

**The Washington Report by Montserrat Miller
Partner, Arnall Golden Gregory, LLP**

Last month I wrote about the use of background checks in hiring, focusing quite a bit on the Equal Employment Opportunity Commission (EEOC). I would like to follow up with a recent federal case decided *against* the EEOC.

In EEOC v. Peplemark Inc. (W.D. Mich. March 31, 2011), the EEOC alleged in its Complaint that Peplemark had a blanket policy “which denied the hiring or employment of any person with a criminal record,” and that such a policy had a disparate impact on African-Americans. Clearly, a blanket “felon need not apply” policy could be deemed unlawful pursuant to Title VII of the Civil Rights Act. Problem is, the company did not have such a policy and the EEOC spent years and taxpayer dollars to investigate and litigate a case in which the judge chastised the EEOC for dragging out this case once they were aware, or should have been aware, that their assertion was not true. In fact, Peplemark did and had hired individuals with a criminal record.

The EEOC filed suit in 2008, with the commission’s unanimous approval to proceed with the case against Peplemark. In the end, after the EEOC could not present a statistical expert to lay out the disparate impact claim, the court ordered the EEOC to pay Peplemark a total of \$751,942.18 in attorneys’ fees, expert fees and other miscellaneous fees. It doesn’t take a rocket scientist to figure out that this undermines the EEOC’s credibility and, at least for the foreseeable future, disparate impact claims will be viewed by attorneys representing employers with suspicion.

Notwithstanding this case, the EEOC views this issue as an important one and they have held a series of hearings over the years on point, including examining the treatment of unemployed job seekers (Feb. 2011), employer use of credit history as a screening tool (Oct. 2010) and employment discrimination faced by individuals with arrest and conviction records (Nov. 2008). There is still talk about a future commission hearing on the use of criminal records in employment, but perhaps the Peplemark case will derail this hearing.

No doubt that the re-entry of ex-offenders is an important issue, particularly in light of current number of individuals in prison and those returning to prison. In a sobering [report](#) by The Pew Center on the States, *State of Recidivism: The Revolving Door of America’s Prisons*, the report found that more than four in ten offenders nationwide return to state prison within three years of their release despite a massive increase in state spending on prisons. States spend more than \$50 billion (that’s right, billion) a year on corrections, yet nearly half of offenders return to state prison. The report also found that if states could reduce their recidivism rates by just 10%, they could save more than \$635 million combined in one year in averted prison costs. This would be welcome relief for cash-strapped states.

In a recent 2011 report by the NAACP, entitled *Misplaced Priorities: Over Incarcerate, Under*

Educate one of the statistics provided is that the United States has the dubious honor of having the world's largest prison system and highest incarceration rate in the world. If you ask me, I'd rather be known internationally for other reasons, say, football and baseball, diversity, gorgeous national parks, freedom...anything other than having the world's largest prison system and highest incarceration rates. One of the recommendations provided in the [report](#) is support for the sealing of criminal records of certain offenders after they have not committed another crime within a certain number of years. The devil is in the details on this recommendation and the Fair Credit Reporting Act places no limitation on the use of convictions.

It seems a win-win if we support programs that assist in the re-entry of ex-offenders in terms of finding employment and housing, drug treatment and educational programs. And also focus on issues on the front end, such as the importance of education. Having said that, this must be tempered with balancing employers need to understand their workforce, protect their business and business interests, and protect their workforce and customers. Every person should be able to find employment, but not every person is right for every job. A criminal record is just one factor employers should be able to consider during the hiring process, where it is necessary to do so and there is a need.

That's all for this month. Tune in next month.

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