mits termination for any failed drug test, despite no indication that the employee was ever impaired or under the influence at work. Was the employer within its rights? What can the employee do and how might an employer defend an action?

Presently, there is no specific law in Maryland, D.C., or Virginia which specifically prohibits an employer from disciplining, including terminating, an employee who uses marijuana recreationally or who fails a drug test. (And, as noted above, it's not even clear if the laws in Maryland or D.C. protect medical marijuana users from employment decisions related to the use of medical marijuana.) There are also no laws in these jurisdictions which prohibit a zero-tolerance drug policy. An employee's options are thus quite limited. If not all employees caught using marijuana were treated equally, the employee might have a discrimination claim. Even if those facts do not exist, the employee still might be able to bring a wrongful or abusive termination claim against the employer.

As noted above, both Maryland and D.C. recognize a public policy exception to the employment at-will doctrine, meaning that employers have to consider whether specific rights to use medical marijuana and to possess marijuana for recreational use are clear mandates of public policy. If they are, and an employee is terminated for lawful marijuana use or possession, an employee could conceivably bring a wrongful or abusive termination claim based on the violation of public policy. Maryland has decriminalized, as opposed to legalized, recreational possession of small amounts of marijuana, but the employee could argue that decriminalization equates to a public policy of the State that personal use of marijuana is not to be penalized. If an employer can terminate an employee for exercising his or her right to use marijuana, implicitly forcing the employee to give up a lawful right outside the workplace or face disciplinary action at work, this could be claimed to violate public policy. However, the employer could just as forcefully argue that since federal law continues to criminalize possession of marijuana, and Maryland has not legalized recreational use of marijuana (it decriminalized it), it has a right to maintain a drug-free workplace and no enforceable public policy exists to support a wrongful discharge claim. This may not be a particularly strong claim for an employee, but employers should be aware of such a possible claim. Similarly, the same situation could arise in context of the use of medical marijuana where the public policy argument in favor of an employee may be stronger.

Ultimately, this is probably a push given the state of the law and its development. To help avoid this situation, one practical solution might be to adapt policies to the changing social and political views on marijuana use and revise applicable drug use and testing policies to account for the fact that marijuana (specifically, THC) can remain in an employee's system for days after its effects have worn off. Then, an employer could institute a progressive discipline or testing regimen specific to marijuana.

There are a myriad of other potential scenarios that an employer might face under the new marijuana use laws or enforcement policies. Everyone involved in these situations should keep abreast of the changing laws, especially when the employers involved are multi-state employers, and continually reevaluate policies and actions in light of changes or new legislation.

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[i] *See* Memorandum, Guidance Regarding Marijuana Enforcement, August 29, 2013, available at http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf

[ii] According to the DEA, "Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence. Some examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote[.]"

[iii] Courts have taken note of the developments in state law and federal enforcement, however, when making rulings. *See*, e.g., *United States v. Dayi, 980 F. Supp.* 2d 682, 687 (D. Md. 2013) (in a criminal case, specifically discussing changes at the state and federal level when determining sentencing).

[iv] Of course, the situation would only get this far if there were no other reasonable accommodation which could be provided, such as paid leave, an alternative drug, a scheduling change, etc.

[v] This may not end the reasonable accommodation inquiry, however, as the next question would be whether the employer could provide unpaid leave as an accommodation during the period when medical marijuana was prescribed and used.

EEOC LOSES A FOURTH CIRCUIT CASE ON BACKGROUND CHECKS

By Hope B. Eastman, Paley Rothman

Equal Employment Opportunity Commission v. Freeman, No. 13-2365, 2015 WL 728038 (4th Cir. Feb. 20, 2015) deals with the EEOC position on background checks. In this case, the Court of Appeals rejected the report of the EEOC's expert, Kevin Murphy, introduced to show disparate impact. Finding that without Murphy's report the EEOC had failed to make a prima facie case of discrimination, the Court of Appeals upheld the District Court's summary judgment for the defendant. With this decision the Fourth Circuit joins the Sixth Circuit, which in *EEOC v. Kaplan Higher Education Corp,* 748 F.3d 749 (6th Cir. 2014), also rejected the work of Dr. Murphy for similar reasons.

Some history is in order. The allegations against Freeman were that Freeman engaged in a pattern or practice of discrimination against African-American job applicants by using credit history and against African-American, Hispanic, and male job applicants by using criminal background checks, alleging that both have a significant disparate impact. Freeman used credit checks for credit sensitive jobs and criminal background checks for all others. Typically background checks were run after the applicant was offered and accepted a position, but before he or she began work. Freeman only looked back seven years for possible convictions, ignored any arrests that did not result in a conviction or guilty plea, focused primarily on criminal conduct involving violence, destruction of private property, sexual misconduct,

or felony drug convictions, and required a two-level review before a decision to disqualify was made. Although the District Court opinion by Judge Titus focused primarily on the failings of the expert report, the Judge expressed the opinion in a footnote that Freeman's policy seemed "reasonable and suitably tailored to its purpose of ensuring an honest workforce." *EEOC v. Freeman,* 961 F. Supp. 2d 783, 788 n.3 (D. Md. 2013).

Noting that a disparate impact case must be based on "reliable and accurate statistical analysis performed by a qualified expert" to demonstrate disparate impact, Judge Titus looked closely at the expert report relating to the Freeman workforce. He bluntly rejected admission of the report, using strong language. In doing so, he concluded the report contained a "plethora of errors and analytical fallacies," rendering Murphy's conclusions "completely unreliable." Judge Titus further commented that the database contained a "mind-boggling number of errors." He also rejected the EEOC's argument that the case could go forward based on the EEOC's proffered national statistics. He ruled that the case could not go forward without workforce appropriate statistics or a valid expert analysis and further pointed out that the EEOC had failed to isolate a specific employment practice of the defendant that allegedly caused the disparate impact. The Court of Appeals addressed the report issue and national statistics and also held that the EEOC had failed to make a prima facie case and, therefore, the case could not proceed.

A highly pointed concurring opinion by Judge G. Steven Agee of the Court of Appeals expressed distress at the EEOC's conduct in the case, cautioning that the "EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress, as its "significant resources, authority, and discretion" will affect all "those outside parties they investigate or sue." "The Commission's conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences for failing to do so." Judge Agee also excoriated the expert report. He drew on language that the Sixth Circuit had used to reject Murphy's report and testimony, i.e., that his methodology "flunked every test used to assess expert reliability." *Id.* at 752. Judge Agee went on to quote the Sixth Circuit's view that Murphy's testimony and report amounted to "a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself." *Id.* at 754. He then concluded that the Sixth Circuit description "describes the EEOC's expert evidence in this case to a tee." In light of the EEOC's long interest in limiting the use of background checks, it is astonishing that the EEOC continued for so long to rely on such sloppy expert work. The EEOC, finally, has brought in different experts for its future work.

Neither the Fourth Circuit nor the Sixth Circuit have ruled on the merits of the EEOC's position on background checks. In the final footnote of its opinion, the Fourth Circuit emphasized that it expressed no opinion on the merits of the EEOC's claims. Given that this issue has been at the forefront of EEOC efforts to eliminate barriers to employment, it is not surprising that it continues to bring suits on this issue. Two to watch are pending in South Carolina and Illinois. It will be interesting to see, as the cases proceed in 2015, whether the EEOC approaches them differently.

The EEOC has been concerned with the issue of credit and criminal background checks since the early days of Title VII and it has been a priority for the Obama Administration. In 2011, U.S. Attorney General Eric Holder assembled a Cabinet-level Interagency Reentry Council to support the federal government's efforts to promote the successful reintegration of ex-offenders back into their communities. The EEOC's Strategic Plan and Strategic Enforcement Plan, adopted in 2012, lists an attack on barriers in recruitment and hiring as the first of the six Commission priorities to which it would devote the time and resources of the EEOC. One of the major pillars of that attack has been challenging employers' use of credit and criminal background checks to screen out applicants for employment. Also, in 2012, the EEOC issued new and detailed guidance on the use of criminal records. *EEOC Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (April 25, 2012) (the "Guidance").*

The Guidance asserts that the use of criminal conviction records in employment violates Title VII because it had a disparate impact on African Americans and Hispanics who are more likely than whites to be arrested and/or convicted of crimes.

Despite the *Freeman and Kaplan* losses, the EEOC will continue to rely on the Guidance as its basic policy. The Guidance puts the burden on employers to assess their use of exclusionary background checks to determine if there is an adverse impact on their African American and Hispanic applicants and, if so, to determine whether the background check is job-related for the position in question and consistent with business necessity. The Guidance urges employers to develop policies that restrict the use of criminal records accordingly and involve, at a minimum, an individualized inquiry. The Guidance relies on a 1975 Eighth Circuit Court of Appeals decision in *Green v. Missouri Pacific Railroad,* 523 F.2d 1290 (8th Cir. 1975), where the Eighth Circuit held that it was discriminatory under Title VII for an employer to disqualify for employment any applicant with a conviction for any crime other than a minor traffic offense. The Eighth Circuit identified three factors (the "Green factors") that were relevant to assessing whether exclusion of an applicant is job-related for the position in question and consistent with business necessity. The Commission takes the position that a policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent with the Green factors because it does not focus on the dangers of particular crimes and the risks in particular positions. Employers must, under the Guidance, consider these factors in their use of such records:

- nature and gravity of the offense or conduct
- time that has passed since the offense or conduct and/or completion of the sentence and
- nature of the job held or sought

More than sixteen states and localities, including Montgomery County, Prince George's County, Baltimore City and the District of Columbia have passed "ban the box" statutes and ordinances which ban asking about an applicant's criminal record on the employment application question. Quite a number of other jurisdictions have such legislation applicable either to government employees or private employers with government contractors. The four in this area go way beyond "ban the box" to regulate both the timing of criminal background check inquiries and the circumstances under which they can be asked at all. See Montgomery and Prince George's Counties Join Baltimore City in Banning the Box" published herein.

It is important to pay close attention to the jurisdictions where a business operates or an employee works in this area as the four jurisdictions now have laws that differ in significant ways and present significant challenges for multi-jurisdiction employers.

Employers need to monitor developments in this area, review their background check policies against the EEOC Guidance and the plethora of new laws regulating the use of background checks. If the EEOC is unable in future cases to make its statistical case that employer policies have an adverse impact, the role of the EEOC will be sharply limited. Employers must also be sure they are complying with the Fair Credit Reporting Act requirements, especially since there has been a sharp uptake in lawsuits challenging employer failures to comply.

At the same time, however, the battle is shifting to state and local lawmakers who are passing laws without having to make or defend the assertion that there is an adverse impact. It can be expected that this trend will continue as the exclusion of those who have criminal convictions from employment and voting continues to grow as a large public policy issue.

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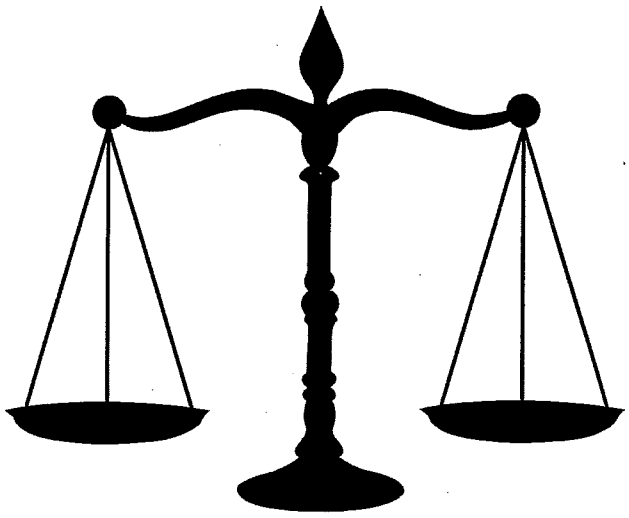
[1] *EEOC v. BMW Manufacturing Co., LLC,* Case No. 13-cv-01583 (Filed Jun. 11, 2013, D.SC) and *EEOC v. Dolgencorp, LLC,* (Filed Jun. 11, 2013, N.D. Ill.).



OFCCP UPDATE: EXECUTIVE ORDER 13673, FAIR PAY AND SAFE WORKPLACES

By Hope B. Eastman, Paley Rothman

Since April 2014, President Obama has signed a long list of Executive Orders affecting government contractors' relationships with employees. None has triggered more opposition than Executive Order 13673 which calls for greater scrutiny of government contractor bidders' compliance with a myriad of federal and state laws relating to labor law and workplace safety and creates a vast new compliance mechanism. Not surprisingly, there is a sharp difference of opinion between proponents of the Executive Order and opponents who have dubbed it the "Blacklisting Order." The opposition has been escalating in 2015.

Along with issuance of the Executive Order on July 31, 2014, the White House issued a Fact Sheet. Based on the Order and the accompanying Fact Sheet, the law's provisions and purposes are as follows:

- Agencies will require prospective contractors to disclose labor law violations from the past three years before they can get a contract. Contractors will be responsible for getting this information from many of their subcontractors as well. The fourteen covered Federal statutes and equivalent state laws identified in the Executive Order include those addressing wage and hour, safety and health, collective bargaining, family and medical leave, and civil rights protections.
- The purpose of the Executive Order is to crack down on repeat offenders. Contracting officers will take into account only the most egregious violations. Each agency will designate a senior official as a Labor Compliance Advisor to provide consistent guidance on whether contractors' actions rise to the level of a lack of integrity or business ethics. The Labor Compliance Advisor will support individual contracting officers in reviewing disclosures and consult with the Department of Labor. The Executive Order states that this process will ensure that the worst actors, who repeatedly violate the rights of their workers and put them in danger, don't get contracts and thus can't delay important projects and waste taxpayer money.
- The goal of the process created by the Executive Order is to help more contractors come into compliance with workplace protections, not to deny contracts to contractors. Companies with labor law violations will be offered the opportunity to receive early guidance on whether those violations are potentially problematic and remedy any problems. Contracting officers will take these steps into account before awarding a contract and ensure the contractor is living up to the terms of its agreement.
- The Executive Order directs companies with federal contracts of $1 million or more not to require their employees to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment (except when valid contracts already exist). This builds on a policy already passed by Congress and successfully