



LEGAL AND LEGISLATIVE UPDATE: JUNE 2007

KEVIN M. GOLD, ESQUIRE, LEGISLATIVE DIRECTOR

THIRD CIRCUIT APPROVES HIRING POLICY BARRING THE HIRING OF APPLICANTS WITH CRIMINAL CONVICTIONS

Recently, the United States Court of Appeals for the Third Circuit found that an employer's policy prohibiting the hiring of individuals with criminal convictions does not necessarily discriminate on the basis of race. Specifically, in *El v. SEPTA*, the Third Circuit held that SEPTA's policy that prohibited the hiring of individuals with violent criminal convictions did not violate Title VII. Instead, the Court held that SEPTA's policy was justified by business necessity and that the Plaintiff failed to prove the existence of an acceptable alternative policy.

At issue was SEPTA's policy that prohibited hiring anyone with a violent criminal conviction. The Plaintiff was hired by a subcontractor of SEPTA, but it was later discovered that the Plaintiff had a conviction for second degree murder. On the basis of this conviction, the Plaintiff's employment was terminated. Plaintiff challenged the termination on the grounds that the hiring policy discriminated against him on the basis of race in that it had a disparate impact on African-Americans and Hispanics, as they are more likely to have criminal records.

The Third Circuit ultimately found that a policy of disqualifying applicants for employment with criminal convictions is not necessarily invalid under the federal discrimination laws. The Court noted that, despite any disparate impact, a policy will be upheld provided it is based upon "business necessity." Through expert reports, SEPTA was able to prove that violent criminals tended to engage in future criminal activity and, therefore, supported its ban on hiring individuals with violent criminal records. The Court accepted SEPTA's business reasons and found that the Plaintiff did not produce any evidence of an "alternative employment practice" that could have served the same legitimate goal of the employer and upheld his termination.

The lesson for employers is that they can legally disqualify applicants on the basis of a prior criminal conviction. It is sound practice, however, for an employer to take into account the nature of the offense, the timeliness of the offense and the nature of the job. The nature of the job is a particularly important factor in light of Pennsylvania's Criminal History Record Information Act that all Pennsylvania employers must comply with if they are using criminal records in the hiring process. The Act allows an employer to consider an applicant's felony and

misdemeanor convictions only to the extent they relate to the applicant's suitability for the job. Thus, employers must make sure there is a connection between the conviction and the applicant's suitability. Finally, under the Act, if the decision not to hire an applicant is "based in whole or in part" on the applicant's criminal record, the employer must notify the applicant, in writing, of this fact.

For more specific guidance on this issue, you may reach Mr. Gold at (717) 237-6702 or by email at kgold@rhoads-sinon.com.