment uses (*e.g.*, for lenders to evaluate whether an individual likely will be able to pay back borrowed money).

Scrutiny of “cutoff” scores would doom employee credit-history checks even if credit record somehow were relevant to employment. Credit record is a “score,” and there is no evidence that that employers are validating whatever “cutoff” they require sufficiently to satisfy the Third Circuit’s caution that “under the Act’s business necessity standard[,] . . . [a] study showing that “more is better,” however, has no bearing on the appropriate cutoff to reflect the minimal qualifications necessary to perform successfully the job in question.”²⁶

This is also true for the employer’s use of credit history (instead of credit score) – such as a late payment or other negative payment history reference – to determine employment suitability. Here too, the “more is better” construct is readily apparent. The employer is simply setting an arbitrary cutoff as a barrier to employment without any relation to the basic qualifications of the job. Can an employer validate the use of a 30-day late payment reference on a credit history report to lawfully bar employment? The answer is obvious.

Some employers argue that a heightened “credit history” standard is appropriate for positions that have ready access to cash or financial products. Bank tellers, for example, have

²³ 181 F.3d at 492-93 (emphasis added).

²⁴ 306 F.3d at 291.

²⁵ 306 F.3d at 291 (emphasis added).

²⁶ 181 F.3d at 492-93.

the means and opportunity to steal money from the bank – their own history of financial accountability therefore must satisfy the Title VII job related and consistent with business necessity defense. But where is the proof of a correlation between a heightened propensity to steal and credit history? And if credit history is an accurate predictor of criminality, wouldn't we expect employers to monitor current employees as a prophylactic measure to guard against employee theft? The answer is that there is simply no support for the proposition that applicant (or incumbent employee) credit score or history correlates to a heightened risk for theft. And given that African American applicants are more likely to have bad credit, this notion of risk of theft also fosters a shameful historic racial stereotype.

(ii) **Poor Credit History Indicates Primarily Past Financial Distress Due to Objective Causes, Not Employment-Related Traits**

Bad credit is often the result of a variety of factors that bear no relation to employment suitability. An examination of the single most powerful cause of a negative credit record – a bankruptcy filing – illustrates that many of the primary causes of bad credit are factors that could not possibly correlate to the performance of any job. According to the most significant recent study of how and why bankruptcy filings occur, 85% of bankruptcy filings reportedly occur following “income loss, medical problems, or family breakup” – problems that do not trace to simple irresponsible “Over-Consumption”²⁷ or any other trait that could be “job-related,” much less a matter of “business necessity.”

(iii) **Credit Record is a Notoriously Error-Laden Measure**

For a measure that has such significant effects on people's lives, credit records are notoriously error-laden:

[A]ll three national credit bureaus have continuously failed to ensure their data is mistake free. For example, in 1991, TRW, a credit reporting company, wrongly characterized every taxpayer in a small Vermont town as a poor credit risk by enclosing false public record information into their reports. A year later, in a separate case, Equifax was forced to settle with the citizens of Middlesex County, Massachusetts for virtually the same offense.²⁸

²⁷ Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1510 (2004) (citing *The Consumer Bankruptcy Project*, a study that “relied on a diverse group of a dozen professors from seven different research universities to design and implement the study.... These dozen principal investigators brought expertise from a number of policy areas such as family economics, demographics, employment, health care finance, housing policy, small business, women's issues, law, sociology, business, and economics, as well as specific skills in data collection and analysis.”). See also Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 3 (2005) (“households with children are more likely to experience bankruptcy than childless households, and most individuals filing bankruptcy are women who depend on their jobs to climb their way out of financial distress”) (citing other work by Elizabeth Warren).

²⁸ Kenneth G. Gunter, *Computerized Credit Scoring's Effect on the Lending Industry*, 4 N.C. BANKING INST. 443 (2000) (citations omitted).

Thus, credit record is not only unrelated to one's qualifications as an employee, it is also not even a reliable indicator of qualifications *as a borrower*.

(4) Would Barring Employee Credit Checks Comport with Title VII's Goals?

For a number of reasons, barring the use of credit history information would comport with the goals and purposes of Title VII. Even though most employers undertaking credit checks may not be *intending* to screen out members of racial minorities, that is the clear *effect* of the practice in violation of Title VII. "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability," as the *Griggs* Court stated in explaining why Title VII authorizes disparate impact actions.²⁹ When employers dole out jobs based on financial status, they are letting financial inequality dictate further employment inequality, which is exactly the sort of perpetuation of barriers to employment opportunity that Congress sought to eliminate: "The objective of Congress ... was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees."³⁰

Employers today that rely on credit history information are much like the *Griggs* employer relying on educational attainment for manual labor jobs. The *Griggs* employer was relying on a socioeconomic status – having a high school diploma – that, in 1960s North Carolina, blacks and whites held to differing extents due to broader racial inequalities in society. Similarly, employers today using credit checks are relying on a socioeconomic status – having a positive credit record – that, in today's society, blacks and whites hold to differing extents due to broader racial inequalities in society. Thus, employer use of employee credit checks is a practice that strikes at the heart of Title VII's goal that employers offer equal employment opportunities rather than limit opportunities based on unjustified requirements that disproportionately exclude members of racial minorities.

²⁹ 401 U.S. at 432.

³⁰ 401 U.S. at 429-430.

PART II: EMPLOYER CRIMINAL RECORD CHECKS OF JOB APPLICANTS

Are employers using criminal record checks, like credit checks, more frequently to screen potential hires, and, like credit checks, do criminal record checks have a disproportionately negative impact for African-Americans and Hispanics? If so, are criminal record checks job-related and consistent with business necessity as required under Title VII? Most challenging, if these questions are answered in the affirmative, how do we limit the use of criminal record checks to comport with the goals of Title VII while balancing the legitimate public safety and employer liability concerns that weigh in favor of some type(s) of permissible consideration of past criminal behavior? Each question will be answered in turn below.

(1) Are More Employers Performing Criminal Records Checks on Applicants?

Yes. As with credit history, more employers routinely perform criminal record checks for potential hires. In 2004 80% of large employers conducted criminal background checks – up almost 30% from 1996. For example, Wal-Mart, the nation’s largest private employer, conducts criminal record checks on all applicants to its U.S. stores.³¹ And in 2002, for the first time, the FBI conducted more fingerprint-based background checks for civil purposes than for criminal investigations (5 million for employment purposes).³²

Why the rise in criminal record checks? Though we know of no supporting statistics, employers view criminal record checks as a means of reducing legal liability for crimes and/or injuries caused by employees. An increasing number of companies offer employers criminal history search services. These companies market to employers’ fear of costly lawsuits. One such company warns clients “Failure to screen current and prospective employees for criminal history and substance abuse can cost your company *millions* of dollars!” (emphasis in original) and cites average settlement figures for negligent hiring lawsuits at \$1.6 million.³³ Employers may perceive someone with a criminal record as more likely to break the law than someone without one. Consequently, employers may conclude that an applicant’s criminal record indicates a greater likelihood that the applicant if hired will steal from the employer or harm customers or coworkers.

(2) Do Employee Criminal Record Checks Have a Disparate Impact by Race?

Yes. Incarceration rates have quadrupled over the last 25 years resulting in more working-age people with criminal records than ever before. Today, approximately 25% of the nation’s population lives a substantial portion of their lives with a criminal record —and those numbers are growing.³⁴

³¹ Ann Zimmerman and Kortney Stringer, “As Background Checks Proliferate, Ex-Cons Face A Lock On Jobs,” The Wall Street Journal (August 26, 2004).

³² NELP Report at 3.

³³ Consumer Credentials, “Why Conduct Background Checks” (2004) available at <http://www.consumercredentials.com/background-checks-why.htm>; also see Kevin Pendergrast, “Your Company’s Reputation: You Are Who You Hire,” Human Resource Professional Magazine (March 2001) available at <http://www.researchassociatesinc.com/articles/whouhire.pdf>.

³⁴ Memorandum by Ellen Medlin, Lawyers Committee for Civil Rights, “Race-based Employment Discrimination Resulting from Criminal History and Background Checks,” (December 2006) (hereinafter “LCCR Memo”) citing

- More than 650,000 people are released from U.S. prisons every year³⁵
- 3 out of 4 served time for non-violent offenses (drug offenses - 33%; drug possession -18%); and property offenses - 34%)³⁶

The implications are especially severe for communities of color. Two out of three non-violent offenders released from prison each year are African-American or Hispanic. (48% African-American, 25% Hispanic).³⁷ Minorities with criminal records must overcome both racial bias and the stigma that follows individuals with criminal records. In fact a recent study looking at race and criminal conviction found that African-Americans with criminal records face more discrimination in employment than faced by whites with criminal records or African-Americans without criminal records.³⁸ Hence, using criminal record checks to screen applicants is very likely to disproportionately curtail job opportunities for African-Americans and Hispanics, especially in industries employing significant numbers of African-Americans and Hispanics.

. These figures do not include adults with arrest records who were never convicted of the crime for which they were arrested. About 20% of adults (between 45 – 60 million) have state-maintained criminal records that include arrests.³⁹

Worse still, criminal records can contain inaccuracies comparable to those found in credit records. One study of the FBI's database found that out of 10,000 hits 5.5% were falsely attributed to individuals who had not been convicted of a crime.⁴⁰ State records can contain similar inaccuracies because there is no standardized process for reporting arrests and disposition at the state and local level.⁴¹

Elizabeth A. Gerlach, Comment, *The Background Check Balancing Act: Protecting Applicants With Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981 (2006).

³⁵ Maurice Emsellem, National Employment Law Project, "*The 'Smart on Crime' Agenda: Increase Public Safety by Reducing Legal Barriers to Employment for People with Criminal Records*," at 2, presented at the Congressional Black Caucus Foundation 35th Annual Conference (September 24, 2005). (Hereinafter "NELP Report").

³⁶ *Id.*

³⁷ *Id.*

³⁸ Devah Pager, "*The Mark of a Criminal Record*," AJS Volume 108 Number 5 (March 2003) at 938, *citation omitted*. Also see Devah Pager and Bruce Western, "*Race At Work: Realities of Race and Criminal Record in the NYC Job Market*," Schomburg Center for Research in Black Culture (December 9, 2005), available at http://www.princeton.edu/~pager/race_at_work.pdf.

³⁹ NELP Report at 3.

⁴⁰ "*Study Finds FBI Criminal Database Search Ineffective for Employment Background Checks*," Carolina NewsWire, (Aug. 26, 2005), available at

<http://carolinanewswire.com/news/News.cgi?database=topstories.db&command=viewone&id=3277&op=t>.

⁴¹ Letter from Michael Shankey, Chief Executive Officer, BRB Publications, Inc., to Richard Hertling, Deputy Assistant Attorney General, Office of Legal Policy (June 27, 2005) available at <http://www.usdoj.gov/olp/pdf/hertling.pdf>.

(3) What Is The Legal Standard Governing Employer Use of Criminal Records?

Title VII does not recognize individuals with criminal records as a protected class. However, Title VII prohibits employers from having a race-neutral policy against employing individuals with criminal records because of the adverse impact on African-Americans and Hispanics.⁴² Title VII requires that an employer's policy show that consideration of an individual's criminal record is job-related and consistent with business necessity. If an employer satisfies the business necessity requirement, a plaintiff may still prevail by offering an alternative policy consistent with the stated business necessity with a less discriminatory impact on the protected group.

In *Gregory v. Litton Systems, Inc.*, the Ninth Circuit found that a questionnaire used in hiring by a sheet-metal company disparately impacted African-American job seekers by requiring applicants to reveal arrest records. Inquiries into arrest records (not convictions) could not be shown by employer Litton to have any "reasonable business purpose."⁴³ Then in *Green v. Missouri Pacific Railroad Co.*, the Eighth Circuit ruled that the railroad's policy refusing employment to anyone with a conviction other than a minor traffic violation disparately impacted minorities without showing business necessity. The Eighth Circuit's wrote: "We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. 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."⁴⁴

Accordingly, employers may consider an individual's criminal record only if the employer can justify its policy under the business necessity exception. Earlier this year, in *El v. Southeastern Pennsylvania Transportation Authority (SEPTA)*, the Third Circuit offered the most in-depth court analysis to date of the legality of making hiring decisions based on an applicant's criminal record.⁴⁵ The Third Circuit upheld an employer's policy barring plaintiff from employment because of his criminal record. This case is distinguishable from other cases disallowing criminal record checks because it was a unique job situation involving care for the disabled.

The plaintiff, Douglas El, worked for a subcontractor of SEPTA, Philadelphia's mass transit operator, as a paratransit driver shuttling physically and mentally disabled passengers. Pursuant to the subcontract, SEPTA disallowed hiring anyone with a violent criminal conviction. Within the first few weeks of El's employment, his direct employer discovered that El had a 40-year old conviction for second-degree murder for a crime that occurred when he was 15 years old. Based solely on this conviction, El was fired. El sued on a disparate impact theory under

⁴² EEOC, Notice No. N-915 (<http://www.eeoc.gov/policy/docs/metropol.html>), Policy Statement on Issues of Conviction Records under Title VII of the Civil Rights Act of 1964.

⁴³ LCCR Memo citing *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).

⁴⁴ Ellen Medlin citing *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975).

⁴⁵ 479 F.3d 232 (3rd Cir. 2007).

Title VII. He argued that SEPTA's policy adversely affected minority applicants; he lost on summary judgment.

SEPTA's policy required its drivers have:

No record of driving under the influence of alcohol or drugs and no record of any felony or misdemeanor conviction for any crime of moral turpitude or of violence against any person(s); and

No record of any conviction within the last seven years for any other felony or any other misdemeanor in any category referenced below, and not be on probation or parole for any such crime, no matter how long ago the conviction for such crime may be.⁴⁶

The court held, *inter alia*, that SEPTA's expert reports concluding (a) that individuals with violent convictions are more likely to commit violent acts than individuals who have never been convicted and (b) that mentally and physically disabled people are more likely to be victims of abuse sufficiently proved that its policy was justified by business necessity and that El had not offered an alternative policy that accomplished SEPTA's legitimate goal of public safety.⁴⁷

The decision briefly discusses the EEOC guidelines. Under the EEOC's current guidelines, employers may avoid Title VII liability only if they demonstrate a business necessity by showing that they considered the following three factors: (1) the nature and gravity of the offense;⁴⁸ (2) the time elapsed since the conviction or completion of the sentence; and (3) the nature of the job sought.

The court noted, "The EEOC's Guidelines...do not speak to whether an employer can take these factors into account when crafting a bright-line policy, nor do they speak to whether an employer justifiably can decide that certain offenses are serious enough to warrant a lifetime ban."⁴⁹ Further, the court determined that the guidelines were entitled to deference "in accordance with the thoroughness of its research and the persuasiveness of its reasoning." Yet here, the court found the EEOC guidelines lacking because they failed to "substantively analyze the statute," thus the court did not adopt the EEOC's three part test.⁵⁰

Instead, the court established a broader standard that requires an employer's policy to "accurately distinguish between applicants that pose an acceptable level of risk and those that do not."⁵¹ The court went on to say, "[w]e would expect that someone at SEPTA would be able to explain how it decided which crimes to place into each category, how the 7-year number was selected, and why SEPTA thought a lifetime ban was appropriate for a crime like simple assault."⁵² The court expressed skepticism that SEPTA derived its policy from rigorous analysis

⁴⁶ *Id.* at 237.

⁴⁷ *Id.* at 248-49.

⁴⁸ Guidelines originally appear at Equal Employment Opportunity Commission ("EEOC") Compliance Manual § 605 App.

⁴⁹ 479 F.3d at 243.

⁵⁰ *Id.* at 244.

⁵¹ *Id.* at 245.

⁵² *Id.* at 248.

and research, yet without any rebuttal evidence from *El*, the court had little choice but to uphold the trial court's ruling.⁵³

(4) **How Do We Limit the Discriminatory Impact of Employer Criminal History Checks and Maintain Safe Workplaces?**

Because no one argues that criminal history is *never* relevant, the goal is to limit the consideration of one's criminal history to circumstances where the history is truly job-related. A job involving a high degree of trust or involving sensitive circumstances may warrant consideration of an applicant's criminal history, but for jobs not of that sort, criminal records should be presumptively irrelevant. The dilemma highlighted in *El* is the dearth of solid research to frame our recommendations. We know millions of people are living with criminal records. What we do not seem to know is how to best utilize this information to ensure safety without compromising fairness.

Therefore, the EEOC can play an important role clarifying how employers may best use the information they have available to them. For example, the EEOC can offer guidance to employers (a) limiting disqualifying offenses that are not job-related; (b) imposing age limits on disqualifying offenses eliminating unwarranted lifetime disqualification; (c) waiving in current workers – allow for individual waivers from disqualifying offense for new hires, providing opportunity to document record of rehabilitation; and (d) imposing age limits on use of incomplete arrest records.⁵⁴ Doing so protects vulnerable minority populations from unreasonable discrimination and opens doors for those re-entering society without compromising public safety.

⁵³ *Id.* at 247.

⁵⁴ From NELP Report at 11.