Zinsergram a/k/a Legal Update

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EEOC'S DISPARATE IMPACT CONCLUSION IS WORTHLESS

Recently, I have written often about the NLRB and its bad decisions. The EEOC is another rogue agency adopting unreasonable positions in lawsuits against Employers. U.S. District Judge Roger Titus, of the U.S. District Court in Maryland, recently dismissed a suit filed by the EEOC, claiming that an Employer had engaged in discrimination by using criminal background checks in its hiring process.

The EEOC was proceeding on its controversial disparate impact theory. On that theory, the EEOC need not prove actual discrimination. It merely proves that the impact of the hiring practice is that more blacks are found to have criminal backgrounds.

Judge Titus ruled that checking a person's criminal background is "a legitimate component of a reasonable hiring process." He further wrote that Employers have "a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their Employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable."

Judge Titus skewered the report of the EEOC's expert, who was attempting to establish that checking criminal backgrounds disproportionately harmed black job seekers. Judge Titus described the report as follows:

- "… an egregious example of scientific dishonesty…"
- "… laughable… "
- "… skewed…"
- "… cherry-picked data… "
- "… EEOC's disparate impact conclusions are worthless."
- "… simply no facts here to support a theory of disparate impact resulting from any identified, specific practice."

The court further chided the experts, stating that the report "was not based on a random sample of accurate data." Rather than analyze data for each relevant time period, the expert had extrapolated his small sampling of data to cover periods of time not contained in the data set. Further, he ignored half of the Employer's branch offices without explanation.

In granting the Employer's Motion for Summary Judgment, the court noted:

> *Any rational employer in the United States should pause to consider the implications of actions of this nature based upon such inadequate data. By bringing actions of this nature, the EEOC has placed many employers in the "Hobson's Choice" of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees.*

The court ended by stating, "To require less would be to condemn the use of common sense, and this is simply not what the discrimination laws of this country require."

Editor's Note: At the time of the writing of this article, the EEOC had not decided whether to appeal the decision. It has also filed lawsuits concerning criminal background checks against Dollar General and BMW.

NLRB POISED TO ATTACK PHOTOGRAPHY POLICIES

The NLRB only recently released a March 21, 2012 Advice Memorandum, finding unlawful an Employer's social media policy. The Employer (Giant Food) had a social media policy that stated in relevant part:

> *Do not use any Company logo, trademark, or graphics, which are proprietary to the Company, or photographs or video of the Company's premises, processes, operations, or products, which includes confidential information owned by the Company, unless you have received the Company's prior written approval... Please note that the Company will not construe or apply these Guidelines in a manner that improperly interferes with or limits employees' rights under any state or federal laws, including the National Labor Relations Act.*

Unbelievably, the NLRB found the policy to be unlawful. The Board's think tank concluded that the above-quoted policy would reasonably be construed to "chill" Section 7 activity. Consistent with the NLRB's longstanding dismissal of private property rights, the Advice Memorandum states, "Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, employees' use of its name, logo, or other trademark while engaging in Section 7 activity would not infringe on that interest."

The Advice Memorandum concludes that the disclaimer about employee rights was not sufficient to protect the policy.

Editor's Note: This is part of the NLRB's ongoing campaign to strike down Employer policies that restrict employees' use of social media. It is also part of the NLRB's ongoing, unlawful campaign of compelled speech and violation of the First Amendment of the Constitution. The NLRB is attempting to force Employers to publish their policies using language that will aid the union organizing/activity process.

THE 6TH CIRCUIT UPHOLDS MICRO UNITS

The U.S. Court of Appeals for the 6th Circuit, in an opinion written by Judge Boyce Martin (who is considered the liberal lion of the 6th Circuit), upheld the NLRB's decision in *Specialty Healthcare*. That decision sanctioned "micro units" and a whole new approach to union organizing. The idea is that if a small group of employees enjoys a "community of interests," it can unionize even if the Employer's other employees have similar working conditions.

If the Employer wants to include the other employees in this petition for a unit, the new case requires the Employer to show that the additional employees share an "overwhelming" community of interests with the employees who want to unionize. This is a brand new standard. The decision makes it easier for unions to get inside a Company, establish a beachhead, and spread from there.

The 6th Circuit ruled:

> *Unless the Employer establishes that it is arbitrary, unreasonable, or abuse of discretion… we review deferentially the Board's determination of appropriate bargaining units because the Board has wider discretion in determining the limit of an appropriate bargaining unit… We have even gone so far as to say that normally, the Board exercises a discretion bordering on finality in determining the unit appropriate for bargaining.*

The bottom line: the 6th Circuit has approved an NLRB decision to make it easier for unions to organize. The 6th Circuit has signed on to the NLRB's mission to "breathe new life into unions," which today represent less than 7% of the private section work force.

What does this hypothetically mean? If only sports reporters in a newsroom want to organize, this decision arguably says that they can do so as a separate unit – unless the newspaper Publisher can prove that the remaining newsroom employees share an overwhelming community of interests with the sports reporters.

This decision is merely one case. There are others working their way through the court system. Let us hope that we soon get some different results that provide justice for Employers.