

HUMAN RIGHTS DEFENSE CENTER

Dedicated to Protecting Human Rights

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SENT VIA EMAIL ONLY

Chairman Martin R. Castro
U.S. Commission on Civil Rights
1331 Pennsylvania Ave. NW, Suite 1150
Washington, DC 20425

RE: Comment on EEOC Enforcement Guidance No. 915.002

Dear Chairman Castro:

The Human Rights Defense Center (HRDC) is a non-profit 501(c)(3) organization that advocates for the human rights of people held in U.S. detention facilities. I serve as HRDC's associate director and managing editor of *Prison Legal News*, an HRDC publication that reports on criminal justice issues. Over the past 22 years, *Prison Legal News* (PLN) has published numerous articles on topics related to reentry, recidivism and the challenges faced by prisoners upon their release.

I am contacting you in reference to EEOC Enforcement Guidance No. 915.002, issued on April 25, 2012,¹ concerning the use of criminal background checks by employers and the impact of same on former offenders, including potential racial disparities due to the demographics of the ex-offender population.

Both I and HRDC executive director Paul Wright are former prisoners, having served a total of 27 years between us. Almost all of PLN's regular writers are currently or formerly incarcerated and we have a preferred hiring policy for people with criminal records.

Our empirical experience, common sense and research studies all indicate that ex-offenders have a difficult time finding jobs that provide a living wage following their release from custody, in large part due to their criminal record, and that this difficulty in securing employment directly contributes to reentry problems and thus higher recidivism rates.

A collaborative report by the Pew Charitable Trusts' Economic Mobility Project and Public Safety Performance Project, released in September 2010, addressed the impact of prior incarceration on the upward economic mobility of ex-offenders. The study found a strong negative effect of incarceration on upward economic mobility not only for ex-offenders but also their families. Before incarceration, more than two-thirds of male prisoners were employed with over half being the primary earner for

their families. After release, their hourly wages were about 11% less than a similar group of men who were not incarcerated, their annual employment was nine weeks less and their annual income was 40% lower, on average.²

Additionally, a report by the National Employment Law Project (NELP) released in March 2011 concluded that growth in background checks by employers, combined with a lack of enforcement of civil rights and consumer protections for an estimated 65 million people with criminal records, subjects ex-offenders to a lifetime of social and economic disadvantage. The NELP report points out that as background checks have become more popular and inexpensive, “the share of the U.S. population with criminal records has soared to over one in four adults.”³

Ensuring that all workers have job opportunities is a matter of public concern and is critical for our nation’s struggling economy. Studies show that ex-offenders who have stable employment have lower recidivism rates. Moreover, “[n]o healthy economy can sustain such a large and growing population of unemployable workers, especially in those communities already hit by joblessness,” the NELP report notes.⁴

Often a former prisoner’s criminal record has no relation to the type of job he or she is seeking, but because ex-offenders do not constitute a protected class, employers are free to discriminate against them and deny them employment based on their criminal record alone. Certainly, some offenders who commit certain crimes should be legitimately excluded from work in positions that are directly related to their offense; child sex offenders, for example, should not be working at day care centers. Yet while the majority of former prisoners have committed crimes unrelated to any particular job position – e.g., non-violent drug or property offenses – they frequently face exclusion from the job market solely due to the fact of a previous conviction, even if years or even decades old.⁵

Some jurisdictions have passed laws and ordinances to remove questions about prior convictions from employment job applications or to make ex-offenders a protected class for purposes of anti-discrimination statutes – including Hawaii, Massachusetts and Philadelphia.⁶ But convictions are not the only problem, because background checks sometimes reveal arrests that did not result in conviction – a distinction that is lost on some employers who blindly rely on the results of a background check to deny employment rather than verifying the results with the job applicant. That, and the fact that background checks are not always accurate, mean it is important to provide job applicants with an opportunity to explain or challenge their criminal record.

The widespread use of background checks also invokes concerns about the potential race-based impact of such practices. It is well known that minorities are disproportionately represented in our nation’s criminal justice system. According to a December 2012 Bureau of Justice Statistics report, U.S. incarceration rates are 478 per 100,000 population for whites, 1,238 per 100,000 population for Hispanics and 3,023 per 100,000 population for blacks, based on 2011 data for male state and federal prisoners.⁷ The same report indicates that 37.8% of state and federal prisoners are black and 22.7% are Hispanic.⁸ According to the U.S. Census Bureau, however, blacks made up only

12.7% of the noninstitutionalized U.S. population in 2011, while Hispanics comprised an estimated 16.3% of the population.⁹ Consequently, since minorities are disproportionately represented among prisoners – and thus among former prisoners – criminal background checks have a correspondingly disproportionate negative impact on minority ex-offenders seeking employment.

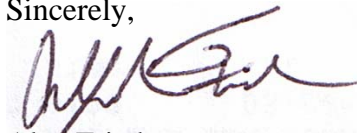
The Human Rights Defense Center supports actions that remove barriers to reentry for ex-offenders, including barriers to employment and employability. This includes ensuring that former prisoners do not face discrimination in the job market due solely to the fact of their criminal record when that record has no relationship to or bearing on the job position they are seeking.

Absent reforms in this area, ex-offenders will continue to face discrimination in hiring decisions and will continue to have difficulty securing employment post-release, which will have a negative effect on reentry and result in higher recidivism rates among former prisoners.

We are therefore supportive of the EEOC's Enforcement Guidance No. 915.002, which provides guidance to employers regarding the use of criminal background checks to ensure they do not result in a disparate impact on hiring decisions based on a job applicant's prior criminal record, which may consequently have a disparate impact on hiring decisions based on race.

Given that more than 688,000 prisoners are released from state and federal prisons each year,¹⁰ this is a matter of significant concern. We trust that the Commission will weigh the importance of the EEOC's guidance in this area accordingly. Thank you for your time and attention;

Sincerely,



Alex Friedmann
Associate Director, HRDC

¹ www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

² www.pewtrusts.org/our_work_report_detail.aspx?id=60960.

³ www.facesandvoicesofrecovery.org/pdf/eNews/65_Million_Need_Not_Apply.pdf.

⁴ *Ibid.*

⁵ "Wells Fargo fires employee who committed 10-cent fraud in 1963," available at:

<http://newsfeed.time.com/2012/09/02/wells-fargo-fires-employee-who-committed-10-cent-fraud-in-1963>.

⁶ www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/4a4a4bbf-5bfa-49b3-b8e4-36e1eb2218e1.

⁷ <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>.

⁸ *Ibid.*

⁹ www.census.gov/population/race/files/ppl-ba11/ba11tab1.xls;

www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff18.html.

¹⁰ <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf>.