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EEOC Inquiring into Employer Practice of Not Hiring Out-of-Work Job Applicants

By Michael Mishlove, Esq.

In a public meeting held on February 16, 2011, the U.S. Equal Employment Opportunity Commission examined what an EEOC press release described as an "emerging practice of excluding unemployed persons from applicant pools." EEOC Press Release, *Out of Work, Out of Luck*, Feb. 16, 2011. The meeting was held at the urging of over fifty members of Congress from both sides of the aisle, who sent a letter to EEOC Chair Jacqueline Berrien in November 2010, recounting that "[a]ccording to various news reports, employers are posting advertisements stating: 'must be currently employed' or 'no unemployed candidates will be considered at all.'" The letter notes that in October 2010, the Bureau of Labor Statistics reported a national unemployment rate of 9.6%, with unemployment rates for whites, African-Americans, and Hispanics being, respectively, 8.8%, 15.7%, and 12.6%. The members of Congress called upon Chair Berrien to investigate "how this discriminatory practice can have an adverse impact on minority groups and be an unnecessary barrier to employment for minorities" and to "issue a statement detailing that discriminating against the unemployed could be illegal if it has a disparate impact on minority groups."

Several panelists at the meeting indicated that women and individuals with disabilities are also overrepresented among the unemployed, and echoed the Congress members' request for EEOC guidance and enforcement activity to address any unlawful disparate impact of using employment status as a hiring factor. Other panelists, however, did not share the view that this practice was either common or growing. A representative of the Society for Human Resource Management stated, "SHRM is unaware of widespread recruiting practices that involve blanket exclusions of

the unemployed." *Written Testimony of Fernan R. Cepero*.

The EEOC's meeting on unemployment discrimination falls close on the heels of the agency's meeting in October 2010, which examined employer use of credit history as a screening tool. Two months later, in December 2010, the EEOC commenced a class action lawsuit against Kaplan Higher Education Corporation, alleging the company engaged in a pattern or practice of unlawful discrimination based on its use of credit histories as an employment selection criterion, which allegedly had an unlawful race-based disparate impact.

Prior to the October 2010 meeting, the EEOC had also held a meeting in May 2007, in which the agency examined the use of credit history as an employment screening criterion as well as the use of a variety of other employment testing and screening devices, including basic literacy tests, personality tests, and medical and fitness tests. The May 2007 meeting was held just as the agency was settling a significant nationwide class action complaint alleging disparate treatment based on the use of employment testing instruments.

Indeed, employers that routinely administer basic aptitude tests as part of their employment screening process without having considered whether the test is truly job-related and consistent with business necessity ought to be mindful of *EEOC v. Ford Motor Co. and United Automobile Workers of America*, Case No. 04-cv-00845 (S.D. Ohio, June 16, 2005), which involved a nationwide class action brought by the EEOC on behalf of African-Americans who were rejected for an apprenticeship program after taking a cognitive test that measured verbal, numerical, and spatial reasoning. The test had a disparate impact in its exclusion of African-American applicants, and although less discriminatory selection procedures were available that would have served Ford's needs, the company did not change its testing procedure. In settlement of the charges brought by the EEOC, Ford agreed to replace the test and to pay $8.55 million in monetary relief. And, employers that routinely list "high school diploma" as a job requirement ought to bear in mind that the doctrine of "disparate impact" discrimination was originally recognized by the Supreme Court precisely in a case alleging the employer discriminated against African-Americans by requiring a high school diploma.

The point of all this is to say that when the EEOC gets to the point of holding public matters on issues such as this it usually is an indication that some sort of enforcement action may be afoot. Indeed, a review of the statements made by EEOC members and the testimony of invited panelists at these meetings make it clear that the EEOC is actively and vigilantly examining all manner of hiring practices to identify practices that may operate as barriers to employment that disproportionately affect minorities, women, and individuals with disabilities.

So, although employment screening practices such as background checks, credit history checks, and literacy/math testing are commonplace, employers are well-advised not to use such devices indiscriminately and without ensuring that they are properly

validated for the positions and purposes for which they are used. Any selection test must be job-related and consistent with state and federal employment laws. Needless to say, as a threshold determination, employers should consult with their counsel or otherwise ascertain that there is no express state or federal prohibition against use of the selection criterion. In addition, prior to utilizing such devices, employers should clearly define what it is that they are looking for and what the qualification/disqualification criteria will be with respect to any particular screening device. Use of an instrument with vaguely defined scoring/qualifying is an invitation to subjective and inconsistent decision making, which, in turn, is an invitation to unnecessary expenditures incurred in connection with the defense of a discrimination claim.

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