

Court Orders EEOC To Pay Employer Nearly \$1 Million In Attorneys' Fees And Costs, Finds EEOC Pursued Case Long After It Was Clear That It Lacked Merit

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Employers often criticize the EEOC's position on employers' use of background checks in the application process as increasing exposure for disparate treatment claims from applicants and as being willfully blind to legitimate business concerns related to having convicted individuals in the workplace (for example, the risk of having a crime occur at a work site that impacts safety). Under the EEOC's guidance, to comply with Title VII, employers must conduct a case-by-case analysis of the results of the applicants' criminal background checks and must weigh certain factors, including the severity of the offense(s), the date(s) of the offense(s), and the job-relatedness of the offense(s). Further, employers must provide applicants an opportunity to provide any mitigating circumstances for consideration (this practice is also consistent with the Fair Credit Reporting Act, which applies to the use of background checks, as well.) However, in a **recent case**, a federal district court awarded a company nearly \$1 million in attorneys' fees from the EEOC for unreasonably pursuing a background check case against a company based upon the EEOC's use of "inexplicably shoddy" statistical evidence. The case emphatically underscores the fact that, to maintain a Title VII case related to background check policies, the EEOC must **first** show – with **reliable** statistical evidence – that a background check policy has a disparate impact on a protected group before a court will require an employer to even show that the policy is job-related and consistent with business necessity. It remains to be seen whether this award will slow the EEOC's enforcement efforts against companies on this issue, but the case does provide additional fodder for

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employers looking to defend such charges and lawsuits, as well as to attorneys looking to quantify settlement potential in pending cases.