STARNES DAVIS FLORIE LLP

LABOR & EMPLOYMENT BULLETIN

December 2013

# Use of Criminal Background Checks – Lessons Learned From Recent Developments

Last year we wrote about the Equal Employment Opportunity Commission's then-new Enforcement Guidance on the use of criminal background checks in hiring decisions. Since that time, federal courts and the EEOC have been doing battle over the proper standards an employer may apply when using an applicant's arrest and conviction records.

Following the issuance of its Guidance, the EEOC made extensive announcements regarding its filing of two high-profile lawsuits against Dollar General and BMW. However, these lawsuits were not the EEOC's first attempt to challenge an employer's criminal background check policy. In 2009, it sued Freeman Companies, a nationwide event planning company, alleging that the manner in which Freeman used background checks had a disparate impact on minorities. Recently, the judge in the *Freeman* case dealt a significant blow to the EEOC when he dismissed the lawsuit.

On August 9, 2013, after several years of litigation, the *Freeman* judge granted summary judgment for the employer and concluded that the EEOC did not show that the company discriminated against African American applicants or other protected individuals. The *Freeman* judge's ruling contained a stinging rebuke of the EEOC, stating that "the story of the present action has been that of a theory in search of facts to support it" and criticizing the EEOC's expert statistician, calling his report "an egregious example of scientific dishonesty."

Although the EEOC suffered a defeat in the *Freeman* case, there is no indication that it will ease its efforts to attack the use of criminal and credit checks in the hiring process. Therefore, employers should continue to review their background check policies and practices and consult with counsel to help navigate this potential legal minefield. The needs of each employer are different, and any background check policy should be tailored accordingly. The following portions of the Freeman policy were praised by the court, however, and thus may be instructive to other employers.

1) The Freeman application asked about guilty plea and conviction information, not about arrests.

2) Before conducting the background screening, Freeman offered the job to the applicant.

3) Freeman limited its review to convictions occurring in the past seven (7) years.

4) Freeman evaluated offenses in terms of job-relatedness.

5) Freeman rated various crimes. It considered the following to be most relevant: violent crimes, destruction of private property (employees handled Freeman's and vendors' property), sexual misconduct, felony drug convictions, and job-related misdemeanors.

6) Freeman restricted use of credit checks to positions responsible for handling consumer credit cards, money, and customer's property.

7) Upper Human Resource officials reviewed any recommendations not to hire an applicant based on the background check.

If you need to develop or revise your background check policy, please contact Starnes Davis Florie LLP for further information.

– Allison J. Adams

## The Status and Purpose of the ENDA Explained

On November 7, 2013, the United States Senate passed S. 815, the Employment Non-Discrimination Act of 2013 ("ENDA") by a bipartisan vote of 64 to 32. The ENDA would provide basic protections against workplace discrimination on the basis of sexual orientation or gender identity. The bill is closely modeled on other civil rights laws such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. The bill extends federal employment discrimination protections currently provided based on race, religion, gender, national origin, age, and disability to sexual orientation and gender identity. Specifically, the ENDA prohibits employers from using an individual's sexual orientation or gender identity as the basis for employment decisions, such as hiring, firing, promotions, or compensation. The bill exempts small businesses (less than 15 employees), religious organizations, and the military. Unlike Title VII, however, the ENDA does not permit disparate impact suits.

Currently, twenty-one states and the District of Columbia have laws in place that prohibit employment discrimination based on sexual orientation, and seventeen states and the District of Columbia also prohibit discrimination based on gender identity. A much larger group of private employers have already instituted internal policies prohibiting such discrimination. A group of 14 state attorneys general recently wrote to House Speaker John Boehner—who openly opposes the bill—urging him to bring the ENDA to the House Floor for a vote. Likewise, a group of bipartisan House members wrote a similar letter calling on the Speaker to bring the legislation to the floor before the close of the 113th Congress, which will conclude in 2014. Despite both President Obama's full support and opinion polls showing that a majority of Americans support the bill, it does not appear that the bill will make it to the House of Representatives' floor before the year's end.

Although the ENDA will not likely become law this year, employers should stay updated on its status next year, as its passage would place further restrictions on employers. As always, we will do our part in keeping you updated on any new developments on the ENDA.

– Breanna H. Young

---

## EEOC Complaint filed by new Father over Paternal Leave Policy

"Childcare provider," which would include biological fathers, is not a protected class under federal Equal Employment Opportunity laws. However, there are certain circumstances where discrimination against childcare providers could constitute unlawful disparate treatment. According to the EEOC's Enforcement Guidance regarding the unlawful disparate treatment of workers with caregiving responsibilities, the amount of time men devote to childcare has nearly tripled since 1965. http://www.eeoc.gov/policy/docs/caregiving.html. As a result, the potential exists for many men to complain about being "denied paternal leave or other benefits routinely afforded to their female counterparts," based on the stereotype that men are either poorly suited or not involved with childcare or caregiving.

For example, a CNN reporter living in the Atlanta, Georgia area recently filed an EEOC complaint alleging that Time Warner Inc.'s leave policy was biased against biological fathers. Time Warner's policy provided ten weeks of paid time to women who give birth and to women or men who have infants through adoption or surrogacy. Biological fathers were not afforded the same benefits. Instead, biological fathers were given only two weeks of paid paternal leave. While this claim is ongoing, it highlights a new potential area of exposure for employers and thus the importance of making sure employers' rules and policies regarding paternity leave comply with Title VII.

Title VII permits employers to provide leave to women for the period they are incapacitated due to pregnancy, childbirth, and/or related medical issues. However, the EEOC guidance provides that employers should distinguish between pregnancy-related leave and other forms of leave that are not tied directly to pregnancy, childbirth, or a related medical condition in order to "ensur[e] that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth."

– Alexandra S. Terry

---

# Supreme Court decisions on Title VII

During its most recent term, the United States Supreme Court decided two cases that will have a far-reaching impact on the future of Title VII claims. The holdings of both have given a more employer-friendly interpretation to certain aspects of Title VII.

The first, *Univ. of Texas Southwest Med. Ctr v. Nassar*, 133 S.Ct. 2517 (2013), involved Respondent Nassar, a physician of Middle Eastern descent, who filed suit against the Petitioner medical center alleging two discrete claims under Title VII. First, Nassar alleged that his supervisor's racially and religiously motivated harassment had resulted in his constructive discharge from the University, in violation of 42 U.S.C. §2000e–2(a), which prohibits an employer from discriminating against an employee "because of such individual's race, color, religion, sex, and national origin" (i.e. status-based discrimination). Second, he claimed that another of Respondent's employees prevented him from being hired at an affiliated hospital in retaliation for complaining about the harassment, in violation of §2000e–3(a), which prohibits employer retaliation because an employee has opposed an unlawful employment practice or made a Title VII charge. Nassar prevailed on both claims at trial. The Fifth Circuit vacated the constructive-discharge claim, but affirmed the retaliation claim, finding that retaliation claims brought under §2000e-3(a) - like §2000e-2(a) status-based claims - require only a showing that retaliation was a motivating factor for the adverse employment action, not its but-for cause, see §2000e–2(m).

The Supreme Court agreed to hear the case to determine whether retaliation claims are subject to the lessened " motivating factor" causation test that is applied to status-based discrimination claims under Title VII. After examining the text, structure, and history of Title VII, the Court concluded that the lessened causation standard stated in § 2000e-2(m) does not apply to claims of retaliation. Instead, a plaintiff is required to prove the traditional tort standard of causation—that the unlawful retaliation would not have occurred "in the absence of" (or "but-for") the alleged wrongful action or actions of the employer.

The Court found the "but-for" causation standard is of "central importance to the fair and responsible allocation of resources in the judicial and litigation systems." A stricter standard is important because retaliation claims filed with the EEOC have nearly doubled over the past 15 years (from approximately 16,000 in 1997 to over 31,000 in 2012), outstripping claims for every other type of status-based discrimination except race. The court noted lessening the causation standard could further contribute to the filing of "frivolous" claims by employees seeking to thwart a forthcoming employment action. Accordingly, the "but-for" causation standard is necessary to safeguard employers from financial and reputational harm by preserving the ability of the trial court to dismiss dubious claims at the summary judgment stage.

In the second case, *Vance v. Ball State*, 133 S.Ct. 2434 (2013), Petitioner Vance, an African-American woman, sued her employer, Ball State University ("BSU") alleging that a fellow employee, Saundra Davis, created a racially hostile work environment in violation of Title VII. The District Court granted summary judgment to BSU, holding that it was not vicariously liable for Davis' alleged actions because Davis, who could not take tangible employment actions against Vance, was not a supervisor. The Seventh Circuit affirmed.

The Supreme Court granted certiorari to answer the question of who qualifies as a "supervisor" in a case where an employee files a Title VII claim alleging workplace harassment? In attempting to set a workable, bright-line rule, the Court held an employee may only be considered a "supervisor" when he or she is "empowered by the employer to take tangible employment action," *i.e.*, "to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The Court reasoned this answer was implicit in the framework it previously adopted in *Faragher* and *Ellerth*, which draws a sharp line between co-workers and supervisors and implies that the authority to take tangible employment actions is the defining characteristic of a supervisor. This issue is critical in Title VII harassment cases because it determines an how an employer can defend an employee's harassment claim, and can potentially be outcome-determinative.

Under the Supreme Court's precedent in *Faragher* and *Ellerth*, if the alleged harasser is merely the plaintiff's co-worker, then the employer may only be held liable if it was negligent in controlling working conditions. If this is the case, then the plaintiff has the burden of proving that the employer knew or reasonably should have known about the harassment but failed to take reasonable measures to correct it. On the other hand, if the alleged harasser is a "supervisor" whose harassment culminates in a "tangible employment action," then the employer will be held strictly liable to the plaintiff. If the "supervisor's" harassment does not result in a tangible employment action, however, the employer may only avoid liability by establishing as an affirmative defense (1) that the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage or the employer's reasonable remedial measures (i.e., the "*Faragher-Ellerth*" defense).

Of course, every company's organizational structure is different, and only time will tell how clear the Court's distinction truly is. Moreover, employers should make sure their company has an anti-harassment policy in place that allows it to effectively monitor the workplace, receive any employees' complaints of harassment, and timely respond to them.

– Alfred H. Perkins, Jr. and Chris Vinson

## OFFICE LOCATIONS

**Birmingham**
Tele: (205) 868 ▪ 6000
100 Brookwood Place
7th Floor
Birmingham, AL 35209

**Mobile**
Tele: (251) 433 ▪ 6049
RSA-Battle House Tower
11 North Water Street
20th Floor
Mobile, AL 36602

starneslaw.com



This newsletter and past L&E newsletters can be found on the firm's Labor & Employment webpage.
Click here for a direct link.