Using Arrest Records In Hiring Essay, Research Paper

The Supreme Court’s 1966 Miranda ruling providing for ?the right to remain silent? is now a well-known phrase thanks to American mass media and, especially, popular television police dramas. However, not nearly as well known is, that for better or worse, this right can also be extended to the workplace. The topic of this paper is to examine the legality and issues involved with regard to questioning applicants during the hiring process about their arrest and conviction records.

Discrimination occurs at all levels of society involving many types of people for various reasons. In the 1960?s a populist movement in the United States raised national awareness of civil rights as an issue in American society, culminating in 1964 with landmark legislation. The Civil Rights Act of 1964 dramatically altered the landscape that had permitted discrimination to occur in the United States of America upon the basis of an indicidual?s race, color, religion, sex and national origin. However, landscapes do not change overnight. American society and its employers have been forced to revise their hiring, selection, promotion, and termination employment practices in order to conform to Title VII.

The Equal Employment Opportunity Commission (EEOC) was created to enforce adherence to the Act by employers and promote the practice of observing Title VII provisions in the workplace. The EEOC has developed administrative guidelines which federal agencies and employers must follow to remain in compliance with Title VII. In cases where those guidelines are not followed, the EEOC may bring suit in federal court against the employer in question. One such guideline, and the topic of this paper, involves pre-employment inquiries.

The EEOC?s pre-employment inquiry guidelines are designed to assist employers in identifying what types of questions are permissible and which should be avoided during the pre-offer or hiring stage. For example, EEOC guidance suggests that comments made during the hiring process by employers regarding the nature of an applicant?s surname should be avoided. Such questioning may violate the national origin protection of Title VII and could be regarded as discriminatory.1 Similarly, questions ?about job-related injuries or workers? compensation history are prohibited at the pre-offer stage.?2 On the other hand, many permissible applicant questions do exist, and the EEOC does not restrain employers from asking them. These range from inquiries regarding past applicant performance relating to job functions and work attendance habits to past or present illicit drug use. The list of permissible questions is not exhaustive.

Perhaps not surprisingly, employers do not always welcomed these guidelines. Some believe that certain EEOC guidance policies do not reflect a practical application of the principles of Title VII and claim that the EEOC ?goes way too far?3 in its requirements for them to be considered reasonable. In one controversial interpretation, ?the Equal Employment Opportunity Commission?s position is that an employer is precluded by [EEOC interpretation of] Title VII of the Civil Rights Act of 1964 from asking a potential employee about arrest records. The rationale behind this position is that arrests do not prove guilt and that screening out applicants with arrest records has an adverse impact on minorities.?4 Such a stance on the part of the EEOC places employers in somewhat of a double bind so that ?every stage in the hiring process can subject the employer to legal liability, including discrimination claims [and] negligent hiring.?5 We now turn our attention o the subject of discrimination in employment hiring.

Discriminatory treatment at the pre-offer stage of hiring generally falls into one of two categories: disparate treatment and disparate impact. Disparate treatment can be defined as treating some people less favorably than others because of certain factors. Disparate impact involves practices that fall more harshly on one group than another and cannot be justified by business necessity.6 Race, color, religion, creed, sex, age, marital status, national origin, mental or physical disability, veteran status, or sexual orientation represent some of the reasons job applicants are subjected to discrimination. Note, that not all of these factors are legally protected from discrimination during the hiring process. The legal protection would depend upon various applicable state or federal law and the individual circumstances of the case.

Because of it?s disparate impact upon minorities, questioning an applicant about his or her arrest record has been determined to be a discriminatory practice by the EEOC. Many facts support this claim since it is minorities who are arrested in numbers disproportionate to their population representation within the general population. According to 1998 US Census data, while minorities total 28.7% of the US population, they account for nearly 34% of the all arrests.

Figure 1: 1998 US Population Distributions by Race

In addition, figures for the total number of national arrests during 1998 showed 66% of the arrestees were white while 32% were black; yet blacks constitute only 12.7% of the population. (US Census Data)

Figure 2: 1998 US Arrest Distributions by Race

Furthermore, Native Americans have consistently been arrested at approximately three times the Black rate and ten times the White rate, according to age-adjusted figures for 1950-1968.7 Such startling disparity in minority arrests with respect to the white majority clearly make a case for disparate impact.

Proponents of prohibiting employers from asking applicants about their arrest records hold that the danger of disparate treatment of individuals also buoys the need for the current EEOC stance. They argue that questioning applicants about their arrest records, and basing any hiring decision upon that data, posses a greater risk for discriminatory abuse by employers than providing any protection against hiring dangerous employees. The logic behind this position is based upon the observation that arrests are not equivalent to convictions and cannot, therefore, automatically be assumed to establish an individual as an employment risk. ?Over 40% of every 100 individuals who are arrested for felonies are not prosecuted or have their cases dismissed at first appearance (United States Department of Justice, 1987, in Miller, 1997). So, UCR [Uniform Crime Reports] arrest statistics tend to create myths about who is dangerous and guilty.?8

Employer regulatory responsibilities are many these days, and just as employers must avoid discriminatory hiring practices, so too must they protect themselves against negligent hiring. These seemingly contradictory requirements?to properly investigate employees at the pre-offer stage to avoid negligent hiring while at the same time prohibiting employers from receiving and considering certain pertinent data, such as arrest records?places employers in somewhat of a double-bind. Perhaps adding to the confusion, some state laws actually require employers to conduct background checks for certain positions.9 These scenarios usually involve employees who provides home health services or work in public education school systems.

If an employee commits an illegal act in the performance of his or her job functioning, a reasonable investigation duty standard is widely believed to protect employers from legal liability with respect to negligent hiring. Generally the law requires that employers have a duty to make a reasonable investigation of an applicant’s fitness before hiring.10 This is done to establish the likelihood of an applicant committing illegal acts, which could reasonably have been predicted through a simple background check. ?The extent of [this duty] may vary with the circumstances. For jobs in which an employee will have access to people’s homes or to sensitive information, a criminal records check should be conducted.?11 Failure to conduct background checks could result in liability and penalties in catastrophic amounts for employers.

Questioning applicants about convictions is not an altogether different matter for the EEOC or employers. The EEOC has interpreted the provisions of Title VII and provided guidance for their use as well. Convictions differ in nature from arrest records in that a conviction has resulted from due process, which has presumably established an individual?s guilt in regard to commission of a crime. Accordingly, questions regarding applicant convictions and using them to make hiring decisions are treated differently by employers based upon EEOC guidelines and applicable state laws.

While EEOC and state requirements do make some allowances for the differing nature of convictions, statistics like those for arrests, present reasons for concern by the EEOC because of the potential for disparate treatment and impact. According to the UCR, of the nearly 15 million arrests for all offenses in the United States in 1998, there was a total of 2 million felony convictions in state or federal courts12. African Americans make up roughly 47% of those convicted for felonies in state courts.13

Figure 3: US State Court Conviction

Source: FBI 1998 Uniform Crime Report

Alarmingly these statistics are steadily on the rise, and so too will the degree of disparate impact cases if employers are permitted complete freedom to make hiring decisions based merely on the existence of a conviction. Indeed, that a person had an arrest and conviction history is not an automatic bar to employment, the EEOC has said.14 For this reason, the EEOC has declared that an arrest and conviction history is not an automatic bar to employment.

The EEOC holds that employers may ask applicants about his or her conviction history at the pre-offer stage but can only consider the conviction in making a hiring decision to the extent that the conviction ?bear[s] some relationship to the job in order to constitute a sufficient reason not to hire.?15 ?For example, a bus company’s refusal to hire a protected class applicant with a single recent DUI conviction would be justified because the conduct underlying the arrest, driving while intoxicated, is clearly related to the safe performance of the duties of a bus driver, and occurred fairly recently.?16

The tightrope employers must walk to balance their adherence to Title VII against protecting themselves from hiring dangerous employees promises to continue to create a complicated hiring process for employers. But realities within our culture and society clearly demonstrate a need for protecting many from being disenfranchised from the workforce by arbitrary and systemic practices of discrimination in employment and the EEOC guidance makes the attempt.

American public policy currently dictates that employers must legally observe the fundamental civil rights of potential applicants while at the same time refrain from negligent hiring of dangerous employees or else face liability exposure, costly litigation, and potentially catastrophic financial penalties. The attempt on the part of public policy makers, policy enforcers, and employers to strike a balance between at times competing obligations will continue to challenge all concerned.

Footnotes

1 ?Employment Law for Business 2nd Edition? Bennett-Alexander, Pincus. Irwin/McGraw Hill. 1998. p. 305.

2 ?Hiring Without Lawsuits: Remaining Within The Shrinking Boundaries of What Is Appropriate and Legal? Law Firm of Meckler Bulger & Tilson Web Page. Downloaded 8 Feb. 2000. p. 12. (http://www.bmbt.com/pubs/articles/hiring2.htm)

3 David Andrew Price (Washington Legal Foundation), “English-Only Rules: EOC Has Gone Too Far,” USA Today, March 28, 1996 http://www.ncpa.org/pd/affirm/pdaa/pdaa17.html

4 ?Employment Interview Guidelines: Research Notes — Arrest Records in Employment.? The Catholic University Of America. Downloaded February 29, 2000. p. 1 (http://counsel.cua.edu/Employ/Arrest\_Records.htm.)

5 ?Hiring Without Lawsuits: Remaining Within The Shrinking Boundaries of What Is Appropriate and Legal? Law Firm of Meckler Bulger & Tilson Web Page. Downloaded 8 Feb. 2000. p. 1. (http://www.bmbt.com/pubs/articles/hiring2.htm)

6 ?Grievance Policy And Procedures.? University Of Massachusetts Amherst Equal Opportunity & Diversity Office. Downloaded 17 March 2000.

http://www-nss.oit.umass.edu/eod/grievance.html

7 ?Alcoholism and Native Americans.? John M. Stevenson. Downloaded 5 March 2000. p. 1.http://www.geocities.com/Athens/Forum/9235/Alcohol.html

8 ?The Construction and Reinforcement of Myths of Race and Crime?. Matthew Robinson, Ph.D., Appalachian State University. Downloaded 10 March 2000. p. http://www.appstate.edu/~robinsnmb/race.htm

9 ?Combating Negligent Hiring Claims.? Business Owner?s Toolkit Web Site, CCH INC. 6 Feb 2000. p. 1. (http://csi.toolkit.cch.com/text/P05\_1515.asp)

10 Ibid. p. 1.

11 Ibid. p. 1.

12 FBI 1998 Uniform Crime Report http://www.fbi.gov/ucr/Cius\_98/98crime/98cius22.pdf

13 ?The Construction and Reinforcement of Myths of Race and Crime?. Matthew Robinson, Ph.D., Appalachian State University. Downloaded 10 March 2000. p. http://www.appstate.edu/~robinsnmb/race.htm

14 ?Combating Negligent Hiring Claims.? Business Owner?s Toolkit Web Site, CCH INC. 6 Feb 2000. p. 1. (http://csi.toolkit.cch.com/text/P05\_1515.asp)

15 ?Case Study ? Using Arrest Records? Business Owner?s Toolkit Web Site, CCH INC. Downloaded 28 Feb 2000. p. 1.

?Combating Negligent Hiring Claims.? Business Owner?s Toolkit Web Site, CCH INC. 6 Feb 2000. p. 1. (http://csi.toolkit.cch.com/text/P05\_1515.asp)

16 ?Case Study ? Using Arrest Records? Business Owner?s Toolkit Web Site, CCH INC. Downloaded 28 Feb 2000. p. 1.http://csi.toolkit.cch.com/text/P05\_1615.asp

Bibliography

References

1. ?Employment Law for Business 2nd Edition? Bennett-Alexander, Pincus. Irwin/McGraw Hill. 1998

2. 42 U.S.C. ?2000e 1-16

3. ?Hiring Without Lawsuits: Remaining Within The Shrinking Boundaries of What Is Appropriate and Legal? Law Firm of Meckler Bulger & Tilson Web Page. (http://www.bmbt.com/pubs/articles/hiring2.htm) 8 Feb. 2000.

4. Rosemary Alito. New Jersey Employment Law (2nd Ed.). Newark: New Jersey Law Journal, 1999.

5. ?Limitations On An Employer’s Ability To Consider Arrest Or Conviction Records Of A Job Applicant.? Law firm of Donahue, Gallagher, Woods & Wood web page. (http://www.donahue.com/HTML/frames/resour/1998\_f.html) 10 Feb. 2000.

6. ?Combating Negligent Hiring Claims.? Business Owner?s Toolkit Web Site, CCH INC. (http://csi.toolkit.cch.com/text/P05\_1515.asp) 6 Feb 2000.

7. ?Employment Interview Guidelines: Research Notes — Arrest Records in Employment.? The Catholic University Of America. http://counsel.cua.edu/Employ/Arrest\_Records.htm. May 21, 1998

8. ?Alcoholism and Native Americans.? John M. Stevenson. http://www.geocities.com/Athens/Forum/9235/Alcohol.html

9. ?Key Crime & Justice Facts at a Glance? U.S. Department of Justice Bureau of Justice Statistics January 21, 2000 http://www.ojp.usdoj.gov/bjs/glance.htm

10. The Construction and Reinforcement of Myths of Race and Crime, Matthew Robinson, Ph.D., Appalachian State University, Boone, North Carolina 28608

http://www.appstate.edu/~robinsnmb/race.htm

11. FBI 1998 Uniform Crime Report http://www.fbi.gov/ucr/Cius\_98/98crime/98cius22.pdf

12. David Andrew Price (Washington Legal Foundation), “English-Only Rules: EEOC Has Gone Too Far,” USA Today, March 28, 1996

http://www.ncpa.org/pd/affirm/pdaa/pdaa17.html

13. ?Grievance Policy And Procedures.? University Of Massachusetts Amherst Equal Opportunity & Diversity Office. Downloaded 17 March 2000.

http://www-nss.oit.umass.edu/eod/grievance.html