Recent EEOC Developments Involving Disqualification of Applicants Based on Criminal History

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INTRODUCTION

Over the past several years, we have witnessed increased attention by the EEOC and plaintiffs' counsel in challenging employer practices in which African American and/or Hispanic applicants are disqualified for employment based on the applicants' criminal history. This paper focuses on efforts by the EEOC in addressing this issue.

The EEOC's policy guidance on criminal records initially is addressed. The EEOC has taken the position that an employer's policy or practice of excluding individuals from employment based on an applicant's criminal history has an adverse impact on African American and Hispanic applicants, and any such policy is unlawful under Title VII unless it is job related and justified by business necessity. The paper traces the EEOC's current policy guidance on conviction records, as adopted in 1987, subsequent guidance issued by the EEOC involving criminal records, the EEOC's E-Race initiative that focuses in part on arrest and conviction records and recent EEOC hearings as the EEOC works toward developing updated guidance dealing with employer reliance on an applicant's criminal history in the pre-employment process.

The discussion next turns to recent EEOC pattern or practice investigations and lawsuits filed based on the potential exclusion of minority applicants from the hiring process. The EEOC's Seventh Circuit decision in *EEOC v. Watkins Motor Lines*, 553 F. 3d 593 (7th Cir. 2009) is first examined and illustrates the broad based investigations currently being conducted by the EEOC, which are being approved by the courts.

Two significant lawsuits initiated by the EEOC involving challenges to the use of criminal conviction records in the pre-employment process are next examined — *EEOC v. Peoplemark, Inc.*, filed in the U.S. District Court for Western District of Michigan, and *EEOC v. Freeman*, filed in the U.S. Federal District Court for the District of Maryland. The *Peoplemark* case provides a useful roadmap concerning the required proof and potential discovery in such actions. The *Freeman* case, which still is in its early stages, is examined based on the issue brought front and center in the case — the applicable statute of limitations applied to pattern and practice litigation initiated by the EEOC.

Hopefully, this paper will serve as a useful resource as employers continue to wrestle with this evolving area of the law.

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I. EEOC GUIDANCE AND RELATED INITIATIVES DEALING WITH CRIMINAL RECORDS

A. EEOC POLICY STATEMENT ON CONVICTION RECORDS (2/4/87)

1. The EEOC's current policy guidance was developed in 1987 during the tenure of EEOC Chair Clarence Thomas.
2. The guidance underscores the "Commission's underlying position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population." Thus, "such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity."
3. Assuming the conviction policy or practice involving the failure to hire or terminate a charging party has an **adverse impact** on the protected class to which the CP belongs, the employer must demonstrated "that it considered these three factors to determine whether its policy was justified by business necessity:"
   a. "The **nature and gravity** of the offense or offenses;"
   b. "The **time** that has passed since the conviction and/or completion of the sentence;" and
   c. "The **nature of the job** held or sought" based on a conviction policy or practice."
4. The first factor considers the circumstances involved, the first and third factors focus on "**job relatedness**" and the second factor focuses on the time frame involved.
5. The guidance underscores that the EEOC considers "bright line" rules to be unacceptable — "the absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII."
6. The guidance also refers to not impacting on disparate treatment claims involving individuals in a protected class.
7. The guidance refers to the Eighth Circuit decision, *Green v. Missouri Pacific Railroad Company*, 523 F. 2d 1290 (8th Cir. 1975) as the "leading Title VII case on the issue of conviction records" (fn. 6), which took exception with any blanket exclusions based on criminal convictions.

B. SUPPLEMENTAL POLICY STATEMENT ON USE OF STATISTICS

1. The EEOC issued an additional policy statement on July 29, 1987, referred to as its "Policy Statement on the use of statistics in charges involving the exclusion of individuals with conviction records from employment." This supplemental policy statement reiterated its reliance on *Green v. Missouri Pacific Railroad Co.*, supra, and its position that "an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population." However, the policy statement carved out an exception to its general rule, concluding that a "no cause" determination would be "appropriate" in circumstances where: (1) "the employer can present more narrowly drawn statistics showing either that Blacks and Hispanics are not convicted at a disproportionately greater rate;" or (2) "there is no adverse impact in its own hiring process resulting from the convictions policy."
2. The policy statement used the example of "narrow local, regional, or applicant flow data, showing that the policy probably will not have an adverse impact on its applicant pool and/or in fact does not have an adverse impact on the pool." Other illustrations were used to underscore that a more fact-specific analysis may support a "no cause" determination, which may include barring employment for certain crimes by presenting "national, regional, or local data on conviction rates for the particular crime" that show no adverse impact.

C. EEOC GUIDANCE DEALING WITH ARREST RECORDS (9/7/90)

1. The next Chair, Evan Kemp, continued to address the issue, and in 1990 the EEOC issued guidance which refers to reliance on arrest records in the pre-employment process as having a disparate impact on Blacks and Hispanics.
2. "Since using arrests as a disqualifying criteria can only be justified where it appears that the applicant actually engaged in the conduct for which he/she was arrested and that conduct is job related, the Commission further concludes that an employer will seldom be able to justify making broad general inquiries about an employee's or applicant's arrests."
3. The guidance includes a detailed legal discussion involving: (a) adverse impact of the use of arrest records (*i.e.* statistics may be used to establish a *prima facie* case based on showing that Blacks are arrested more often than Whites, but similar to convictions, an employer may rebut a discrimination claim by presenting statistics that are "more current, accurate and/or specific to its region or applicant pool"); and (b) business justification (*i.e.* an employer may attempt to show not only that the arrest charges are related to the position sought, but also the likelihood that the applicant actually committed the offense). The guidance cautions that business justification rarely can be demonstrated for blanket exclusions on the basis of arrest records.

4. The guidance explains that an employer must focus on the conduct, not the arrest or conviction per se in relation to the job sought, to demonstrate unfitness for the job, and relies on *Green v. Missouri Pacific Railroad Co.*, 549 F.2d 1158, 1160 (8th Cir. 1077) and reiterated in the February 4, 1987 policy guidance on convictions. The EEOC again underscores that an employer must focus on three factors:

   a. "The nature and gravity of the offense or offenses;"

   b. "The time that has passed since the conviction (or in this case, arrest) … ;" and

   c. "The nature of the job held or sought."

   The guidance provides citations to specific cases that support job-relatedness findings.

5. The guidance points out that the cited cases, which support disqualification for employment, illustrate job relatedness in dealing with convictions, but includes the caveat that with arrests, there is a second-prong that must be met, which is "a showing that the alleged conduct was actually committed." Specific examples are provided to illustrate the process by which arrest record charges should be considered.

D. EEOC COMPLIANCE MANUAL CHAPTER ADDRESSING RACE AND COLOR DISCRIMINATION INCORPORATING POSITION ON ARREST AND CONVICTION RECORDS (4/19/06)

1. The EEOC's Compliance Manual was updated in 2006 in addressing "Race and Color Discrimination" during the tenure of EEOC Chair Cari Dominguez.

2. In Section VI.B.2, which discusses "Hiring and Promotion," the Compliance Manual expressly addresses conviction and arrest records and provides in pertinent part:

   > Of course, it is unlawful to disqualify a person of one race for having a conviction or arrest record while not disqualifying a person of another race with a similar record. For example, an employer cannot reject Black applicants who have conviction records when it does not reject similarly situated While applicants.
   >
   > In addition to avoiding disparate treatment in rejecting persons based on conviction or arrest records, upon a showing of disparate impact, employers also must be able to justify such criteria as job related and consistent with business necessity. This means that, with respect to conviction records, the employer must show that it considered the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. A blanket exclusion of persons convicted of any crime thus would not be job-related and consistent with business necessity. Instead, the above factors must be applied to each circumstance. Generally, **employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.**
   >
   > Arrest records are treated slightly differently. While a conviction record constitutes reliable evidence that a person engaged in the conduct alleged (*i.e.* convictions require proof "beyond a reasonable doubt"), an arrest without a conviction does not establish that a person actually engaged in misconduct. Thus, when a policy or practice of rejecting applicants based on arrest records has a disparate impact on a protected class, the arrest records must not only be related to the job at issue, but the employer must also evaluate whether the applicant or employee actually engaged in the misconduct. It can do this by giving the person the opportunity to explain and by making follow up inquiries necessary to evaluate his/her credibility.
   >
   > Other employment policies that relate to off-the-job employee conduct also are subject to challenge under the disparate impact approach, such as policies related to employees' credit history. People of color have also challenged, under the disparate impact theory, employer policies of discharging persons whose wages have been garnished to satisfy creditors' judgments.

3. The discussion of arrest and conviction records includes detailed footnotes (fn's 90-102). Particularly noteworthy is citation to a 2003 study referring to disparate treatment of Blacks versus Whites in call back rates in dealing with those having criminal records and those without. (fn 96). In addressing adverse impact, the Compliance Manual cites with approval two cases: *Green v. Missouri Pacific Railroad Co.*, 523 F. 2d 1290, 1293-99 (8th Cir. 1975) (applying disparate impact principles to employer's 'no convictions' hiring policy); and *Caston v. Methodist Medical Center of Ill.*, 215 F. Supp. 2d 1002, 1008 (C.D. Ill. 2002)(race based disparate impact claim challenging employer's policy of not hiring former felons was cognizable under Title VII and thus survived motion to dismiss).

E. INCLUSION OF ARREST AND CONVICTION ISSUES IN E-RACE INITIATIVE (2/28/2007)

1. On February 28, 2007, during Naomi Earp's tenure as Chair of the EEOC, the E-Race (*i.e.* Eradicating Racism and Colorism from Employment) initiative was launched by the EEOC.

Recognizing that race discrimination charges historically have been the most frequent type of charge filed with the EEOC, this initiative has involved a full-scale effort to address race discrimination issues in the workplace.

2. One of the goals of the E-Race initiative, referred to as a five-year plan (FY 2008-2013), is "Developing Strategies, Legal Theories, and Training Modules to Address Emerging Issues of Discrimination," which includes the following:

> **Develop Strategies for Addressing 21st Century Manifestations of Discrimination** — OFP (*i.e.* Office of Field Programs) and OGC (*i.e.* Office of General Counsel) will **develop and implement investigative and litigation strategies to address selection criteria and methods that may foster discrimination based on race and other prohibited bases, such as** credit and background checks, **arrest and conviction records**, employment tests, subjective decision making, and exclusions based on names, zip codes or geographic areas and other factors. Additionally, OGC is responsible for prosecuting cases raising race and color issues and will continue to examine its docket to assess whether the number of cases filed in each office's region is reasonable when compared to the number of meritorious race and color charges (that have failed conciliation) in those regions. Finally, EEOC will continue to work with small and mid-sized companies to better educate them about anti-discrimination laws and the types of discrimination that may occur at smaller companies.

F. RECENT DEVELOPMENTS AT EEOC — RECENT COMMISSION HEARINGS INVOLVING RELIANCE ON CRIMINAL RECORDS IN THE PRE-EMPLOYMENT PROCESS

1. The EEOC has revisited the issue of criminal records over the past couple of years at two public meetings conducted by the EEOC: (1) the first was held on May 17, 2007 and focused on employment testing and screening; and (2) the second was held on November 20, 2008 and was devoted to arrest and conviction records. The critical session was the November 2008 session, and for that reason, the details are discussed below in greater detail.

2. On November 20, 2008, the EEOC held a meeting led by the Chair (Naomi Earp), attended by other sitting EEOC Commissioners (Ishimaru, Griffin and Barker), which focused on "Employment Discrimination Faced by Individuals with Arrest and Conviction Records." (Numerous portions of the proceeding were transcribed and are available on the EEOC's website.) The session was described as being held to focus on arrest and conviction records as part of the E-Race initiative and work toward developing updated guidance on the issue. Chair Earp explained:

> Two years ago, Commissioner Ishimaru worked with me to roll out the E-RACE Initiative, Eradicating Racism and Colorism from Employment. E-RACE is basically a 21st Century framework for looking at some old and persistent problems of race and color. We wanted to especially look at those things that may constitute proxies for race, color or ethnicity. Today's Commission meeting on employment discrimination against individuals with arrest and conviction records is an issue that has long been with us but which in recent years has re-emerged as an important civil rights issue.
>
> Of course, the concern about arrest and convictions is also a business issue, a security issue, a safety issue and a tort liability issue. This is also an area where facts and reason can easily be overwhelmed by fears, stereotypes, and myths. So the need to balance so many competing interests including whether or not criminal records are a proxy for race discrimination means that we all have our work cut out for us.
>
> With the help of EEOC's Office of Legal Counsel, Reed Russell and the very, very thoughtful OLC Staff, we have been actively reviewing our existing enforcement guidance on arrest and conviction records. We are working desperately and trying hard to think through these issues in order to provide updated guidance. We need to get guidance to the staff as well as to our stakeholders.

3. Chair Earp referred to the Second Chance Act, signed by President Bush, which gives offenders greater opportunities to be integrated back into the working world and explained the efforts made to date and current actions of the EEOC, which included recent litigation initiated by the EEOC to challenge certain employer actions barring applicants with criminal records from employment:

> And as we'll hear during the course of the day, many, many people have interaction with the criminal justice system and that number is growing and it's grown in recent years by substantial numbers. And the question for all of us is, how do we deal with that issue and its aftermath? And this is not an issue that comes on one side of the political aisle or the other. These are difficult questions of how do you get people back into society when they've been excluded from it for a variety of reasons.
>
> And you know, I wanted to note the bipartisan nature of this issue and I know that this year President Bush signed into law the Second Chance Act, that he supported and the Second Chance Act will assist prisoners' transition back into society in hopes of reducing recidivism. It authorizes funding

for states and non-profit organizations to provide job training and placement services, housing, substance abuse treatment, mental health assistance, and other services to help ex-offenders re-enter our communities.

And in signing the Second Chance Act, President Bush stated, "This country was built on the belief that each human being has limitless potential and worth. Everybody matters. We believe that even those who have struggled with a dark past can find brighter days ahead. One way we can act on that belief is by helping former prisoners who have paid for their crimes. We help them build new lives as productive members of our society."

I fully agree with the words of the President. It's something that our country should do and should be proud of doing. And studies have shown that having a job helps keep people from becoming recidivist. As President Bush said, "A high recidivism rate places a huge financial burden on taxpayers. It deprives our labor force of productive workers and it deprives families of their daughters and sons, husbands and wives and moms and dads."

Fears, myths and such stereotypes and biases against those with criminal records continue to be part of the -- part of a decision making for many employers. Business and industry suffers as a result because it is not able to benefit fully from the skills of every potential worker. For our economy to be successful, we cannot afford to waste any available talent. And the EEOC has a long role in addressing this issue. One of the reasons why we're here is that as we'll hear during the course of the day, the Courts have questioned some of our guidance that was issued many years ago. [*i.e.* the 3rd Circuit raised concerns raised in *El v. Southeastern Pennsylvania Transit Authority (SEPTA)*, 479 F. 3d 232 (3rd Cir. 2007), which declined to defer to the EEOC's current guidance]

The first came during the tenure of Chairman Thomas. I don't know if you were here at the time when this was issued but there was 1987 guidance under Chairman Thomas during the Reagan Administration and there was other guidance issued in 1990 under Chairman Kemp, during the George H.W. Bush Administration. But, you know, much has changed. Some of that guidance has been out of date and this discrimination continues to arise in our work at the EEOC even today.

Just this past September, the Commission unanimously approved the filing of a case in the Western District of Michigan against Peoplemark, alleging that a class of African Americans were discriminated against due to its policy that denies the hiring or employment of any person with a criminal record.

4. The Commission meeting had four panels present the following topics: (a) Barriers Presented by People With Criminal Convictions: (b) Stakeholder Perspectives and Litigation Issues: (c) New Research Developments; and (d) Employer Practices.
    a. The first panel included Dr. Devah Pager, Professor of Sociology from Princeton University, who discussed her research which compared success rates of job applicants with and without criminal records, and Ms. Diane Williams, CEO and President of the Safer Foundation, an organization that works to help formerly incarcerated individuals find jobs.
    b. The second panel included advocates from the employer and employee perspective.
    c. The third panel involved a presentation by Shawn Bushway from the University of Maryland and the Consortium on Violence Research.
    d. The final panel discussed recommended approaches to any changes in the EEOC's current guidance and included presentations by Rae Vann, lead counsel for the employer group, Equal Employment Advisory Council (EEAC), and Laura Moskovitz, Staff Attorney with the National Employment Law Project, which is responsible for the Second Chance Labor Project that describes its objective as working to reduce unfair barriers to employment for people with criminal records.
5. While it is difficult to predict whether the input provided from this proceeding will be considered in any updated guidance issued by the current Commission (which includes only two of the Commissioners who participated in the 2008 hearing — Ishimaru and Barker — and the recently seated Chair and two new Commissioners), the following are noteworthy issues addressed at the proceeding:
    a. Diane Williams from the Safer Foundation and other employee advocate representatives recommended that the EEOC adopt a "ban the box" approach in which criminal conviction questions are not permitted until the post-offer stage (which have been adopted for public sector employees in various cities). One proponent of this approach suggested that it would be analogous to the manner of approaching medical inquiries under the ADA. They also recommended prohibiting employers from using information about arrests that did not lead to conviction (as prohibited based on various state FEP laws).

b. Various employer representatives discussed the importance of distinguishing between arrest and conviction records in dealing with the issues involved, explaining that most employers did not consider arrest records in the pre-employment process. Another concern brought to the EEOC's attention was that many large employers in heavily regulated industries are required by federal law to inquire into a job applicant's criminal background. Rae Vann from EEAC explained:

> For instance, Section 19 of the Federal Deposit Insurance Act bars financial institutions from hiring anyone who has been convicted of any criminal offense involving dishonesty, breach of trust or money laundering unless and until they are able to obtain a written consent letter from the FDIC essentially.
>
> Insurance companies are subject to similar rules. They are prohibited from willfully permitting any person who has been convicted of insurance fraud or similar crimes involving dishonesty, to participate in the business unless, as is the case with banks, they receive a written consent from the regulatory body, the applicable regulatory body. It's a little more difficult or sticky for insurance companies because the term "participate in the business", has been interpreted quite broadly and basically can be read to apply to anyone who works for an insurance company. So that imposes -- and I should say there are pretty hefty fines associated with violating some of these laws, including one particular provision that imposes a million dollar per day fine potentially. So employers who are subject to these legal requirements try to be very careful in who they consider for employment because failure to conduct the right investigations or inquiries could lead to significant legal penalties under these rules.

c. Employer representatives also pointed to the potential bar to employment based on legitimate job considerations even in the absence of legislation precluding an applicant's employment. Vann further commented:

> …outside of these over-arching legal requirements that some employers are obligated to operate under, what might motivate employers who are not required by some law to perform criminal background investigations, and I think we've touched upon those issues throughout the course of the morning. For one thing, depending on the requirements of a particular job, certain criminal conviction information may be very relevant in assessing the individual's ability to perform the job in a safe and acceptable manner. For instance, but again, it's a case by case assessment. A company that employs drivers to transport merchandise from Point A to Point B may legitimately disqualify someone who has a history of criminally reckless driving or of driving under the influence of alcohol or controlled substances. At the same time, that criminal record may very well be irrelevant to that applicant's consideration for another job that doesn't involve driving specifically.

d. In terms of specific recommendations, employer representative Vann suggested as follows:

> Again, as I said, EEAC recognizes the importance of insuring that criminal conviction records do not inappropriately and arbitrarily exclude qualified candidates from consideration for employment and obviously, we recognize that there is proven disparate impact against certain protected groups, people of color, in particular.
>
> However, as we've discussed, many employers, especially federal government contractors and those in heavily regulated industries such as insurance, healthcare and financial services, now are required to perform detailed criminal background investigations and to automatically disqualify certain applicants based on certain criminal offenses — convictions, I should say. **So we would strongly encourage the Commission, if it decides to update its current enforcement guidance, to make clear that an employer's reliance on those laws is sufficient to demonstrate business necessity in cases where adverse impact is shown.**
>
> **Furthermore, we would ask the Commission to emphasize the categorical bars on the employment of persons who have been convicted of serious violent crimes will not violate Title VII as long as the prohibition is demonstrated by the employer to be job related and consistent with business necessity, which I think is consistent with what you've heard from others.**

6. It should be noted that an earlier public meeting held by the EEOC on May 16, 2007 focused on employment testing and screening, and touched briefly on pre-employment inquiries relating to an applicant's criminal history. The meeting primarily discussed other topics, such as credit inquiries, but individuals such as Rae Vann from EEAC and plaintiff's attorney Adam Klein from the law firm of Outten and Golden in New York City, commented on criminal history records. Klein presented written testimony as an employee advocate, which submitted in pertinent part:

> …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. Doing so protects vulnerable minority populations from unreasonable discrimination and opens doors for those re-entering society without compromising public safety.

II. RECENT EEOC LITIGATION INVOLVING CRIMINAL RECORDS

A. REVIEW OF RECENT EEOC INVESTIGATIONS AND LITIGATION

1. There has been a flurry of EEOC activity over the past couple of years in which the EEOC has been investigating employer policies and/or practices in which minority applicants have been disqualified from employment based on criminal conviction records.

2. Two significant lawsuits have been initiated by the EEOC involving the failure to hire based on an applicant's criminal history, and it is anticipated that other EEOC lawsuits will soon follow, if not already filed as of the date of the Class Action Summit.

a. On September 28, 2008, in *EEOC v. Peoplemark, Inc.*, Case No. 1:08-cv-907, the EEOC sued Peoplemark, Inc, in the United States District Court for the Western District of Michigan. The EEOC charged that Peoplemark's purported policy prohibiting the hiring of any person with a criminal record violated Title VII because it had a disparate impact on African American applicants. Based on certain procedural failures by the EEOC (*i.e.* the failure to timely identify an expert) and most likely other concerns, the EEOC joined in a motion to dismiss the case after 1½ years of litigation. Notwithstanding, the *Peoplemark* case provides an excellent roadmap concerning the proof required and potential discovery in such actions.

b. The more recent case of *EEOC v. Freeman*, Case No. 8:09-cv-02573, filed in the United States District Court for the District of Maryland (Southern Division) on September 30, 2009, which remains pending, provides a glimpse of one of the key issues now being debated in the courts in litigation initiated by the EEOC — the applicable statute of limitations dealing with pattern or practice litigation by the EEOC.

3. A third case, which remains at the investigation stage, involving Watkins Motor Lines, Inc. is significant because it sheds light on the potential broad scope of EEOC investigations in dealing with criminal conviction records and other potential pattern or practice investigation by the EEOC. *See EEOC v. Watkins Motor Lines, Inc.*, 553 F. 3d 593 (7th Cir. 2009).

4. Various employers are in the midst of dealing with EEOC investigations involving discrimination charges filed by applicants disqualified for employment based on their criminal records. Additional activity is anticipated involving both potential subpoena actions and litigation because the EEOC is expected to continue to bring this issue front and center in the courts.

B. SCOPE OF EEOC INVESTIGATIVE AUTHORITY — *EEOC v. WATKINS MOTOR LINES, INC.*

1. The EEOC's investigation involving Watkins Motor Lines is important in illustrating the EEOC's view that it is entitled to conduct broad based investigations involving employer use of conviction records in the pre-employment process.

a. The Charging Party (CP) filed an individual discrimination charge in September, 2004, after being denied employment in August, 2004, based on his criminal record — he had pleaded guilty to criminal assault 10 years earlier in 1994. The conviction was based on a charge of aggravated criminal sexual abuse against his wife resulting from a September 1993 domestic dispute.

b. Rejection of the applicant stemmed from the Company policy of refusing to hire individuals convicted of violent crimes, which was adopted after three incidents of worker-on-worker violence at its facilities (*i.e.* although the incidents had not occurred at the location where the CP had applied for employment). The rejection admittedly was based on this Company policy.

c. In February 2005, during the EEOC's investigation, Watkins proposed a settlement in which it would make certain changes to its policy; the EEOC rejected the offer and on April 8, 2005, issued a subpoena for records.

d. In the interim, Watkins settled with the CP, who requested withdrawal of his charge in January 2006. EEOC regulations provide that "a charge filed by or on behalf of a person claiming to be aggrieved may be withdrawn only by the person claiming to be aggrieved and only with the consent of the Commission… where the withdrawal of the charge will not defeat the purposes of Title VII." 29 CFR §1601.

e. Despite the agreed upon settlement with the CP, the EEOC refused its consent for withdrawal of the charge.

2. A subpoena enforcement action was filed after Watkins refused to comply with a subpoena served on Watkins based on the CP's desire to withdraw his charge.

a. Watkins refused to comply with the request for information/documents (*i.e.* various applications and other documents) based on the view that the EEOC improperly refused to approve withdrawal of the charge, arguing that existence of a valid charge was a prerequisite to a subpoena enforcement action.

b. The employer also argued that the subpoena was improper because it had ceased operations as of the date of the subpoena, having closed the warehouse and sold its assets to a different entity.

c. Further, the charge was individual-based involving the refusal to hire Watkins.

d. As part of the earlier settlement negotiations with the EEOC, the employer had agreed to modify its policy so that it conformed with the EEOC guidance on criminal records and further agreed to provide quarterly reports to the EEOC for a year regarding applicants, identifying those with criminal records, and disposition of the application.

e. After the EEOC issued the subpoena, the employer filed a petition to revoke, which the EEOC granted and denied in part 18 months later (without any explanation for the delay).

f. In the interim, the Company sold its assets and went out of business, although it continued to exist as a Florida corporation (without any active employees)

g. During the course of the subpoena enforcement action, it also was disclosed that following the CP's conviction involving the assault on his wife, the couple reconciled, had two more children, and the CP led a stable personal life, including nearly 15 years working for the same employer.

h. In considering all of the various arguments, the District Court concluded that the settlement negotiations with the CP furthered rather than defeated Title VII's purposes and that the EEOC abused its discretion based on its refusal to permit withdrawal of the charge.

i. In refusing to enforce the subpoena, the District Court further held that a valid charge of discrimination is a jurisdictional prerequisite to judicial enforcement of a subpoena.

3. The Seventh Circuit reversed the District Court and enforced the subpoena.

a. The Appeals Court underscored that withdrawal only could occur with the EEOC's approval, and "**(t)he agency does not commit a legal error, or act arbitrarily, by concluding that it will 'defeat the purposes of title VII' for the settlement of a single applicant's claim to wipe out a pattern-or-practice investigation. The agency is entitled to vindicate the interests of all employees and applicants.**"

b. "The Commission's decision not to allow a private charge to be withdrawn is 'as if' a Commissioner had filed a charge… Treating a no-withdrawal decision as if it were a Commissioner's charge is especially appropriate when it would be too late for a Commissioner to make a formal charge."

c. "Although we (like the district judge) question whether the EEOC is acting prudently by devoting time of both its staff and Watkins to short-lived practices by an entity that is not longer an operating company, and whose rule may well be amply supported by 'business necessity' given its history of workplace violence, the Executive Branch rather than the Judicial Branch is entitled to decide where investigative resources should be devoted."'

4. *Also see EEOC v. Caterpillar, Inc.*, 409 F. 3d 831 (7th Cir. 2005) (Seventh Circuit held that "… a suit by the EEOC is not confined 'to claims typified by those of the charging party," thus permitting EEOC to initiate pattern or practice lawsuit, despite the fact that the lawsuit stemmed from an individual-based charge).

5. A sampling of recent decisions shows the EEOC generally has been successful in arguing that it is entitled to pursue broad based investigations, as shown by the following:

a. *EEOC v. United Parcel Service*, 587 F. 3d 136 (2nd Cir.) (upheld subpoena seeking nationwide information relating to a company policy based on an individual charge);

b. *EEOC v. Federal Express Corp.*, 543 F. 3d 531 (9th Cir.), *cert. denied*, 2009 U.S. Lexis 8012 (Nov. 9, 2009) (subpoena enforced involving pattern or practice investigation even after CP requested right to sue notice and joined private class action); and

c. *EEOC v. Kronos, Inc.*, 2009 U.S. Dist. LEXIS 45449 (W.D. Pa.) *rev'd in part*, 2010 U.S. App. LEXIS 18694 (3d Cir. Pa. Sept. 7, 2010) (district court enforced third party subpoena in ADA charge requesting nationwide race and disability-related records from vendor involved in testing relating to applicants, but limited scope, time period and positions involved; Third Circuit reversed, in part, enforcing nationwide subpoena for disability-related records for all positions for expanded time period, but denied enforcement of subpoena for requested records relating to investigation of potential race discrimination).

C. *EEOC v. PEOPLEMARK, INC.* — A ROADMAP CONCERNING ISSUES OF PROOF AND DISCOVERY IN EEOC LITIGATION FOCUSING ON CRIMINAL CONVICTION RECORDS

1. One of the leading EEOC pattern or practice lawsuits filed to date involving criminal conviction records involves a temporary staffing company, Peoplemark, Inc. On September 29, 2008, the EEOC filed a Complaint in the Western District of Michigan against Peoplemark alleging that the company had a blanket policy of not hiring convicted felons at all its facilities, which adversely impacted African Americans in violation of Title VII. *EEOC v. Peoplemark, Inc.*, 1:08-cv-00907 (W.D. Mich., S. Div). (Docket #1)

a. The lawsuit stemmed from an individual charge of discrimination filed on November 13, 2005, by CP Sherri Scott, who had applied for a job at Peoplemark's Grand Rapids, Michigan office. (*See* Docket #122-2). Notwithstanding, the lawsuit was brought as a class action on behalf of the charging party and "similarly situated African Americans" who were adversely affected by the company's practices.

b. Although the EEOC ultimately elected to dismiss the case, there was extensive discovery and related discovery battles between the parties during the course of the litigation. The EEOC's agreement to dismiss the case stemmed, in principal part, from certain procedural errors by the EEOC in failing to timely produce a statistical report from one of its experts, which was critical in proving the case.

c. Despite the EEOC's procedural and/or tactical errors in the Peoplemark case, this case provides an extremely useful roadmap concerning the issues of proof required and discovery faced by employers in such litigation.

(i) The case is best summarized in the company's memorandum in support of its motion for fees, costs and sanctions. (Docket #122-2).

(ii) The matter remains open based on a pending motion for attorneys' fees and costs filed by Peoplemark, which currently is under review by the Court.

d. Discussed below is a brief summary of procedural developments in the case, followed by a review of requested discovery by the parties, which is useful in illustrating anticipated EEOC discovery and potential employer discovery in this type of litigation.

2. In response to the Complaint, the defendant timely submitted its Answer on November 13, 2008. Aside from a general denials, it is noteworthy that the company asserted in its Answer that the "action is barred by the offsetting and overriding legitimate business considerations of Defendant with regard to potential third party liability incurred by Defendant absent the enforceability of its current policies." (Perhaps this defense stemmed from the potential assertion that absent such a policy, the employer could have faced potential negligence claims in the event that it hired a person with a criminal background involving crimes of violence who subsequently injured co-workers.)

3. The Case Management Plan (which later became critical to the Company's successful defense and ultimate dismissal of the case), as filed on January 9, 2009, initially set a deadline of June 30, 2009 for the EEOC and August 31, 2009 for Peoplemark to designate their respective experts. The EEOC's expert reports initially were due on August 31, 2009, and Peoplemark's expert reports were due by October 30, 2009. The discovery cut off was set for December 30, 2009. (Docket #14). As discussed below, the EEOC sought various extensions relating to required disclosures and submissions involving its experts.

4. The EEOC lost an initial dispute with the employer following a motion to compel a response to the employer's first set of interrogatories, which requested disclosure of the names and addresses of each individual allegedly discriminated against based on the company's policy.

a. The EEOC's initial disclosures initially only identified the plaintiff.

b. Thereafter, in response to the company's interrogatories, the EEOC again only identified the plaintiff and submitted that it was premature to identify others.

c. A motion to compel was filed on March 20, 2009. Therein, the employer asserted that it had the right to a full and complete response based on the need to defend against a purported class claim.

(i) The Company argued that during the investigation stage the EEOC received thousands of pages of documents, providing the identity of applicants who sought work with Peoplemark who were either hired or rejected. The Company had produced information dating back to 2004 covering applicants at locations in Grand Rapids, Michigan; Owensboro, Kentucky; Memphis, Tennessee; Orlando, Florida; and Maitland, Florida.

(ii) The company asserted it had the right to discover whether it was defending against a single claim or class action suit brought on behalf of so-called "similarly situated African Americans," as alleged in the EEOC's Determination and Complaint.

(iii) The company further submitted that the failure to respond prejudiced the Company because it had to disclose its experts and it would not be in a position to know, for example, whether it needed a statistician to refute a purported class of African Americans that had been adversely impacted by the company's purported practice of excluding African Americans. Further, the expert would need to know whether the purported class members resided in all five cities in issue, in which years applicants were rejected for hire, the geographical area involved for the applicants and whether the criminal conviction status was the sole reason for rejection for hire.

d. On April 21, 2009, the Court ordered the EEOC to fully answer the interrogatory and permitted the Company to seek attorneys fees based on the EEOC's failure to fully respond to such discovery. (Docket #33).

5. The EEOC subsequently amended its response and identified 258 alleged "victims," identifying them by name and address, which the company later argued further weakened the EEOC's position based on the information Peoplemark confirmed through the discovery process.

a. The company reviewed the list and subsequently determined that various individuals identified were not reported to have any felony convictions and that others with felony convictions actually had been hired by the company.

b. Depositions subsequently taken by the company also confirmed that the Peoplemark had in fact hired certain African American who had felony convictions.

6. Various disputes next arose involving expert discovery. This stemmed from delays by the EEOC regarding production of an expert's report from their statistical expert.

a. The EEOC had identified two experts: (1) Janice Madden, Ph.D., a labor economist to testify on statistical evidence for adverse impact; and (2) Devah Pager, Ph.D, to testify regarding why felony convictions affect Blacks more than Whites in obtaining employment, among other things. (Note: Devah Pager is the same individual who testified concerning these issues in the EEOC public meeting on arrest and conviction records on November 20, 2008).

b. On July 31, 2009, the EEOC moved for a further extension based on expert-related issues. (Note: The EEOC's statistical expert, Janice Madden, was not even formally hired until August 6, 2009.)

c. On September 24, 2009, shortly before the expert report deadline of September 30, 2009, the EEOC filed another motion for an extension to complete the expert reports particularly relating to the statistical expert (*i.e.* Janice Madden), which was granted in part, although the Court raised various questions at this juncture, including inquiring about the EEOC's planned objective in potential reliance on use of the expert.

d. The EEOC was granted a third extension to December 31, 2009 as the deadline for Dr. Madden's expert statistical analysis to be filed. (Docket ## 101, 108). Notwithstanding, the EEOC failed to meet the Court's third extension and did not submit the expert report as of the filing deadline. Thus, only the EEOC's expert report prepared by Dr. Pager was produced during the discovery process.

7. On February 25, 2010, Peoplemark filed a motion for summary judgment on various grounds:

a. The employer asserted that the EEOC could not establish a prima facie case of disparate impact race discrimination, citing applicable case law that "there must be a causal link between the disparate impact and the challenged employment practice" (*Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 655-658 (1989). The employer also argued that "(s)tatistical evidence is used to show the causal link," and "expert testimony is essential to the demonstration of a disparate impact discrimination case" [citing *EEOC v. Gen. Dynamics Corp.*, 999 F.3d 113, 117 (5th Cir. 1993), which held that the district court's exclusion of expert testimony 'was tantamount to dismissal of the EEOC's disparate impact claim"].

b. The employer further asserted that the EEOC had not identified a specific employment policy or practice, noting that the EEOC had shifted its theory from its initial claim that the employer had a policy of not hiring any individuals if they have a felony conviction to a position that Peoplemark may use felony conviction records in different manners at different locations to exclude African Americans from hire in a disproportionate rate compared to White individuals.

c. The company also provided support from their own expert, Malcolm S. Cohen, Ph. D, affiliated with Employment Research Association, who found that Peoplemark data verified that there was evidence in every Peoplemark office that it hired "ex-offenders." Deposition testimony further supported this conclusion.

(i) Dr. Cohen's report referred to the absence of any evidence to suggest that the employer treated African Americans with a criminal record differently than Whites with a criminal record, or any differently without a criminal record.

(ii) Dr. Cohen also referred to the unique issue involving Peoplemark, a temporary staffing agency, which must consider its clients' hiring needs. Certain employers, such as a school, may not be able to accept ex-offenders by law. Others may restrict hiring of such personnel for security-related reasons. Thus, "Peoplemark … merely accepts client orders as to what qualifications its [sic] wishes in its employees." Thus, "(b)ecause Peoplemark's clients, coupled with very real legal concerns, dictate the type of workers Peoplemark ultimately ends up placing, the EEOC cannot point to a specific policy or practice –neutral on its face- that has a disparate impact on African Americans with felony convictions."

d. Peoplemark further argued that the EEOC itself had acknowledged that without being able to present relevant statistical proof in the case, its case was "doomed."

e. The employer also presented statistical evidence that there was no adverse impact against African Americans and challenged the one expert report produced by the EEOC, the report from Dr. Pager, whose findings purportedly were based on general and vague statements about the population at large and did not provide evidence that Peoplemark's hiring policies have a disparate impact on African Americans.

f. Finally, to the extent that any disparate impact could be "flushed out of Dr. Pager's report," Peoplemark asserted that even Dr. Pager conceded that the company had valid business reasons for considering an applicant's felony convictions based on the concession that her study excluded certain occupations with legal restrictions on ex-offenders- such as jobs in the health care industry, work with children and the elderly, jobs requiring firearms (*i.e.* security guards) and jobs in the public in the public sector." Reliance was placed Dr. Cohen's finding that these were some of the very same employers in which Peoplemark placed its employees.

8. Thereafter, on February 26, 2010, while the summary judgment motion was pending, the magistrate judge issued an extremely unfavorable Order, mandating extensive additional disclosures and production of documents by the EEOC, following another motion to compel that had been filed by Peoplemark. A notice of appeal to the judge regarding the adverse discovery ruling by the magistrate was filed on March 12, 2010.

9. Following these various setbacks, on March 24, 2010, the EEOC agreed to filed a joint motion to have the case dismissed, which was granted by the Court on March 29, 2010. (Docket #120).

10. Peoplemark then filed its motion for attorneys fees, costs and sanctions on April 30, 2010, which remains pending with the Court.

11. Despite the setback to the EEOC in the *Peoplemark* case, it is unlikely that this case will negatively impact or discourage future cases filed by the EEOC involving employer reliance on criminal records in disqualifying applicants for employment. The EEOC clearly learned various lessons that most likely will not be repeated in future EEOC litigation.

12. While the procedural developments may be unique to the *Peoplemark* case, this case is particularly useful to employers in providing a roadmap concerning anticipated discovery by the EEOC and potential discovery requests by employers in future litigation involving criminal records and other pattern or practice cases.

13. Discussed below is a review of EEOC discovery requests in the *Peoplemark* case:

a. EEOC interrogatories included the following requests for information:

(i) Identification of any computerized or machine readable files and databases maintained by the employer for a 5½ year period involving personnel information, customer orders, job orders, job assignments and skill codes (*i.e.* the employer was involved in assignment of temporary workers to its customers) , and related inquiries concerning such data, including data editing routines, the data dictionary for each of the files and the meaning of each field in the personnel files identified preceding the interrogatories.

(ii) Identification of all company locations for a 5½ year period.

(iii) The practice, policy or procedure at each location for handling applications for employment submitted by individuals with felony records and the period in effect.

(iv) Identification of all managers, employees and others involved in the decisions to select and not select applicants (*i.e.* for temporary job assignments) at any time for the 5½ year period.

(v) Identification of each individual hired and/or placed, including general background on each individual, including whether any individual had any felony or misdemeanor conviction(s), the applicable date and nature of the conviction.

b. The EEOC's document requests included the following :

(i) Copies of all employment applications for employment for a 5½ year period for each company location during the applicable period.

(ii) All written policies relating to handling of applications for employment submitted by individuals with felony

records and misdemeanor records.

(iii) Any and all documents relating to validation studies conducted regarding the impact of the company's purported "no conviction policy" on African Americans.

c. According to Court records, the company reportedly produced approximately 176,073 documents, after having been scanned, Bates stamped and put on CD's in pdf format, in addition to electronic eEmpact data (a digital database of employee information, skill codes, order and assignments), plus a disk containing the payroll information for over 17,000 employees.

14. A review of the employer discovery requests and various court rulings also are extremely helpful concerning the type of information that employers may be successful in requesting in such litigation by the EEOC.

a. First, it is noteworthy that in response to various document requests and/or interrogatories served on the EEOC, the EEOC refused to produce the requested documents or otherwise respond, cloaking itself in the "government deliberative process privilege" and/or attorney client privilege. Aside from the EEOC's initial refusal to identify potential "victims" of discrimination at the outset of the litigation, and the court's ruling mandating such disclosures (as previously discussed), the EEOC's refusal to respond to various subsequent discovery requests was the subject of a second motion to compel by the employer. (Docket #52).

b. The magistrate judge's subsequent ruling in favor of the employer, issued on February 26, 2010, issued shortly before the EEOC elected to voluntarily dismiss the case, provides an outstanding analysis of one court's view of the types of documents that are protected and not protected from disclosure by the EEOC, and also provides a glimpse of the deliberations engaged in by the EEOC prior to the filing of the lawsuit. (Docket #114).

c. Significantly, the magistrate judge ruled that the employer was entitled to a response to interrogatories directed to the EEOC in which the employer "sought a description of all documents, statistics and demographic data that the EEOC had at the time it filed the lawsuit which supported the claim in this action that Peoplemark's policies have a disparate impact on African American applicants." The Court determined that such requested information was not protected from disclosure based on any claim of privilege asserted by the EEOC. In relevant part the Court stated:

> The fact that the EEOC may have obtained information during investigation which is relevant to the claim it chose to file in this court, does not (absent a specific privilege) somehow immunize that information itself from discovery. Nor does the fact plaintiff might not choose to use this information in court make it any less discoverable, if it is relevant to proving or defeating the claim, or cold lead to admissible evidence which could help prove or defeat the claim. A party may not withhold evidence merely because it may prove detrimental to that party's position.
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> Throughout this litigation the EEOC has confused its power to investigate compliance with the law, with its own obligations to abide by the Federal Rules of Civil Procedure when it moves the matter into federal court. If the EEOC has relevant evidence, it must produce this evidence, within the rules.

(*See* Docket #114).

d. The magistrate judge further opined that the deliberative process privilege "does not protect factual or objective material" and specifically referred to the following categories of information and/or documents being discoverable by the employer:

(i) Who the EEOC interviewed during its investigation;

(ii) Who conducted the investigations;

(iii) The facts on which the EEOC based its cause determinations;

(iv) The documents or testimony on which the EEOC based its finding of fact included in the reasonable cause determinations;

(v) The communications between the EEOC and witnesses (both from plaintiffs' side and defendant's side); and

(vi) The dates on which the investigations were started and finished.

e. On the other hand, the magistrate judge concluded that certain documents were protected and shielded from disclosure by the EEOC. Even so, the magistrate judge's ruling provides an excellent overview of the deliberative process and the parties involved at the EEOC prior to filing the lawsuit against Peoplemark. This case may vary from other pattern or practice lawsuits because it was the first case of its nature that focused on the alleged adverse impact of felony conviction records on African Americans, and input was sought from headquarters and the Commission prior to filing suit. While the contents of the following documents were viewed as privileged, they clearly identify the procedures followed and those involved prior to filing the lawsuit against the employer:

(i) Transmittal memorandum from EEOC General

Counsel to the Commissioners prior to and for purposes of reaching the decision to file the lawsuit.

(ii) Communications from the EEOC Regional Attorney to the EEOC's Assistant General Counsel and from the trial attorney to the Regional attorney .

(iii) Analysis of labor pools in three markets where the employer operated prepared by a **Senior Economist in the Office of General Counsel** in support of the recommendation for litigation.

(iv) A Presentation Memorandum from the Regional Attorney to the EEOC General Counsel which contains an analysis of the case and recommendation of the regional attorney.

(v) An Investigative Memorandum from the investigator to the EEOC District Director concerning analysis of the information obtained during the investigation, including analysis of statistical data and the investigator's opinion (but not withholding portions of the memorandum containing factual information).

(vi) A memorandum prepared by an **EEOC Social Science Analyst** containing a "pre-decisional statistical analysis of racial disparities in conviction rates" considered by the Detroit Field Office in making its determination on the merits that was submitted to the Commissioners.

(vii) Thus, the case clearly demonstrates the EEOC's current reliance on internal experts at the EEOC, particular reliance on statistical experts, prior to filing such pattern or practice cases.

D. *EEOC v. FREEMAN* — THE APPLICABLE LIMITATIONS PERIOD IN EEOC PATTERN OR PRACTICE LITIGATION

1. A second pattern or practice lawsuit filed by the EEOC in the United States District Court for the District of Maryland on November 30, 2009 alleges, in relevant part, that the employer engaged in a nationwide "pattern or practice" of discrimination against a class of male, African American and Hispanic job applicants by using "criminal history" as a hiring criterion based on such criteria having a disparate impact on such individuals. *EEOC v. Freeman*, Case No. 8:09-CV-02573-RWT (D. Md, Southern Div).

a. The underlying discrimination charge involved a claim by the charging party (Katrina Vaughn) that she applied for a position with the defendant, Freeman Company, in August 2007, and was informed that she would be hired, contingent on passing a drug, criminal and credit background check. Shortly thereafter, on or about August 30, 2007, the CP was told that she would not be offered a position. In the discrimination charge, filed on January 17, 2008, the CP alleged that she was discriminated against based on her race and further asserted that the employer "discriminates in this manner against racial minorities, as a class, in violation of Title VII."

b. The lawsuit includes allegations that credit history also was relied on by the employer, which had a significant disparate impact on African American job applicants

c. The EEOC alleges in the Complaint that above hiring practices have a significant disparate impact against the protected groups and are not job related or justified by business necessity. The EEOC further asserts that there are appropriate, less-discriminatory alternative selection procedures.

2. Although the lawsuit remains in its early stages, the *Freeman* case is significant because it addresses the applicable statute of limitations in pattern or practice litigation initiated by the EEOC.

a. On November 30, 2009, Freeman filed a partial motion to dismiss in which it moved to dismiss all claims that relate to hiring decisions made more than 300 days before the filing of the administrative charge on which the case is based—that is, all claims relating to decisions made prior to March 23, 2007 (*i.e.* 300 days prior to the January 8, 2008 discrimination charge filed by CP Katrina Vaughn).

b. On April 27, 2010, the District Court granted Freeman's motion and held that "applicants for employment who Freeman did not hire before March 23, 2007, are not members of the class for whom the EEOC may seek relief." Based on its Order, the Court "dismiss(ed) all claims asserted in the complaint to the extent that they relate to hiring decisions made before March 23, 2007." (Docket #18).

3. Based on the significance of this issue regarding the potential scope of coverage and relief based on EEOC pattern or practice claims, a review of the Court's rationale is summarized below:

a. Section 707 of Title VII authorizes the EEOC to bring a pattern or practice claim. *See* 42 U.S.C. §§ 2000e-6(a), (c). Section 707(e) requires the EEOC to investigate and act on a charge of a pattern or practice of discrimination according to the procedures set forth in Section 706, and Section 707(e)(1) expressly requires a charge to be aggrieved within 300 days after the alleged unlawful employment practice occurred.

(i) The pivotal issue in the case is "how the Section 706(e)(1) requirement impacts a lawsuit brought by the EEOC, rather than one brought by an aggrieved individual."

(ii) Freeman argued that the plain language of Section 706(e)(1) limits the class of individuals for whom the EEOC can seek relief to those individuals who allegedly were subjected to unlawful employment practices during the 300 days before Ms. Vaughn filed her Charge

(iii) The EEOC asserted that Section 706(e)(1) affects only its administrative functions, and not the scope of remedies it can pursue as a litigant. According to the EEOC, Section 706(e)(1) does no more than require that the charge triggering the EEOC's investigation be timely filed: once that condition precedent is satisfied, the EEOC contends that Section 706(e)(1) in no way limits the class of individuals for whom the EEOC can seek relief.

b. In adopting the defendant's view in limiting the limitations period for any claimants to those with claims within 300 days of the charge, the Court focused on the express language of Title VII and explained:

> The Court need not look any farther than the plain language of Section 706(e)(1) to conclude that the class of individuals for whom the EEOC can seek relief is limited to those who could have filed an EEOC charge during the filing period. Section 706(e)(1) clearly bars claims from individuals who failed to timely file charges. *See* 42 U.S.C. § 2000e-5(e)(1) ("[A] charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred…"). Nothing in the text of Section 706 or 707 suggests that the EEOC can recover for individuals whose claims are otherwise time-barred. If Congress intended to make an exception for the EEOC to revive stale claims under Sections 706 and 707, it should have said so. The plain language of Section 706(e)(1), which is incorporated into Section 707 via subsection (e), precludes the EEOC from seeking relief for individuals who were not subjected to an unlawful employment practice during the 300 days before the filing of the triggering charge.

c. The Court rejected the EEOC's arguments that focused on legislative history and public policy:

(i) The EEOC focused on legislative history which previously granted the Justice Department the right to assert pattern and practice claims without any time limitation, but the Court held that the EEOC was limited to the express terms set forth in the statute.

(ii) The EEOC also argued that there were public policy grounds supporting the absence of any limitations period for pattern or practice claims, referring to the EEOC's broad authority and primary responsibility to root out systemic discrimination in the workplace. In rejecting this view, the Court concluded that the EEOC was only barred from seeking relief based on stale claims; it remained free to pursue injunctive remedies, as well as equitable and monetary relief for individuals who did or could have filed charges within 300 days of the filing of the triggering charge. In short, the Court concluded that the EEOC has an "important mission, but it must play on the same field subject to the same rules as individuals."

d. The EEOC next argued that despite the limitations period referenced above, pattern or practice claims should be treated as "continuing violations" and "therefore the class of individuals for whom it can recover cannot be so limited." In rejecting this view, the Court stated in relevant part:

> There are two reasons why the continuing violation doctrine does not make Freeman potentially liable for acts that pre-date the 300-day filing period. First, *the continuing violation doctrine permits the inclusion of additional, but otherwise time-barred, claims—not the inclusion of otherwise time-barred parties.* This equitable exception to the 300-day filing period allows an individual who filed a timely charge to recover for acts outside the filing period if the nature of the claim involves "repeated conduct" constituting a single "unlawful employment practice."… It does not, however, excuse a complainant from adhering to the statutory time limits for filing a charge. *Morgan* [*i.e. National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)] is silent as to whether a class can include individuals who did not experience any discriminatory acts during the filing period. In this Court's view, the continuing violation doctrine should not be invoked to expand the class of individuals for whom the EEOC can seek relief under Title VII.
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> Second, even if the continuing violation doctrine could allow otherwise time-barred parties to recover in certain cases, this is not one of them. A pattern or practice of refusing to hire job applicants does not constitute a continuing violation. Title VII precludes recovery for discrete acts of discrimination that occur outside the applicable statutory charge-filing period. *See Morgan*, 536 U.S. at 112 ("[D]iscrete acts that fall within the statutory time period do not make timely acts that fall outside the time period."). The refusal to hire

> an applicant with an unacceptable criminal history or credit history is undoubtedly a discrete act of discrimination.

4. Regardless of the favorable decision in *EEOC v. Freeman* regarding the limitations period applicable to pattern or practice claims, the courts continue to be split whether a limitations period should be applied to such claims.

   a. Other recent favorable decisions: *See e.g. EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 867 (N.D. Iowa, 2009)

   b. On the other hand, other courts have held that the EEOC is not restricted by any limitations period in dealing with pattern or practice claims: *See e.g. EEOC v. Sterling Jewelers, Inc.*, 2010 WL 86376 (W.D. N.Y. Jan. 6, 2010); *EEOC v. LA Weight Loss*, 509 F. Supp. 427 (M.D. 2007).

5. It should be noted that on September 7, 2010, the employer in *EEOC v. Freeman* made an additional statute of limitations argument. Freeman moved for partial summary judgment as to all claims made more than 300 days before the EEOC notified it of the EEOC's decision to expand its investigation to include Freeman's use of criminal history information.

   a. In the underlying discrimination charge, filed on July 17, 2008, the CP alleged only that Freeman discriminated against her based on its use of credit history as a hiring criteria.

   b. The focus on criminal history merely stemmed from the EEOC's investigation of the charge and the employer did not notify Freeman that it was investigating criminal history until September 25, 2008.

   c. Although there is limited precedent on this issue, Freeman relied on the *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 371 (4th Cir. 1976), which limited back pay in a Title VII proceeding to two years prior to the notice to the employer that the EEOC was investigating the type of discrimination *not* alleged in underlying charge. The employer argued that the same reasoning applied in dealing with the limitations period under Title VII in a pattern or practice claim by the EEOC. The motion remains pending before the court in the *Freeman* case.

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