

EEOC Loses a Fourth Circuit Case on Background Checks

Equal Employment Opportunity Commission v. Freeman, No. 13-2365, 2015 WL 728038 (4th Cir. Feb. 20, 2015) deals with the EEOC position on background checks. In this case, the Court of Appeals rejected the report of the EEOC's expert, Kevin Murphy, introduced to show disparate impact. Finding that without Murphy's report the EEOC had failed to make a prima facie case of discrimination, the Court of Appeals upheld the District Court's summary judgment for the defendant. With this decision the Fourth Circuit joins the Sixth Circuit, which in *EEOC v. Kaplan Higher Education Corp*, 748 F.3d 749 (6th Cir. 2014), also rejected the work of Dr. Murphy for similar reasons.

Some history is in order. The allegations against Freeman were that Freeman engaged in a pattern or practice of discrimination against African-American job applicants by using credit history and against African-American, Hispanic, and male job applications by using criminal background checks, alleging that both have a significant disparate impact. Freeman used credit checks for credit sensitive jobs and criminal background checks for all others. Typically background checks were run after the applicant was offered and accepted a position, but before he or she began work. Freeman only looked back seven years for possible convictions, ignored any arrests that did not result in a conviction or guilty plea, focused primarily on criminal conduct involving violence, destruction of private property, sexual misconduct, or felony drug convictions, and required a two-level review before a decision to disqualify was made. Although the District Court opinion by Judge Titus focused primarily on the failings of the expert report, the Judge expressed the opinion in a footnote that Freeman's policy seemed "reasonable and suitably tailored to its purpose of ensuring an honest workforce." *EEOC v. Freeman*, 961 F. Supp. 2d 783, 788 n. 3 (D. Md. 2013).

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