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At the EEOC

Last month, *The Washington Report* focused considerable attention on the Equal Employment Opportunity Commission (EEOC), including congressional hearings and the EEOC's announcement that the agency had filed suit against both BMW and Dollar General alleging that those companies had violated Title VII of the Civil Rights Act of 1964 as a result of background screening policies that had disparate impacts on minority, specifically black, employees or applicants as a result of the manner in which those companies used criminal conviction information.

Since our last report, the EEOC announced that transportation company J.B. Hunt has agreed to a conciliation agreement with the EEOC to settle EEOC allegations that J.B. Hunt denied an African-American job candidate a position in 2009 based on a criminal conviction record which—as the EEOC put it in its press release announcing the settlement—“the EEOC contends was unrelated to the duties of the job.” The press release also suggests that J.B. Hunt may have had a blanket prohibition against hiring individuals that had been convicted of the offense, as the press release goes on to note that blanket prohibitions are consistent with the EEOC's 2012 policy guidance on the use of criminal history information for employment purposes. J.B. Hunt agreed to a conciliation agreement with the EEOC—subject to EEOC monitoring for five years—under which the Company agreed to review, and if necessary, revise its hiring policies to comply with the EEOC's guidance and provide additional compliance training. The Company also entered into a private settlement with the individual that was denied employment.

At the Supreme Court

Shortly before beginning its summer recess, the Supreme Court agreed to hear a case next term which may lead to a ruling from the Court on the extent to which “disparate impact” suits can be brought under the federal Fair Housing Act. The case, *Mount Holly v. Mount Holly Gardens Citizens in Action Inc.*, alleges that a New Jersey township's plan to redevelop a “blighted” area should not be allowed to move forward because it would have a disparate impact on minority residents of the area in violation of the Fair Housing Act. The facts of this case have nothing to do with background screening—either for employment or tenant purposes—but the case merits close attention because a ruling either for or against disparate impact litigation could impact the ability of the EEOC, the Department of Housing and Urban Development or other agencies or litigants to bring actions on the basis of disparate impact. The Court had agreed to hear a similar case earlier this year, but the parties reached a settlement before the Court heard the matter.

At the FTC

On June 26th, Federal Trade Commission (FTC) Commissioner Julie Brill gave a key-note address at the 23rd Computers Freedom and Privacy Conference in Washington. Commissioner Brill used part of her address to announce what she refers to as her “Reclaim Your Name” initiative. As part of this initiative, Commissioner Brill has asked data brokers—a term she uses to include consumer reporting agencies—to give consumers the knowledge and technological tools “to reassert some control over their personal data – to be the ones to decide how much to share, with whom, and for what purpose—to reclaim their names.” Commissioner Brill envisions data brokers (including consumer reporting agencies empowering “the consumer to find out how brokers are collecting and using data; give her access to information that data brokers have amassed about her; allow her to opt-out if she learns a data broker is selling her information for marketing purposes; and provide her the opportunity to correct errors in information used for substantive decisions – like credit, insurance, employment, and other benefits.” Commissioner Brill recognizes that, in the case of consumer reporting agencies, the FCRA provides protections, but, citing the national credit reporting systems as her examples, indicates that more must be done to promote transparency and accuracy.

On June 21st, President Obama nominated Terrell McSweeney to fill the current vacancy at the Federal Trade Commission (FTC) created when former Chairman Jon Leibowitz resigned. Ms. McSweeney currently is Senior Counsel in the Antitrust Division at the Justice Department. Ms. McSweeney has ties to Vice President Biden, including having served as his Deputy Chief of Staff while he was a Senator. Upon confirmation, Ms. McSweeney would give the Democrats a 3-2 majority on the Commission. This would permit the Democratic Commissioners to bring actions over the objection of the two Republican FTC Commissioners if they chose to do so. As The Washington Report goes to press, a hearing on Ms. McSweeney’s nomination has not yet been scheduled. The timing of a vote on her nomination by the full Senate could be affected by possible changes to Senate rules governing the use of filibusters to block presidential nominations, which could allow the Democratic majority to approve the nomination even if there were objections by Republican Senators.

FTC Chairman Ramirez has announced a number of senior FTC Staff appointments, including the nomination of long-time FTC staffer Jessica Rich to become head of the FTC’s Bureau of Consumer Protection (BCP). Ms. Rich has over twenty years of experience as part of the FTC’s staff, including stints as BCP Deputy Director and most recently as head of the Associate Director in charge of the Division of Financial Practices; she also has held a variety of other positions, including having served as Acting Associate Director and Assistant Director of the BCP’s Division of Privacy and Identity Protection. Ms. Rich has long been involved in FTC privacy initiatives and can be expected to continue FTC initiatives in this area. Ms. Rich replaces Chuck Harwood, who had been serving as Acting BCP Director since David Vladeck left the FTC earlier this year to return to Georgetown University Law Center.

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