

Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks

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INTRODUCTION

When Ayanna Spikes entered the job market after completing college in 2010, over a dozen employers rejected her. The reason? The employers, while impressed with her credentials given her years of education and training in medical administration, were unwilling to extend her an offer in light

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of her 1997 conviction for robbery. Although she had successfully completed her prison sentence, had not been subsequently arrested or convicted for any other crimes, and had taken demonstrable steps to turn her life around, she found that her criminal record continued to prevent her from obtaining employment.¹

Spikes' experience is not an anomaly; more and more employers are conducting criminal background checks when screening applicants and are using the results of those checks as a determinative factor when deciding whether to extend job offers. A survey of human resource managers found that only approximately 50% of employers used criminal background checks as a screening mechanism in 1996; by 2003, over 80% were using them.² While employers cite concerns about safety and negligent hiring as reasons for the increased use of criminal background checks,³ the rise is also likely due to the ease and reduced cost of conducting the checks. Thanks to technological advances, there is now a cottage criminal background check industry comprised of hundreds, if not thousands, of companies offering their services to employers.⁴

This growing trend has a significant impact on the employment prospects for a large share of the nation's workforce. The number of Americans with a criminal record has increased exponentially in the last several decades. It is estimated that at least 65 million adults — over a quarter of the nation's adult population — have been arrested and/or convicted of a criminal offense.⁵ Moreover, it is well documented that criminal record rates are not evenly distributed throughout the population: African Americans and Latinos are disproportionately much more likely than their white counterparts to be arrested and convicted. FBI statistics reveal that African Americans

¹ Erica Goode, *Internet Lets a Criminal Past Catch Up Quicker*, N.Y. TIMES, Apr. 29, 2011, at A17.

² EVREN ESEN, SOC'Y FOR HUM. RES. MGMT., SHRM WORKPLACE VIOLENCE STUDY 18 (2004). A 2009 study revealed that 92% of the employers who responded reported that they used criminal background checks when screening some or all of their job applicants. SOC'Y FOR HUM. RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS (Jan. 22, 2010), http://www.slideshare.net/shrm/background-check-criminal?from=share_email, archived at <http://perma.cc/0LZG5KxYD2j?type=image>.

³ See Eric Krell, *Criminal Background: Consider the Risks — And Rewards — Of Hiring Ex-Offenders*, H.R. MAGAZINE, Feb. 1, 2012, at 44, 48. There is also rising pressure from both the state and federal level for employers to rely on criminal background checks in the applicant screening process. See, e.g., Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, Title I, § 109(b)(1) (requiring that the Secretary of Transportation develop training and certification of maritime security professionals, such as recommendations for incorporating a background check for those trained and certified in foreign ports); see also OHIO REV. CODE ANN. § 3319.39(A)(1) (West 2013) (requiring a criminal background check for any applicant to an Ohio public school district).

⁴ ABA, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 38 n.4 (2007).

⁵ See NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), available at http://nelp.3cdn.net/e9231d3ae1d058c9e_55im6wopc.pdf, archived at <http://perma.cc/0WycSevw8bc> [hereinafter 65 MILLION].

accounted for more than three million arrests in 2009 (28.3% of total arrests), even though they represented around 13% of the total population in the past decade; whites, who have made up around 72% of the population in the past decade, accounted for fewer than 7.4 million arrests (69.1% of total arrests).⁶ As of 2001, 16.6% of African American adult males and 7.7% of Latino adult males have been imprisoned in their lifetime; that same statistic is 2.6% for whites.⁷ Racial profiling and discriminatory criminal justice policies, and not disproportionate rates of criminal activity, explain these stark racial disparities. For example, although both white and African American youth carry weapons at approximately the same rate, African American young people are arrested for weapons offenses at a rate that is more than double that of their white counterparts.⁸ The differences are greatest in offenses involving illicit drugs. A June 2013 report by the American Civil Liberties Union (“ACLU”) found that although whites and African Americans use marijuana at similar rates, an African American was nearly four times more likely to be arrested for marijuana possession than a white person.⁹

In light of these racial disparities, employers’ use of criminal background checks raises concerns under Title VII of the Civil Rights Act of 1964,¹⁰ the landmark federal legislation that prohibits employment discrimination on the basis of, *inter alia*, race and color. While there is reason to be worried that employers are violating Title VII’s disparate treatment (i.e., intentional discrimination) provisions,¹¹ there is even greater reason for concern that employers’ use of criminal record screens violates Title VII’s disparate impact provision, which invalidates an employer’s facially neutral policy if it has a disproportionate impact on a protected group and is not

⁶ U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 CENSUS BRIEFS 4 (Mar. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>, archived at <http://perma.cc/0eK81VUBz8m>; *Crime in the United States 2009*, Table 43, FED. BUREAU OF INVESTIGATION (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_43.html, archived at <http://perma.cc/0votNE2kMuV>.

⁷ THOMAS P. BONZCAR, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>, archived at <http://perma.cc/0ZZGhe8mzBN>.

⁸ Van Jones, *Are Blacks a Criminal Race? Surprising Statistics*, HUFFINGTON POST (Oct. 5, 2005, 4:43 PM), http://www.huffingtonpost.com/van-jones/are-blacks-a-criminal-rac_b_8398.html, archived at <http://perma.cc/0qcxXiVQ4gD>.

⁹ AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 9 (2013), <https://www.aclu.org/sites/default/files/assets/100413-mj-report-rfs-re11.pdf>, archived at <http://perma.cc/0x68XxXVzJk>.

¹⁰ 42 U.S.C. §§ 2000e–2000e-17 (2006).

¹¹ There is considerable social science research showing that employers are more likely to hire white applicants with criminal records than African Americans with equivalent records; in fact, this research has revealed that white applicants with criminal records often fare better than African Americans with no record at all. *See, e.g.*, Devah Pager, Bart Bonikowski, & Bruce Western, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 785 (2009); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937, 957–60 (2003) (suggesting that some employers may be discriminating against African American applicants with criminal records because of their race).

related to the job at issue or consistent with business necessity.¹² To the extent employers have developed criminal records screening policies that result in a disproportionate exclusion of racial minorities and are unable to satisfy Title VII's "business necessity" defense, they are running afoul of Title VII.

This Article proceeds in four parts. Part I provides a brief overview of disparate impact liability, and describes how employers' consideration of applicants' criminal history information — including arrests and convictions — can run afoul of antidiscrimination law. Part II surveys the Title VII jurisprudence that has developed concerning disparate impact challenges to employers' criminal records policies. It reveals that although there have been a few notable cases where judges have struck down employers' policies, overall, federal courts have not been very receptive to plaintiffs' claims, and are unlikely, in the near future, to serve as a venue where challenges to employers' criminal records policies will find overwhelming success. Part III looks at a growing trend — colloquially known as "ban the box" — that has emerged as a nonjudicial method for addressing employers' overreliance on criminal history information in the applicant screening process. It explores why the ban the box movement, though promising, is also insufficient, by itself, to cure fully the discriminatory effects of criminal records policies. Finally, Part IV discusses how the United States Equal Employment Opportunity Commission ("EEOC"), the federal agency tasked with primary responsibility for enforcing Title VII's antidiscrimination principles,¹³ is well positioned to adopt a multifaceted strategy to remedy the disparate impact caused by employers' overreliance on criminal records policies. The section explores the steps the EEOC has already taken to bring meaningful reform to this area of the law, and concludes by offering additional ways civil rights advocates can continue to use the tools available through the EEOC to address this critically important civil rights injustice.

I. HOW EMPLOYERS' CRIMINAL BACKGROUND POLICIES CAN VIOLATE TITLE VII'S DISPARATE IMPACT PROVISION

The United States Supreme Court first recognized disparate impact liability in its landmark decision *Griggs v. Duke Power Company*.¹⁴ There, the Court held that an employer's requirements that applicants possess a high school diploma and pass a general intelligence test were not permissible

¹² See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹³ EEOC, STRATEGIC PLAN FOR FISCAL YEARS 2012-2016 3 (2012) [hereinafter STRATEGIC PLAN] ("Since 1965, the United States Equal Employment Opportunity Commission . . . has served as the nation's lead enforcer of employment antidiscrimination laws and chief promoter of equal employment opportunity (EEO).").

¹⁴ 401 U.S. 424 (1971).

under Title VII.¹⁵ The Court determined that neither requirement was necessary for employees to perform the jobs at issue, and observed:

[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.¹⁶

The three-part burden-shifting standard for establishing a disparate impact claim, which was ultimately codified by Congress in the Civil Rights Act of 1991,¹⁷ is well known. In the first stage, a plaintiff must establish a *prima facie* case that the employer has a facially neutral employment policy or practice that has a significant adverse impact on a protected group.¹⁸ If the plaintiff is successful, the burden then shifts to the employer “to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”¹⁹ Even if the employer establishes a “business necessity” defense, the plaintiff may still prevail if she can demonstrate there is a less discriminatory alternative available to the employer.²⁰

Thus, in order for a plaintiff to succeed in challenging an employer’s criminal records policy under Title VII’s disparate impact provision she does not need to show that the employer intended to discriminate. Instead, she must establish that the employer’s consideration of criminal history information has a disproportionate adverse impact on a group protected by Title VII. For example, if the employer’s policy prevented a large number of African American applicants from getting a certain position, but it did not have a similar impact on white applicants, a plaintiff may highlight that differential to support her *prima facie* case. Even if the plaintiff meets her burden, the employer can escape liability by establishing a valid business necessity defense. To do so, an employer would likely present evidence showing that consideration of criminal history information is necessary to identify applicants who will successfully perform the job’s functions. However, if the plaintiff then identifies a “less discriminatory alternative” (e.g., the employer’s policy disqualifies anyone with any criminal conviction, but the plaintiff shows that applicants with only misdemeanor convictions would be just as capable of performing the job as those with no criminal record), she may still prevail. Importantly, Title VII’s disparate impact provision does not preclude employers from conducting background checks; it simply re-

¹⁵ *Id.* at 431–32.

¹⁶ *Id.* at 431.

¹⁷ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

¹⁸ *Crum v. Alabama* (In re: Employment Discrimination Litigation Against the State of Alabama), 198 F.3d 1305, 1311 (11th Cir. 1999).

¹⁹ *Id.* at 1314 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

²⁰ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

quires that such checks not be used in a way that has an adverse impact on protected classes and is not necessary for the positions at issue. As one court has recently explained: “it is not the mere use of any criminal history . . . generally that is a matter of concern under Title VII, but rather what specific information is used and how it is used.”²¹

Concerns about employers’ criminal records policies are not merely academic: millions of Americans find themselves in situations like Spikes’, where they are denied jobs for which they are qualified due to information uncovered on a criminal background check. The National Employment Law Project (“NELP”), a national employment rights advocacy organization, conducted a study that found that many employers — ranging from major corporations to small businesses — regularly deny applicants who have any criminal history whatsoever.²² In the study, NELP explained: “[a]cross the nation there is a consistent theme: people with criminal records ‘need not apply’ for available jobs.”²³ And as the editorial board of the *Los Angeles Times* has recently observed:

[S]ociety makes it hard, both for people returning from jail or prison and for those who have lived responsibly for many years after being incarcerated but who then lose their jobs and must go back into the employment market. . . . In large companies or public institutions, those applicants are generally blocked by lowest-level bureaucrats or by human resources software before they can even make their case to decision makers, who can put any criminal history in its proper perspective.²⁴

II. FEDERAL COURT RESPONSES TO DISPARATE IMPACT CHALLENGES TO EMPLOYERS’ CRIMINAL RECORDS POLICIES

Title VII, which was designed as a prophylactic measure to remove barriers that prevent equal employment opportunities,²⁵ appears to be well suited to address the disparate impact created by employers’ overreliance on criminal background check policies. Given the significant aforementioned racial disparities in arrest and conviction rates, it would seem intuitive that plaintiffs bringing challenges to employers’ policies would be able to establish a prima facie case of adverse impact. Further, the finding in NELP’s survey that employers’ policies are often overly broad — many times excluding anyone with a criminal history — suggests that it would be difficult for such employers to mount successful “business necessity” defenses.

²¹ EEOC v. Freeman, No. RWT 09cv2573, 2013 WL 4464553, at *1 (D. Md. Aug. 9, 2013).

²² 65 MILLION, *supra* note 5, at 1–2.

²³ *Id.* at 2.

²⁴ Editorial, *To Help Ex-Cons, Ban the Box*, L.A. TIMES, July 3, 2013, at 14.

²⁵ Connecticut v. Teal, 457 U.S. 440, 449 (1982); *Moody*, 422 U.S. at 417.

Yet despite the appeal of disparate impact liability, the success rate for such challenges to criminal records policies has been dismally low. While, as discussed below, there have been a few notable successes, overall, civil rights advocates have found it extremely difficult to establish, to the satisfaction of a federal court, that the policies violate Title VII's disparate impact provision.

A. *Favorable Treatments of Plaintiffs' Claims*

Gregory v. Litton Systems, Inc.,²⁶ decided even before the Supreme Court's decision in *Griggs*, is one of the earliest cases challenging the disparate impact caused by an employer's criminal records policy. There, the employer, Litton Systems ("Litton"), had a policy of not hiring applicants who had multiple arrests for offenses other than minor traffic violations.²⁷ The plaintiff, Earl Gregory, had been arrested, but never convicted, for fourteen qualifying offenses, and when that information was disclosed — after Litton already gave him an offer as a sheet metal mechanic — Litton withdrew his offer of employment.²⁸ Gregory filed suit, and the district court struck down Litton's policy.²⁹ The court explained that, because African Americans were arrested at a disproportionately higher rate than whites, "any policy that disqualifies prospective employees because of having been arrested . . . discriminates in fact against negro applicants."³⁰ The court was not persuaded that Litton's policy advanced any legitimate business necessity, and observed "[i]t is unlawful even if it appears, on its face, to be racially neutral and, in its implementation, has not been applied discriminatorily or unfairly as between applicants of different races."³¹ The decision was affirmed by the Ninth Circuit.³²

A similar outcome was ultimately reached in *Green v. Missouri Pacific Railroad Co.*³³ In that case, the plaintiff, Buck Green, filed a class action lawsuit against the Missouri Pacific Railroad Company ("MoPac"), alleging that its use of criminal history information violated Title VII.³⁴ Similar to the policy in *Litton*, MoPac refused to hire anyone who had been arrested and convicted of a criminal offense other than a minor traffic violation.³⁵ After a bench trial, the district court ruled in favor of MoPac, finding that the plaintiff failed to make a prima facie case of adverse impact and that, even if

²⁶ 316 F. Supp. 401 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972).

²⁷ *Id.* at 402.

²⁸ *Id.*

²⁹ *Id.* at 403.

³⁰ *Id.*

³¹ *Id.*

³² *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 634 (9th Cir. 1972).

³³ *See* 381 F. Supp. 992 (E.D. Mo. 1974), *aff'd in part, rev'd in part*, 523 F.2d 1290 (8th Cir. 1975).

³⁴ 381 F. Supp. at 993.

³⁵ *Id.* at 994.

he had, MoPac nevertheless demonstrated its policy was supported by business necessity.³⁶

The Eighth Circuit disagreed. The court first found that the plaintiff had established a prima facie case of adverse impact because he showed that “[t]he . . . practice under consideration disqualifie[d] black applicants or potential black applicants for employment at a substantially higher rate than whites.”³⁷ The court also rejected the notion that MoPac had a valid business necessity defense. As the court explained:

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.³⁸

On remand, the district court entered an injunction, which was subsequently affirmed by the Eighth Circuit, that MoPac could consider an applicant’s criminal history in the screening process only “so long as defendant takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied” [the “*Green* Factors”].³⁹

B. *Negative Treatment of Plaintiffs’ Claims*

Tellingly, the courts in *Litton* and *Green* did not base their holdings on language explicitly found in the text of Title VII. Rather, the courts grounded their conclusions in a progressive interpretation of Title VII’s purpose and mission. Just like the Supreme Court’s opinion in *Griggs*, the *Litton* and *Green* decisions reflect the belief that Title VII was enacted as a broad-based measure to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”⁴⁰

Those decisions highlight the outsized role that federal judges have played in determining the reach and limits of disparate impact liability. Although, as discussed above, Congress ultimately codified disparate impact within the text of Title VII, the doctrine originated and developed as a result

³⁶ *Id.* at 994–96.

³⁷ 523 F.2d at 1295.

³⁸ *Id.* at 1298.

³⁹ *Green v. Missouri Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

⁴⁰ *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

of judicial interpretations on the reach and purpose of the statute.⁴¹ Furthermore, the standards adopted by Congress still leave judges considerable discretion when they are determining whether the parties have met their respective burdens.⁴² The fact that the outcomes in these disparate impact decisions are largely dependent on the ideological views of the decisionmakers means that, as the Civil Rights Movement faded and the judiciary became more conservative,⁴³ the early victories in cases such as *Litton* and *Green* were eclipsed by a long series of federal court decisions rejecting plaintiffs' challenges to employers' criminal records policies. As one scholar has observed:

Since the late 1980s, judgments have been almost uniformly grim for plaintiffs alleging that the consideration of criminal records disparately impacts blacks or Hispanic job applicants. Plaintiffs lost almost every case identified during this period, with judges frequently awarding summary judgment for employers.⁴⁴

Courts have generally rejected these claims for one of two reasons (and sometimes both): (i) the statistical evidence presented by the plaintiff was insufficient to establish a prima facie case of disparate impact, or (ii) the employer met the business necessity defense.

1. *Prima Facie Case.*

Title VII's text does not spell out what evidence a plaintiff must present in order to establish a prima facie case of adverse impact. In cases such as *Litton* and *Green*, the courts were fairly flexible in the type of statistical evidence they accepted as sufficient to meet a prima facie case of adverse impact. For example, in *Litton*, the court was satisfied with general population statistics showing proportionally higher rates of arrest and convictions of racial minorities. However, courts in disparate impact cases — including, but not limited to those challenging employers' criminal records policies — have increasingly interpreted the standard plaintiffs must meet far more stringently, demanding that they provide a statistical analysis that is more closely tied to the employment practice at issue in the litigation.

⁴¹ See Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 317, 320 (1998).

⁴² See Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 248 (2005).

⁴³ See Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 493 (2003); see also Songer, *supra* note 42, at 268–70.

⁴⁴ Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 4, 12 (2012).

This shift is seen in the court's opinion in *Hill v. U.S. Postal Service*.⁴⁵ There, the plaintiff, Arthur Hill, a former employee of the Postal Service, alleged that his former employer's criminal records policy led to an "automatic exclusion of persons with felony or serious misdemeanor convictions . . ."⁴⁶ In support of his claim, he presented statistics contrasting the total population of racial minorities and the arrest and conviction rates for those same populations as compared to whites. He provided these data for several different time periods and geographic locations.⁴⁷ The court rejected these data as sufficient to establish a prima facie case of disparate impact, noting that they left "much to be desired."⁴⁸ It explained that Hill's evidence was simply not specific enough to meet his burden because he failed to show that the data covered the precise geographic area that was at issue in the litigation.⁴⁹ The court went further to explain that Hill's statistical evidence was fatally flawed because general population statistics were not very probative. The court based this conclusion on the fact that the positions for which Hill applied — working in various manual labor positions — required "special qualifications" (i.e., applicants were required to pass a competitive examination as part of the screening process).⁵⁰ As a result, according to the court's reasoning, Hill needed to provide statistical evidence to account for what portion of those with conviction records could successfully pass that examination.⁵¹ His failure to do so was fatal to his claim.

A similar result was reached in *EEOC v. Carolina Freight Carriers Corp.*⁵² In that litigation, the EEOC brought a civil action against the Carolina Freight Carriers Corporation ("Carolina Freight"), a trucking company, challenging its criminal records policy, which barred individuals from working as drivers if they were ever convicted of a felony, theft, or larceny that resulted in a jail or prison sentence.⁵³ Specifically, the EEOC alleged that

⁴⁵ 522 F. Supp. 1283 (S.D.N.Y. 1981).

⁴⁶ *Id.* at 1287–88.

⁴⁷ *Id.* at 1294–97.

⁴⁸ *Id.* at 1302.

⁴⁹ *Id.* Specifically, the court found the plaintiff's evidence lacking because he had not defined the "relevant geographic area" with the degree of specificity the court deemed was necessary. *Id.* The court also rejected the statistics he provided concerning racial disparities in arrest rates in the general population, due to the fact that arrest records were not considered by the Postal Service's criminal records policy. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1302–03. The court explained:

The difficulty with plaintiff's statistical evidence in establishing a prima facie case that defendant's policy concerning the employment of persons with criminal records has a disproportionate impact on minorities, is that it assumes that all convicted felons apply to the Postal Service, pass the necessary competitive examination and then are rejected because of their criminal record. But there is no evidence in the record that discloses the proportion of convicted persons, either black or white, who could successfully complete the Postal Service examination.

Id. at 1302.

⁵² 723 F. Supp. 734 (S.D. Fla. 1989).

⁵³ *Id.* at 737–38.

the company's decision to fire Francisco Rios, pursuant to its criminal records policy, from his position as a tractor-trailer truck driver at its Fort Lauderdale terminal violated Title VII.⁵⁴ To establish its prima facie case, the EEOC presented a statistical analysis comparing the expected and actual employment patterns for truck driver positions at the Fort Lauderdale terminal.⁵⁵ The EEOC's data also looked at the disparities between rates of prison sentences of Latinos and whites.⁵⁶ The court rejected the evidence as insufficient because the EEOC's analysis did not focus "on the national origin composition of the jobs at issue and the national origin composition of the relevant labor market."⁵⁷ The court also criticized the EEOC for failing to examine applicant flow data and showing the exact number of Latino drivers who were disqualified based on their criminal records, even though it acknowledged that such information was not available from Carolina Freight.⁵⁸

Recently, the district court in *EEOC v. Freeman*⁵⁹ granted summary judgment to the defendant, a company that provided services for conventions, corporate events, and similar functions, after holding that the EEOC failed to establish a prima facie case.⁶⁰ In that case, the EEOC argued that Freeman's use of criminal background checks had a disparate impact on African American and Latino applicants. The court, however, rejected the EEOC's use of national statistics, observing that such data can be used only "to create an inference of disparate impact [where] the general populace . . . [is] representative of the relevant applicant pool."⁶¹ It concluded that the EEOC failed to meet that standard.⁶²

The higher burden of proof courts have demanded has made it significantly more difficult for plaintiffs to prevail in the first phase of their disparate impact claims. This challenge has only been compounded because the type of information courts are requiring, such as applicant flow data, is often difficult — and in many cases, nearly impossible — for plaintiffs to obtain.⁶³ Thus, the heightened standard courts are applying often serves as a death knell for disparate impact actions.

⁵⁴ *Id.* at 736–37.

⁵⁵ *Id.* at 742.

⁵⁶ *Id.* at 742–43.

⁵⁷ *Id.* at 751.

⁵⁸ *Id.* at 742, 751.

⁵⁹ No. RWT 09cv2573, 2013 WL 4464553 (D. Md. Aug. 9, 2013).

⁶⁰ *Id.* at *17–18.

⁶¹ *Id.* at *13.

⁶² *Id.*

⁶³ See Bradford C. Mank, *Proving An Environmental Justice Case: Determining an Appropriate Comparison Population*, 20 VA. ENVTL. L.J. 365, 397 (2001) ("[E]mployers often fail to keep adequate records regarding the racial composition of applicants and employees and, as a result, it may be difficult for a plaintiff to prove discrimination based on applicant flow data.").

2. *Business Necessity Defense.*

The statutory language in Title VII does not provide any more guidance on what employers have to do in order to satisfy the business necessity defense; it merely states that they must show that the challenged practice “is job related for the position in question and consistent with business necessity.”⁶⁴ While in *Green*, the court flatly rejected the notion that employers were justified in adopting criminal records policies that broadly and indiscriminately disqualified applicants because of their criminal history, in the subsequent decades many courts have embraced a more employer-deferential interpretation of the business necessity defense.

For example, the court in *Carolina Freight*, after concluding that the EEOC failed to meet its prima facie burden, went on to explain that the employer’s criminal records policy was also justified by business necessity.⁶⁵ After observing that the management of Carolina Freight attributed much of their annual losses to employee theft, the court found that the company was justified in screening out applicants with criminal records because it went to the “honesty of the prospective employee.”⁶⁶ The court was not troubled by the racial implications of the policy, explaining:

Obviously a rule refusing honest employment to convicted applicants is going to have a disparate impact upon thieves. That some of these thieves are going to be Hispanic is immaterial . . . [T]he honesty of a prospective employee is certainly a vital consideration in the hiring decision. If Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing.⁶⁷

The court’s analysis highlights the malleable nature of the business necessity defense. Because there are no strict, objective standards courts must follow when evaluating whether an employment practice is “job related . . . and consistent with business necessity,” the judge was free to adopt wholesale the justifications provided by the employer and also make sweeping and unsupported generalizations about the employability of people with criminal records.

Courts have been especially deferential to the justifications offered by employers when their policies do not contain blanket exclusions on all applicants with criminal records, but rather disqualify applicants for certain offenses the employer has deemed relevant. For example, in *Craig v. Department of Health, Education and Welfare*,⁶⁸ the court affirmed a criminal records policy of the Social Security Office, noting that the employer did

⁶⁴ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

⁶⁵ EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 752 (S.D. Fla. 1989).

⁶⁶ *Id.* at 753.

⁶⁷ *Id.*

⁶⁸ 508 F. Supp. 1055 (W.D. Mo. 1981).

not have a “blanket policy of discharging or refusing to employ all felons,” but rather it had adopted “a somewhat flexible policy . . . [where it attempted] to tailor its practices to meet its needs.”⁶⁹

Likewise, in *Richardson v. Hotel Corp. of America*,⁷⁰ the district court held that a hotel was justified in its decision to terminate an African American bellman who, prior to his employment at the hotel, had been convicted of theft-related crimes.⁷¹ The court explained that given that the hotel designated the bellman position as “security sensitive” because of the bellmen’s proximity to guests and valuable property, it was not impermissible for the hotel to reject candidates solely because they had been convicted of “a serious crime.”⁷² While the court acknowledged that a past criminal conviction does not mean that a person will commit a crime in the future, it concluded that such individuals are more likely to commit a crime than those with no record, and therefore it was “reasonable for management of a hotel to require that persons employed in positions where they have access to valuable property of others have a record reasonably free from convictions for serious property related crimes.”⁷³ The court did not cite any data or legal authority to support its assertions.

Courts have accepted the business necessity defenses offered by employers, even if that results in the continued use of criminal records policies that exclude applicants with very minor criminal histories. In *Clinkscale v. Philadelphia*,⁷⁴ for example, the court had no objection to the criminal records policy of the Philadelphia Police Department, which rejected applicants with arrest records, even if those arrests never led to convictions.⁷⁵ The court was not troubled that the plaintiff was denied a position pursuant to the policy even though he was never convicted following either of his two arrests, and there was considerable evidence that he may have been falsely arrested for at least one of the incidents.⁷⁶ As the court explained, “[e]ven an unjustified arrest may be indicative of character traits that would be undesirable in a police officer, such as a quick temper, poor attitude, or argumentativeness.”⁷⁷

One of the most far-reaching decisions upholding an employer’s business necessity defense was reached in *El v. Southeastern Pennsylvania Transportation Authority*.⁷⁸ There, the Third Circuit affirmed the district

⁶⁹ *Id.* at 1057. For example, the court observed that Craig’s employer had retained an African American typist even after learning that the typist had a criminal record including theft and other offenses. *Id.*

⁷⁰ 332 F. Supp. 519 (E.D. La. 1971).

⁷¹ *Id.* at 521–22.

⁷² *Id.* at 521.

⁷³ *Id.*

⁷⁴ No. Civ.A. 97–2165, 1998 WL 372138 (E.D. Pa. June 16, 1998).

⁷⁵ *Id.* at *1.

⁷⁶ *Id.* at *1–2.

⁷⁷ *Id.* at *2.

⁷⁸ 479 F.3d 232 (3d Cir. 2007).

court's decision upholding the Southeastern Pennsylvania Transportation Authority's ("SEPTA's") criminal records policy, which had resulted in the plaintiff's termination as a paratransit driver due to a forty-year-old conviction for second-degree murder.⁷⁹ In considering whether SEPTA's policy was justified by business necessity, the court explained that the issue it needed to decide was whether the policy "accurately distinguish[ed] between applicants that pose an unacceptable level of risk [to SEPTA's passengers and customers] and those that do not."⁸⁰ While the plaintiff argued that any criminal records policy must, in order to survive Title VII scrutiny, consider the individual circumstances of each applicant, the Third Circuit disagreed.⁸¹

Thus, the second major hurdle plaintiffs have faced in litigating disparate impact claims challenging employers' criminal records policies is the willingness of courts to accept the justifications offered by employers, even in situations where the criminal conduct that resulted in exclusion was only tangentially related to the positions at issue. When this trend is considered along with the heightened standard that needs to be met in order to establish a prima facie case, it is clear that courts have raised the burden for plaintiffs while simultaneously relaxing it for employers.

No doubt, part of the low success rate for plaintiffs is reflective of the broader trend that plaintiffs in employment discrimination cases generally do not fare well within the federal judiciary.⁸² Moreover, the federal courts have become increasingly skeptical of disparate impact claims.⁸³ But, even accounting for those factors, courts have been particularly harsh to Title VII challenges to employers' criminal records policies.⁸⁴ Judges have repeatedly

⁷⁹ *Id.* at 235, 249. SEPTA's criminal records policy automatically excluded anyone, inter alia, who had been convicted of a misdemeanor or felony involving a crime of moral turpitude or of violence against a person. *Id.* at 236.

⁸⁰ *Id.* at 245.

⁸¹ *Id.* (explaining that "[i]f a bright-line policy can distinguish between individual applicants that do and do not pose an unacceptable level of risk, then such a policy is consistent with business necessity").

⁸² See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127 (2009) ("The most significant observation about the district courts' adjudication of employment discrimination cases is the long-run lack of success for these plaintiffs relative to other plaintiffs. Over the period of 1976-2006 in federal court, the plaintiff win rate for job cases (15%) was much lower than for non-jobs cases (51%)."); see also Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558 (2000-2001) ("[P]laintiffs in employment discrimination suits generally fare worse than most other kinds of civil plaintiffs. . . . In federal courts, [those] plaintiffs have long suffered success rates that fall below other civil plaintiffs.").

⁸³ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Scalia, J., concurring). Justice Scalia, who has long challenged the legitimacy of disparate impact, wondered to what extent Title VII's disparate impact provisions are consistent with the Fourteenth Amendment's Equal Protection Clause; he also predicted that "the war between disparate impact and equal protection will be waged sooner or later." *Id.* at 595-96.

⁸⁴ See Harwin, *supra* note 44, at 13 (observing that judges, when issuing opinions in criminal records cases, have expressed "a particular distaste for plaintiffs with criminal records").

adopted interpretations of Title VII that have significantly minimized the statute's ability to ensure that those policies are not overly broad and unnecessarily restrictive. It is not hard to imagine that these decisions have likely also had a significant chilling effect on potential plaintiffs; why bring such a claim knowing the series of significant barriers the courts have erected to knock them out?

III. THE IMPACT OF THE BAN THE BOX MOVEMENT ON CRIMINAL RECORDS POLICIES

A. *History and Background of the Ban the Box Movement*

Instead of relying on the courts and their increasingly antiplaintiff interpretations of Title VII, civil rights advocates have been pursuing other avenues — particularly, the legislative process — to remove the structural barriers that prevent people with criminal records from gaining employment. Recognizing the vital role that governments play as employers themselves and also in regulating other employers, these advocates worked to develop regulations that would restrict the manner in which employers are permitted to inquire about criminal history during the applicant screening process.

The strategy behind these efforts — which ultimately became known as “ban the box,” because advocates almost always seek, at a minimum, to remove the seemingly omnipresent request for applicants to check a box if they have a criminal history — was twofold. First, if employers were prevented from making stereotypical judgments about the employability of people with criminal records, but instead had an opportunity to evaluate the skills that they could bring to the workforce, they would be more likely to hire them. Second, the strategy was designed to counter the deterrent effect that questions about criminal history often have on individuals with criminal records.⁸⁵ People with criminal records, the thinking went, would be more likely to apply for a job if the “box” were removed and they did not believe they would be automatically disqualified due to their criminal history.

Notably, ban the box policies do not, for the most part, preclude an employer's consideration of criminal history information. They simply delay it to later stages in the screening process. As one advocate has explained: “We're not asking anyone to hire ex-felons. It's about giving them the op-

⁸⁵ See Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL'Y 755, 757 (2007) (explaining how early advocates of ban the box policies believed that questions about criminal history served not only to discriminate against people with criminal records, but also to deter those individuals from applying for the jobs at all).

portunity to interview with the employer, sell themselves and tell their own story.”⁸⁶

One of the earliest campaigns to “ban the box” was launched by All of Us or None, a national organizing initiative comprised of formerly incarcerated individuals.⁸⁷ In 2005, All of Us or None succeeded in lobbying the San Francisco Board of Supervisors to adopt a resolution removing any questions about applicants’ criminal history information from initial job applications for public employment.⁸⁸ Under the resolution, an applicant’s criminal history can be considered only once the applicant is identified as a finalist for the position at issue.⁸⁹ Positions where state or local law bars people with convictions were excluded from the resolution. Following All of Us or None’s success, advocates have succeeded in getting ban the box policies passed all across the country. In total, fifty local jurisdictions, including Boston,⁹⁰ Chicago,⁹¹ and Atlanta,⁹² and ten states, have adopted these

⁸⁶ *A Tiny Box Can Unfairly Slam Doors on Ex-Offenders*, DETROIT FREE PRESS, Jan. 20, 2012, at A16. Language in the ban the box policy adopted by the City of Cincinnati, Ohio, provides further insight into the justification behind these policies:

Under the current city practices, qualified applicants with old and irrelevant criminal records are sometimes unnecessarily rejected from city jobs. Instead, we must acknowledge and encourage the possibility of human redemption: there are people with mistakes in their past — even serious ones — who have done the hard work of turning their lives around and becoming productive, contributing members of our community. They should have an equal opportunity for city employment.

Cincinnati, Ohio, Motion in Support of Fair Hiring (June 9, 2010), available at http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/30563.pdf?rpp=-10&m=1&w=doc_no%3D%27201000953%27, archived at <http://perma.cc/0p6h8XoZWWhB>.

⁸⁷ *All of Us or None*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN (Sept. 12, 2013), <http://www.prisonerswithchildren.org/our-projects/allofus-or-none/>, archived at <http://perma.cc/0KoSATrtPnA>; see also Eumi K. Lee, *The Centerpiece to Real Reform? Political, Legal, and Social Barriers to Reentry in California*, 7 HASTINGS RACE & POVERTY L. J. 243, 255–56 (2010) (explaining how the founder of All of Us or None, Dorsey Nunn, has argued that questions about criminal history on employment applications constitute “structural discrimination” against people with criminal records).

⁸⁸ S.F., Cal., Resolution No. 764-05 (Oct. 11, 2005), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions05/r0764-05.pdf>, archived at <http://perma.cc/0PZBYRRUUo8>; *Disclosure and Review of Criminal History Records*, CITY & COUNTY OF SAN FRANCISCO CIVIL SERVICE COMMISSION (Jan. 17, 2006), <http://www.sfgov3.org/index.aspx?page=402>, archived at <http://perma.cc/0d2Ew43PRam> (listing the current hiring policy); NAT’L EMP’T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 2–3 (2013), available at http://nelp.3cdn.net/cb138331f9aa9cd8e3_9qm6bfwws.pdf, archived at <http://perma.cc/0ty3uGpAG8T> [hereinafter MAJOR U.S. CITIES I] (discussing the role of All of Us or None in the city’s policy adoption).

⁸⁹ S.F., Cal., Resolution No. 764-05 (Oct. 11, 2005), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions05/r0764-05.pdf>, archived at <http://perma.cc/0PZBYRRUUo8>.

⁹⁰ BOS., MASS., MUNICIPAL CODE § 4-7 (2005), available at http://nelp.3cdn.net/dc937c758c0ad0c931_fem6bxk1e.pdf, archived at <http://perma.cc/0emZ4VVrxxm>.

⁹¹ Press Release, City of Chicago Mayor’s Press Office, Mayoral Task Force Releases Recommendations on Prison Reentry (Jan. 24, 2006), available at <http://www.nelp.org/page/-/SCLP/2011/MayorDalysPressRelease.pdf?nocdn=1>, archived at <http://perma.cc/0AtKTdkBX9w>.

policies.⁹³ In 2013 alone, five municipalities adopted such regulations.⁹⁴

Not all ban the box policies are identical; in fact, there is considerable diversity in how the policies are crafted. Generally, the policies vary in the following ways: (i) the type of employers covered, (ii) the positions that are covered, (iii) the stage at which criminal history information may be considered in the applicant screening process, and (iv) the extent to which they provide guidance to employers on how to evaluate criminal history information in the screening process. Each of these is briefly discussed below.

1. *Types of Employers Covered.*

As with the ban the box policies passed by the San Francisco Board of Supervisors, most of the regulations are limited to public (i.e., governmental) employers. In targeting public employment, advocates no doubt found it easier to convince municipal leaders to implement reforms in their own hiring apparatuses.

A number of jurisdictions have gone a step further and required that companies contracting with government agencies extend the same protections to their workers as well. For example, Boston issued a policy stating that it will do business only with vendors who have criminal records screening policies that “are consistent with [Boston’s] standards.”⁹⁵ There has also been a growing trend to include private employers within the purview of ban the box policies. In September 2012, Newark, New Jersey, adopted a ban the box policy that applies to any employer with five or more employees doing business “within the City of Newark.”⁹⁶ While jurisdictions that include private employers are still in the minority, the number of locations that cover private, in addition to public, employers is rising.

⁹² Memorandum from Yvonne Cowser Yancy, City of Atlanta Comm’r of Human Res., to Marilyn Winn (Feb. 21, 2013), *available at* <http://www.nelp.org/page/-/SCLP/2013/Atlanta%20HR%20Memo.pdf>, *archived at* <http://perma.cc/0hoxctoDQ9n>.

⁹³ NAT’L EMP’T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2013), *available at* http://nelp.3cdn.net/495bf1d813cadb030d_qxm6b9zbt.pdf, *archived at* <http://perma.cc/0GtVRNwd1Z> [hereinafter MAJOR U.S. CITIES II] (describing the specific policy adopted by each city and county that has “banned the box”); NAT’L EMP’T LAW PROJECT, STATES ADOPT FAIR HIRING STANDARDS: REDUCING BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2012), *available at* <http://www.nelp.org/page/-/SCLP/ModelStateHiringInitiatives.pdf?nocdn=1>, *archived at* <http://perma.cc/0B5jPpjbc6> (describing the specific policy adopted by each state that has “banned the box”).

⁹⁴ Specifically, Atlanta, Georgia; Tampa, Florida; Canton, Ohio; Richmond, Virginia; and Kansas City, Missouri, all adopted ban the box policies in 2013. *See* MAJOR U.S. CITIES II, *supra* note 93, at 23–25.

⁹⁵ BOS., MASS., MUNICIPAL CODE § 4-7 (2005). In explaining the rationale for this policy, Boston observed that it is intended “to ensure that the persons and businesses supplying goods and/or services to the City of Boston deploy fair policies relating to the screening and identification of persons with criminal backgrounds” *Id.* at § 4-7.1.

⁹⁶ *See* Newark, N.J., Ordinance No. 12-1630, art. I, §§ II(e), III (Sept. 19, 2012).

2. *Positions that are Covered.*

Ban the box policies vary considerably in the breadth of positions covered. While policies typically exempt positions where employers are required, pursuant to federal, state, or local law, to conduct background checks,⁹⁷ there is variance in what other positions fall under the purview of the restrictions imposed by ban the box policies.

Many jurisdictions specifically delineate which positions are covered by their ban the box protections. For example, the policy in Richmond, Virginia, states that questions regarding an applicant's criminal conviction history are not permitted on initial applications for city employment, "except to the extent required by federal or state law or for positions that the City council, by resolution, has determined should not be subject to [the ban the box resolution]."⁹⁸ The positions excluded include jobs in law enforcement and positions involving social services and child welfare.⁹⁹ Baltimore has a policy requiring background checks for "positions of trust," which include, *inter alia*, senior positions within the municipal government, positions involving working with children, and positions where employees have access to sensitive information or financial resources.¹⁰⁰ For all other public employment within Baltimore, criminal history information "shall not" be required of applicants.¹⁰¹

3. *The Stage at Which Criminal History Information May be Considered.*

Perhaps the greatest divergence among ban the box policies is found in the stage of the applicant screening process at which jurisdictions permit employers to consider criminal background information. As noted above, while there are some policies that prevent employers from ever reviewing or considering criminal history information for select positions, in the vast majority of ban the box policies, employers may consider applicants' criminal history at some point in the screening process. The question is when.

In many jurisdictions, inquiry into criminal history information is limited to the very early stages of the screening process (i.e., the initial application and/or interview). For example, Austin's policy provides that "[t]he city will amend its employment application to no longer require disclosure of past criminal history during the initial job application process"¹⁰² The policy in New York City is similar: city agencies (with the exception of

⁹⁷ See, e.g., Richmond, Va., Resolution No. 2013-R 87-85 (Mar. 25, 2013).

⁹⁸ *Id.*

⁹⁹ *Id.* at 3-4.

¹⁰⁰ CITY OF BALTIMORE, ADMINISTRATIVE MANUAL, POSITIONS OF TRUST AM-237-1 (Feb. 3, 2008), available at <http://www.nelp.org/page/-/SCLP/BaltimorePolicyonPositionsofTrust.pdf?nocdn=1>, archived at <http://perma.cc/0PsSMJoTL5T>.

¹⁰¹ *Id.* at 3.

¹⁰² Austin, Tex., Resolution No. 20081016-012 (Oct. 16, 2008).

law enforcement) are barred from inquiring about applicants' criminal history only on the initial application or in the initial interview; employers are permitted to inquire about criminal history after the first interview has occurred.¹⁰³ A number of jurisdictions — including Newark, Hartford, and Cincinnati — go further, and do not permit inquiry or review of criminal history until an applicant is a finalist, deemed “otherwise qualified” for the position at issue, or has been extended a conditional offer of employment.¹⁰⁴

4. *Providing Guidance on How to Evaluate Criminal Record Information.*

The last area in which policies vary involves the level of guidance they provide to employers on the manner in which employers evaluate criminal history information. Some policies list specific criteria that employers should consider. For example, Baltimore's policy provides that when public employers are evaluating the criminal history information of applicants for “positions of trust,” arrest information cannot be considered and “[t]he presence of any criminal conviction may not be used as the sole basis for denying employment.”¹⁰⁵ It goes on to state that employers must consider the five following conditions when evaluating an applicant's criminal history: (i) the number and types of convictions, (ii) the seriousness of the crime(s) and the sentence(s) imposed, (iii) how recently the conviction(s) occurred, (iv) any evidence of rehabilitation, and (v) the specific conditions within the workplace.¹⁰⁶ Washington, D.C.'s policy has a similar list of factors employers must consider before rejecting an applicant because of her criminal history, but also requires that they consider the age of the applicant at the time she committed the criminal offense.¹⁰⁷

Many ban the box policies, however, are completely silent about the way in which employers should consider criminal history information. For example, the policy adopted by Austin, Texas, lauds the importance of making employment opportunities available for people with criminal convictions, but says nothing about the factors employers should consider when evaluating applicants with criminal histories.¹⁰⁸

¹⁰³ N.Y.C. Exec. Order No. 151, §§ 1, 2, 8 (Aug. 4, 2011). The policies in Detroit and Washington, D.C., are similar, with the latter prohibiting criminal history questions on initial applications for noncovered positions only. DETROIT, MICH., CITY CODE ch. 13, art. 1 (2010); D.C., CODE § 1-620.42(c) (2013).

¹⁰⁴ See, e.g., Newark, N.J., Ordinance No. 12-1630, art. I, § III; HARTFORD, CONN., MUNICIPAL CODE ch. 2, art. XVI, div. 6, § 2-385 (2009); Cincinnati, Ohio, Motion in Support of Fair Hiring (June 9, 2010).

¹⁰⁵ CITY OF BALTIMORE, *supra* note 100, at 4. .

¹⁰⁶ *Id.*

¹⁰⁷ D.C., STAT. § 1-620.43 (2013).

¹⁰⁸ See Austin, Tex., Resolution No. 20081016-012 (Oct. 16, 2008).

B. Limitations of Ban the Box Movement

Without doubt, ban the box policies have aided a large number of workers in their job search processes.¹⁰⁹ However, the above discussion of the differences in the policies demonstrates both their strengths and weaknesses, and highlights that the ban the box movement, by itself, is unlikely to serve as a panacea to those individuals with criminal records seeking gainful employment.

As an initial matter, a majority of the American workforce does not live in jurisdictions with ban the box protections. Although a growing number of cities and counties have adopted ban the box measures, nearly half the states have neither passed any ban the box legislation nor do they have any cities or counties where any such policies are in effect.¹¹⁰ Moreover, even in locations where ban the box policies are in effect, for the most part they cover only a subset of employers.¹¹¹ The gains made to include private employers in select jurisdictions are encouraging, but many workers (and potential workers) still remain uncovered.

Moreover, the mere presence of a ban the box policy does not guarantee that employers will consider criminal background information in a manner that complies with Title VII. Even in ban the box jurisdictions, employers retain substantial discretion in determining the weight they attach to an applicant's criminal record.¹¹² While ban the box policies are designed to encourage employers to keep an open mind when evaluating job candidates with criminal histories, employers may still be inclined to reject those applicants. It is also conceivable that ban the box policies may even, in some instances, be exploited by employers determined not to hire those with criminal records.

¹⁰⁹ It is difficult to know the exact number of job applicants with criminal records who have benefited from the plethora of ban the box policies that have been adopted across the country. Additional research about the extent to which ban the box policies have (i) successfully addressed the deterrent effect questions about criminal history on job applicants with criminal records, and (ii) led to an increase in the number of people with criminal records who are actually hired for positions, is necessary, and would provide further insight into the quantitative benefits gained through the ban the box movement.

¹¹⁰ Those states are Alabama, Alaska, Arizona, Arkansas, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, West Virginia, Wisconsin, and Wyoming.

¹¹¹ See, e.g., BOS., MASS., MUNICIPAL CODE § 4-7 (2005) (limiting the use of background checks for only those applying vendors who seek to do business with Boston); Cambridge, Mass., Ordinance No. 1312 (Dec. 13, 2007), available at http://nelp.3cdn.net/57c94570f908e0e549_b5m6bh1p8.pdf, archived at <http://perma.cc/06rZguixS2k> (amending an ordinance limiting the use of background checks for applicants to city government positions to include vendors with the city).

¹¹² See, e.g., Office of the Mayor: Special Programs, *Ex-Offender Re-entry Initiatives*, CITY OF CHICAGO, http://www.cityofchicago.org/city/en/depts/mayor/supp_info/ex-offender_re-entryinitiatives.html (last visited Oct. 17, 2013), archived at <http://perma.cc/0XSrGgpPfaE> (listing the variety of factors the city will consider on a case-by-case basis when evaluating an applicant with a criminal record).

For example, in Washington, D.C., where inquiry into an applicant's criminal history is not permitted until after the initial interview, an employer who has decided to reject an applicant because of her criminal history may use information uncovered during the interview as a pretextual justification for the decision to deny the applicant the position. In such a scenario, the applicant might never learn whether the true reason she was denied the job was because of her criminal record.

Further, for many ban the box jurisdictions, positions in law enforcement (e.g., police officers, firefighters) and those involving children are exempted. In Philadelphia, for example, the policy explicitly states that "criminal justice agencies," which include police departments and correctional facilities, are not required to apply any of the ban the box protections to their applicants.¹¹³ In New York City, positions in law enforcement as well as in the Division of Youth and Family Services of the Administration for Children's Services are excluded under the ban the box policy.¹¹⁴ Thus, in such jurisdictions, those employers remain free to adopt whatever criminal record policies they choose, even if they are overly broad and unnecessarily restrictive.¹¹⁵ Those employers may even point to the fact that they are excluded from the ban the box measure as justification to support their broad criminal records policies.

Of course, the more robust and inclusive the ban the box policy, the more likely it will be suited to address these problems. For example, a covered employer in Hartford, Connecticut, is not permitted to inquire about an applicant's criminal history until she has been extended a conditional offer of employment; thus, if the employer ultimately rejects the applicant, it will be clear that the decision was based on her criminal history. Such policies are preferable because they isolate the role that applicants' criminal records play in the job search process. An applicant who is rejected for a job in such a jurisdiction will know the manner in which her potential employer used her criminal history when evaluating her, and will be in a much better position to determine whether there are grounds to mount a Title VII challenge. Similarly, policies that provide instruction on how to evaluate criminal history information are also preferable because most employers probably lack train-

¹¹³ PHILA., PA., CODE §§ 9-3505(2), 9-3502(7) (2011).

¹¹⁴ N.Y.C. Exec. Order No. 151, § 8.

¹¹⁵ These concerns are not merely academic. The facts present in *Clinkscale v. Philadelphia* make clear that law enforcement departments often adopt criminal records policies that have very broad and far-ranging exclusions. One of the rationales justifying those policies is found in the court's opinion in *Clinkscale*, where it rejected a challenge to the Philadelphia Police Department's policy of rejecting applicants with criminal histories consisting solely of arrests that did not lead to convictions:

To give someone a badge, a gun, and — practically speaking — almost unlimited authority over his or her fellow citizens is a grave responsibility. In light of the serious public safety concerns at issue here . . . defendants' policy serves substantial and legitimate interests.

ing on how to perform such an analysis in a manner that is compliant with antidiscrimination laws.

As the ban the box movement continues to grow, it can be hoped that a policy like the one adopted by Newark is used as the model. That policy — which covers almost all employers, limits the types of positions for which criminal background checks can be conducted, permits a background check only after a conditional offer has been extended, and provides a long list of factors employers must consider when evaluating a criminal history — perhaps comes closest to providing the full range of protections necessary to ensure that people with criminal records are not unfairly denied employment solely because of their past. Such a policy also provides applicants with the tools necessary to use Title VII as another mechanism for making sure employers' policies are not unnecessarily restrictive.

But not all policies are like Newark's. And, even assuming that they were, they would still be insufficient to guarantee that all people with criminal records are not unfairly excluded from job opportunities and that employers are following the requirements of federal antidiscrimination law.

IV. THE EEOC'S ABILITY TO REFORM SYSTEMATICALLY THE WAY EMPLOYERS CONSIDER CRIMINAL HISTORY INFORMATION

As discussed above, the federal courts have erected a number of significant hurdles that operate to undercut plaintiffs' ability to use federal court litigation to succeed in challenging the disparate impact caused by employers' criminal records policies. And, the ban the box movement, though promising, is limited in the changes it can reasonably be expected to bring about. Fortunately though, there is another avenue civil rights advocates should consider: the EEOC. Although often overlooked or otherwise viewed as a bureaucratic roadblock, the EEOC has shown through recent actions that it is not only a venue where people with criminal records can find legal remedies, but also where meaningful systematic changes can be made to the ways in which employers use criminal records, without having to navigate the choppy waters that federal litigation presents.

This section begins by providing a brief overview of the EEOC and its role in handling allegations of employment discrimination. It then discusses how the EEOC has used its authority to address employers' criminal background check policies. It concludes with a discussion of additional ways advocates can, and should, work with the EEOC and use its administrative processes to continue to bring reform to this area of the law.

A. Background on the EEOC

The EEOC was created in 1965 as a vehicle for regulating and enforcing Title VII's guarantees of equal employment opportunity.¹¹⁶ Since Title VII operates as "a remedial scheme in which laypersons rather than lawyers, were expected to initiate the process,"¹¹⁷ the statute requires that individuals, before filing suit in court alleging a violation, first file a "charge of discrimination" with the EEOC.¹¹⁸ The EEOC is then tasked with investigating the charge to determine whether there is "reasonable cause" to believe that the complainant suffered discrimination due to an unlawful employment practice.¹¹⁹ If the EEOC does not make a reasonable cause determination, it nevertheless must provide the complainant with authorization — commonly referred to as a "right-to-sue letter" — to file a lawsuit on her own behalf.¹²⁰

In situations where the EEOC concludes that there is reasonable cause to believe that unlawful discrimination has occurred, it must, before issuing a right-to-sue letter, seek to remedy the harm "by informal methods of conference, conciliation, and persuasion."¹²¹ If the EEOC is unable to conciliate (i.e., resolve) the matter successfully, the EEOC can choose to file suit itself to rectify the alleged unlawful employment practice.¹²² Otherwise, it is required to issue a right-to-sue letter to the complainant.¹²³

Although Congress delegated broad responsibility to the EEOC for evaluating claims of discrimination, it narrowly prescribed the agency's rulemaking authority. Specifically, the only delegation of such authority that Title VII grants the EEOC relates to the issuance of "suitable procedural regulations."¹²⁴ The EEOC has no authority to issue rules regarding Title VII's substantive provisions.¹²⁵ While it has, despite (or perhaps because of) that limitation, issued "a dizzying array of arguably less formal documents including enforcement guidance, interpretive guidance, policy guidance, policy statements, technical assistance manuals, and compliance manuals,"¹²⁶ those documents have not traditionally been given a high degree of deference by the federal courts. In *Skidmore v. Swift & Company*,¹²⁷ the Supreme

¹¹⁶ See Emily J. Carson, *Off the Record: Why the EEOC Should Change its Guidelines Regarding Employers' Consideration of Employees' Criminal Records During the Hiring Process*, 36 J. CORP. L. 221, 224 (2010) ("Title VII created the EEOC, and Congress intended the EEOC to be the lead enforcement agency in the area of workplace discrimination.") (internal quotation marks and citation omitted).

¹¹⁷ EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 124 (1988).

¹¹⁸ 42 U.S.C. § 2000e-5(f)(1) (2006).

¹¹⁹ 42 U.S.C. § 2000e-5(b) (2006).

¹²⁰ 29 C.F.R. § 1601.19(a) (2006).

¹²¹ 42 U.S.C. § 2000e-5(b) (2006).

¹²² *Id.*

¹²³ 29 C.F.R. § 1601.28(b)(1) (2010).

¹²⁴ 42 U.S.C. § 2000e-12 (2006).

¹²⁵ See *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 122 (2002) (O'Connor, J., concurring).

¹²⁶ Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1942 (2006).

¹²⁷ 323 U.S. 134 (1944).

Court held that the deference courts need to afford the policy documentation promulgated by the EEOC is determined based on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”¹²⁸ This is contrasted with the far more deferential standard the federal courts apply in situations where administrative agencies have congressional authorization to interpret statutes.¹²⁹

B. *The EEOC's Recent Efforts*

The EEOC has previously attempted to use its authority to provide guidance to employers on how they can consider criminal history in a manner that does not conflict with Title VII. In 1987, when now Supreme Court Justice Clarence Thomas was chair, the EEOC released a policy statement stating that employers were required to show they considered the three *Green* Factors — the nature and gravity of the offense or offenses, the time that has elapsed since the conviction, and the nature of the job — in order to establish that the employment decision was justified by business necessity.¹³⁰ Three years later, the EEOC issued another policy guidance document explaining that policies considering arrest records should also, in addition to the requirements laid out in *Green*, require employers to undertake an investigation to determine whether the applicant actually committed the conduct alleged in her arrest. The EEOC explained that unlike convictions, arrest records “are not reliable evidence that a person has actually committed a crime,” and so employers need to undertake an additional inquiry to determine whether it is likely that the applicant was in fact involved in the unlawful conduct.¹³¹

¹²⁸ *Id.* at 140.

¹²⁹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

¹³⁰ *EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Feb. 4, 1987), <http://www.eeoc.gov/policy/docs/convict1.html>, archived at <http://perma.cc/02wmU6Rb4Hn>. That same year, the EEOC issued another policy statement concerning the use of statistics in cases involving criminal records policies. It explained that plaintiffs could rely on broad statistical data (i.e., nation- or region-wide evidence) to meet their prima facie case of discrimination, especially in situations where employers' policies excluded all people with criminal records from being employed for certain positions. *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 29, 1987), <http://www.eeoc.gov/policy/docs/convict2.html>, archived at <http://perma.cc/0LcroGZrjGL>.

¹³¹ *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Sept. 7, 1990), http://www.eeoc.gov/policy/docs/arrest_records.html, archived at <http://perma.cc/0wJRAo8Vh14>. The reasoning in these policy statements was subsequently incorporated into the EEOC's Compliance Manual. EEOC, COMPLIANCE MANUAL SECTION 15: RACE & COLOR DISCRIMINATION (2006), available at <http://www.eeoc.gov/policy/docs/race-color.pdf>, archived at <http://perma.cc/05BWJRs2HY2>.

Yet, while a few courts were deferential to the EEOC's policy statements, many others ignored or rejected them. For example, when the court in *Clinkscale* affirmed the Philadelphia Police Department's consideration of applicants' arrest histories, it did not even reference the EEOC's 1990 policy statement on arrest records.¹³² Even more damning was the Third Circuit's treatment of the EEOC's policy statements in *El*. There, the Third Circuit explained that the EEOC's guidelines were not "entitled to great deference" under *Skidmore* since the EEOC simply adopted, without much explanation or detail, the Eighth Circuit's holding in *Green*, rather than conducting its own independent analysis of Title VII's limitations on employers' criminal records policies.¹³³

The Third Circuit was not alone in criticizing the EEOC's policy statements. Many civil rights advocates had also raised concerns about the EEOC's written pronouncements on employers' criminal records policies.¹³⁴ A number of groups highlighted that the EEOC's policy statements did not reflect current realities about the ways in which employers were using criminal history information when screening applicants.¹³⁵ There were also calls for the EEOC to adopt guidance that was far more robust.¹³⁶ For example, the ACLU urged the EEOC to "make clear that employers may not delegate employment decisions to a background checking company," and encouraged the EEOC to adopt several other factors (in addition to the *Green* Factors) for employers to consider.¹³⁷

Thus, it is highly noteworthy that in April 2012, the EEOC waded back into this territory by releasing updated guidelines on employers' use of arrest

¹³² See *Clinkscale v. Philadelphia*, No. 97-2165, 1998 WL 372138, at *1 (E.D. Pa. June 16, 1998).

¹³³ *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 243-44 (3d Cir. 2007).

¹³⁴ *Striking the Balance Between Workplace Fairness and Workplace Safety*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 26, 2011), <http://www1.eeoc.gov/eeoc/newsroom/release/7-26-11.cfm?renderforprint=1>, archived at <http://perma.cc/0hvFANtNQci> (discussing a meeting held at the EEOC's headquarters where witnesses testified about needed reforms in the EEOC's guidance on arrest and conviction records); see also Letter from Maurice Emsellem, Policy Co-Director, NELP, and Madeline Neighly, Staff Attorney, NELP, to the Equal Emp't Opportunity Comm'n, EEOC Enforcement of Title VII Protections Regulating Criminal Background Checks (July 26, 2011), available at http://nelp.3cdn.net/3e4e39d1b8aeef7a22_fm6vr1c7.pdf, archived at <http://perma.cc/0vPsHwmXwH8>; Letter from Johnathan J. Smith, Assistant Counsel, NAACP Legal Def. & Educ. Fund, Inc., to the Equal Emp't Opportunity Comm'n, Commission's July 26th 2011 Meeting Regarding Arrest and Conviction Records as Barriers to Employment (July 25, 2011), available at http://www.naacpldf.org/files/case_issue/2011-07-25%20Letter%20from%20LDF%20to%20EEOC%20re%207.26.11%20Meeting%20on%20Arrest%20and%20Conviction%20Records.pdf, archived at <http://perma.cc/0z7KfgycTJt>.

¹³⁵ See Emsellem & Neighly, *supra* note 134; Smith, *supra* note 134.

¹³⁶ See, e.g., Carson, *supra* note 116, at 227-29.

¹³⁷ Email from Laura W. Murphy, Dir., Washington Legislative Office, Deborah J. Vagins, Senior Legislative Counsel, and Ariela Migdal, Senior Staff Attorney, Women's Rights Project, ACLU, to the Equal Emp't Opportunity Comm'n, EEOC Enforcement of Title VII Protections Regulating Criminal Background Checks (July 25, 2011), available at https://www.aclu.org/files/assets/aclu_statement_to_eeoc_on_criminal_records_discrimination_7_25_11_corrected.pdf, archived at <http://perma.cc/0YCKHPn5huJ>.

and conviction records.¹³⁸ Heeding the Third Circuit's criticism in *El* that its guidance needed to be more detailed, the EEOC promulgated guidance, which spans over fifty pages, that grapples with both the intricacies involved in employers' consideration of criminal history information and Title VII's antidiscrimination provisions. While the updated guidance still encourages employers to develop policies that include the three *Green* Factors — (i) the nature and gravity of the criminal conduct, (ii) the time that has elapsed since the criminal conduct occurred, and (iii) the nature of the job sought — it also provides greater detail about why those factors are important,¹³⁹ and the ways in which employers can consider those factors when evaluating candidates. In addition to those factors, the EEOC's guidance recommends employers include, as part of their criminal records policies, "individualized assessments." According to the EEOC:

Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.¹⁴⁰

¹³⁸ See EEOC, ENFORCEMENT GUIDANCE NO. 915-02, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 8 (2012), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf, archived at <http://perma.cc/0PUfqddovdX> [hereinafter ENFORCEMENT GUIDANCE].

¹³⁹ For example, recently published scientific research on recidivism risks among people with criminal records provides powerful evidence that employers are not justified in promulgating overly broad criminal records policies. The results from one study, which analyzed the future criminal histories of adults in New York State who were arrested for the first time as adults, led the researchers to conclude that there may be a "point of redemption," where the likelihood that a person with a criminal record will commit another crime is essentially equal to the likelihood that a person with no criminal history will commit a crime. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 349–50 (2009). In 2012, the researchers updated their research by looking at additional data sets from New York, Florida, and Illinois; the findings were consistent with their initial results. See ALFRED BLUMSTEIN & KIMINORI NAKAMURA, EXTENSION OF CURRENT ESTIMATES OF REDEMPTION TIMES: ROBUSTNESS TESTING, OUT-OF-STATE ARRESTS, AND RACIAL DIFFERENCES 39 (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>, archived at <http://perma.cc/02LV2GMn7wx>. Another study of males in Wisconsin reached a similar result: the researchers found that "if a person with a criminal record remains crime free for a period of about 7 years, his/her risk of a new offense is similar to that of a person without any criminal record." This research provides powerful evidence that a policy such as one with lifetime or other long-term bans, which would exclude an applicant with a criminal record even after the "point of redemption" has been reached, cannot be justified as consistent with business necessity. Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 80 (2007).

¹⁴⁰ ENFORCEMENT GUIDANCE, *supra* note 138, at 17. The EEOC also provides a nonexhaustive list of evidence that an applicant should be permitted to provide during the individualized assessment, which include: (i) evidence that the applicant is misidentified in the criminal record, or the record is otherwise incorrect; (ii) the factual details surrounding the criminal conduct; (iii) evidence that the applicant has previously performed the type of work required

While the guidance explains that individualized assessments are not always required by Title VII, their use “can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.”¹⁴¹

The EEOC’s promulgation of this updated guidance — and in a bipartisan fashion¹⁴² — not only highlights the agency’s commitment to addressing employers’ use of criminal records policies, but also its willingness to serve as a leader on this issue. Since the guidance has been issued, the EEOC has used its bully pulpit to advocate that employers adopt criminal records policies that are consistent with Title VII’s mandates. And its actions are making a tangible difference: since the guidance has been issued, a number of organizations that work with employers and human resources professionals have encouraged their members to revisit, and if necessary, revise, their criminal records policies.¹⁴³

Furthermore, the EEOC has made clear that its ability to regulate these policies is not limited to issuing enforcement guidance. It has also been aggressively using its administrative enforcement process as a mechanism to reform employers’ criminal records policies. For example, in January 2012, the EEOC entered into a settlement with Pepsi Beverages (“Pepsi”) after an investigation found that hundreds of African Americans were denied employment due to a criminal records policy that, inter alia, rejected applicants who had been arrested or convicted for minor offenses.¹⁴⁴ In addition to paying millions of dollars to the affected applicants, Pepsi revised its criminal records policy so that it complied with Title VII.¹⁴⁵

The EEOC entered into a similar settlement with J.B. Hunt Transport, Inc. (“J.B. Hunt”), one of the largest transportation companies in the coun-

for the position at issue without any incidents of criminal conduct; (iv) the applicant’s overall employment history; (v) the applicant’s efforts at rehabilitation; or (vi) references offered by the applicant that speak to his ability to perform the position at issue successfully. *Id.*

¹⁴¹ *Id.*

¹⁴² *EEOC Issues Enforcement Guidance: Commission Updates Guidance on Employer Use of Arrest and Conviction Records*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Apr. 25, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/4-25-12.cfm>, archived at <http://perma.cc/0FAQcuLzvKf> (observing that the Commission voted 4-1 to approve the new enforcement guidance).

¹⁴³ See, e.g., Lynn Davisson, *What You Need to Know About the New EEOC Guidance on Arrest or Conviction Records*, THE CONTINGENT WORKPLACE: A STAFF MANAGEMENT SMX BLOG (June 8, 2012), <http://blog.staffmanagement.com/index.php/2012/06/08/what-you-need-to-know-about-the-new-eeoc-guidance-on-arrest-or-conviction-records/>, archived at <http://perma.cc/09i8XYb5uHz>; *EEOC Issues New Guidance on the Use of Criminal Background Checks by Employers*, JONES DAY (May 2012), http://www.jonesday.com/eeoc_issues_new_guidance/, archived at <http://perma.cc/0iM8G1fyKRT>.

¹⁴⁴ *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Jan. 11, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>, archived at <http://perma.cc/0VfwDetidmj>.

¹⁴⁵ *Id.*

try, in June 2013.¹⁴⁶ There, the EEOC concluded that J.B. Hunt did not have a valid business necessity defense when it denied an African American job applicant a position as a truck driver due to his criminal history. Under a settlement agreement reached in the EEOC's conciliation process, J.B. Hunt agreed to review and revise its criminal records policy as well as provide additional training to its hiring personnel. The EEOC estimated that approximately 14,000 J.B. Hunt employees nationwide would be affected by the settlement.¹⁴⁷ Both of these settlements demonstrate how the EEOC can use its authority not only to benefit individual complainants, but also to bring about substantive reforms.

The EEOC has also appeared increasingly willing to use its authority, in instances where conciliation is not successful, to bring legal actions challenging employers' criminal records policies. In June of 2013, the EEOC filed two lawsuits against employers whose criminal records policies it alleged had a disparate impact on African Americans. In the first action, the EEOC alleged that the policy used by BMW Manufacturing Co., LLC ("BMW") had an adverse impact on African American applicants and employees at one of its manufacturing facilities in South Carolina.¹⁴⁸ BMW's policy, which excludes individuals with a wide range of felony and misdemeanor convictions, no matter how far in the past they occurred, resulted in nearly ninety workers, the vast majority of whom were African Americans, losing positions at the South Carolina plant.¹⁴⁹ In its complaint, the EEOC alleged that BMW's policy violates Title VII because it results in the termination and/or exclusion of applicants or employees "without any individualized assessment" of the *Green* Factors or consideration of the fact that many of the individuals had a long history of successfully working at the South Carolina plant without incident.¹⁵⁰

The second action is a challenge to the criminal records policy used by nationwide realtor Dollar General.¹⁵¹ Under Dollar General's policy, once an applicant receives a job offer, the company conducts a criminal background check to determine whether the applicant's criminal history falls into a "matrix" that could require that the employment offer be rescinded if the applicant has been convicted of certain offenses within specified time periods.¹⁵² The EEOC contended that this policy also violates Title VII because, *inter alia*, it does not include consideration of all the *Green* Factors and does not allow for any individualized assessment.¹⁵³ The EEOC cited applicant flow

¹⁴⁶ *J.B. Hunt Agrees to Settle EEOC Race Discrimination Case Regarding Criminal Conviction Records*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (June 28, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/6-28-13c.cfm>, archived at <http://perma.cc/0xa8eWmUVYf>.

¹⁴⁷ *Id.*

¹⁴⁸ EEOC v. BMW Mfg. Co., LLC, No. 13-1583 (D.S.C. June 11, 2013).

¹⁴⁹ Complaint ¶¶ 19–24, *EEOC v. BMW Mfg. Co.*, No. 13-1583.

¹⁵⁰ *Id.* ¶ 23.

¹⁵¹ EEOC v. Dolgencorp, No. 13-4307 (N.D. Ill. June 11, 2013).

¹⁵² Complaint ¶¶ 12–13, *Dolgencorp*, No. 13-4307.

¹⁵³ *Id.* ¶¶ 13–14.

data it received as evidence that the policy has had an adverse impact on African Americans.¹⁵⁴

Both of these cases will provide an opportunity for federal courts to weigh in on the EEOC's new guidance, and will provide some perspective on how much deference judges are inclined to give to the EEOC's recent pronouncements. But they also highlight the aggressive posture the EEOC has adopted. These cases, which were filed the same month the EEOC announced its settlement with J.B. Hunt, make clear that in situations where the conciliation process is unsuccessful, the EEOC will consider litigation.

C. Ways Civil Rights Advocates Can Use the EEOC to Combat Overly Broad Criminal Records Policies

The EEOC's recent effectiveness rests on the fact it has a multitude of tools it can use to implement change (e.g., issuing policy statements or enforcement guidance, using its administrative enforcement process, and bringing civil litigation). Civil rights advocates should follow the EEOC's example, and also use these tools to continue to make changes in this area of the law.

For example, advocates should use the EEOC's administrative enforcement process as a critical mechanism for achieving meaningful reform. Instead of merely viewing the process of filing charges as a jurisdictional hurdle to overcome before filing suit in court, advocates need to recognize that they may be able to achieve greater results from the EEOC's administrative process than from litigation. As the Pepsi and J.B. Hunt settlements make clear, employers may be willing to engage in the conciliation process and negotiate agreements that involve making substantial changes to their criminal records policies.

This is not to say that the EEOC's administrative enforcement process provides a perfect remedy. Complainants often wait months — if not years — for the EEOC to address their complaints, and this delay may cause individuals who have been harmed by overly broad criminal records policies to overlook the EEOC as a possible avenue for redress. There are a number of steps advocates can take to advance the cause of individuals suffering employment discrimination due to their criminal histories. Even though the EEOC is undeniably burdened by an ever-growing caseload,¹⁵⁵ advocates should continue pushing the EEOC to improve its mechanisms for quickly reviewing charges, especially those involving criminal background check

¹⁵⁴ *Id.* ¶ 15.

¹⁵⁵ In fiscal year 2012 alone, the EEOC received nearly 100,000 charges of discrimination. *Charge Statistics*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited July 24, 2013), *archived at* <http://perma.cc/0SUNAVMnBP3>.

policies.¹⁵⁶ Relatedly, they can proactively engage the investigators and attorneys in the EEOC's regional offices so they are fully aware of the EEOC's updated guidance. They can also flag those provisions of employers' policies that depart from the guidance. And while navigating the EEOC's processes may be frustrating, advocates should remember that litigation can be a lengthy process as well, and that the level of tangible success resulting in that forum pales in comparison to the recent reforms that have come about due to the EEOC's administrative enforcement process.

Obviously, not all charges will be resolved through the EEOC's internal processes, and civil rights advocates will continue to need to rely on Title VII disparate impact litigation to challenge employers' criminal records policies.¹⁵⁷ But even here, the EEOC can serve as a useful ally; the EEOC's updated guidance can serve as a resource that plaintiffs can rely on when litigating their claims. The guidance combines the lessons learned from cases such as *El* and *Green* and provides a roadmap to a future in which the success rate of Title VII disparate impact claims challenging criminal records policies — if properly pled and carefully litigated — may fare better in federal courts. For example, the references in the guidance to the recent research on “redemption time” may be used to combat the business necessity defense mounted by employers who have policies that do not contain any time limitations.¹⁵⁸ And, although the EEOC's recent guidance has not yet been scrutinized by a court, there is reason to be cautiously optimistic that courts will determine that it is entitled to a considerable level of deference. The guidance document evinces a high level of detail and care, and meets many, if not all, of the factors laid out by the Supreme Court in *Skidmore*.

Civil rights advocates should encourage the EEOC to promulgate additional guidance about how employers' criminal records policies can comply with Title VII. It would be useful, for example, for the EEOC to provide additional insight into how it believes individualized assessment falls into Title VII's burden-shifting framework for disparate impact claims.¹⁵⁹ Similarly, while the EEOC has recognized that ban the box policies are good

¹⁵⁶ Advocates can use the EEOC's recently announced statement that it intends to prioritize remedying discriminatory policies and practices that have a substantial impact on the American workforce, STRATEGIC PLAN, *supra* note 13, at 13–14, to push the agency to continue making improvements to the way charges involving allegations of discriminatory criminal records policies are handled.

¹⁵⁷ See Michael Connert, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1007 (2011) (“Title VII’s disparate impact theory of discrimination remains the main legal mechanism by which an ex-offender (from a traditionally protected class) can challenge adverse employment actions on the basis of a non-job-related criminal conviction.”).

¹⁵⁸ See ENFORCEMENT GUIDANCE, *supra* note 138, at 13 n.118.

¹⁵⁹ To date, no court has yet addressed the effect, within the context of Title VII, an individualized assessment requirement has on an employer's criminal records policy.

practices,¹⁶⁰ it could go further and issue a policy statement fully embracing the movement and addressing how the continued expansion of ban the box policies can aid Title VII litigants challenging criminal records policies.¹⁶¹ If courts do ultimately decide that the EEOC's recent guidance is entitled to significant deference under *Skidmore*, the guidance will provide a framework for how the EEOC can structure policy documents going forward.

Relatedly, advocates need to renew their efforts to lobby Congress to provide the EEOC with rulemaking authority. Without this power, the EEOC's guidance will always be subject to the whims of federal judges, and the EEOC will be shackled in its ability to use its expertise and experience to ensure that Title VII continues to develop in a manner that ensures individuals are not unfairly and unnecessarily denied employment opportunities. But even without that statutory authority, advocates should continue encouraging the EEOC to issue enforcement guidance, policy statements, and other documents about criminal records policies. Not only can these documents serve as powerful aids for Title VII litigants, but they can also be used to educate employers about how to revise their policies so that they are not unfairly excluding qualified applicants who would make positive contributions to the workforce.

CONCLUSION

The experiences of people like Ayanna Spikes demonstrate the host of challenges that individuals with criminal records face in the employment context. The ban the box movement has been extraordinarily successful and deserves credit for making tremendous progress in mitigating the challenges faced by those individuals, especially given the difficulties in litigating challenges to employers' criminal records policies under Title VII's disparate impact provision. However, the excitement over ban the box should not eclipse the role that the EEOC has played, and can continue to play, in vindicating the rights of people with criminal records, especially those who belong to protected classes. The EEOC has demonstrated that it has a number

¹⁶⁰ ENFORCEMENT GUIDANCE, *supra* note 138, at 13–14 (recommending as a best practice, and consistent with applicable laws, that employers not ask about convictions on job applications).

¹⁶¹ For example, enacted ban the box policies may serve as another source for challenging employers' business necessity defenses. As discussed above, a number of the ban the box policies, such as the one adopted by Baltimore, provide restrictions on the types of positions for which background checks are required. These policies send the message that criminal history information is simply not relevant for all positions. And to the extent private employers in those jurisdictions are performing background checks on similar positions, there is an argument that can be made that the information employers are purportedly trying to gain through the criminal records screening is not job related or consistent with business necessity. See Henry & Jacobs, *supra* note 85, at 758 ("If cities successfully demonstrate that ex-offenders can be safely hired for most public sector jobs . . . private employers' discrimination against ex-offenders could come to be viewed as invidious and unreasonable.").

of tools at its disposal to combat policies that are overly broad and unnecessarily restrictive, and advocates would be wise not to forget that the EEOC can be a powerful and effective ally.