

Texas Deals Blow To EEOC Background Check Policy

By **Braden Campbell**

Law360, New York (February 2, 2018, 3:06 PM EST) -- A Texas federal judge on Thursday endorsed the spirit of U.S. Equal Employment Opportunity Commission guidance urging employers to limit their use of criminal background checks in hiring but blocked its enforcement against the Lone Star State anyway, saying the agency should have let the public weigh in before publishing the guidance.

U.S. District Judge Sam Cummings granted partial summary judgment to the state of Texas in its challenge of the guidance, which recommends that employers not ask job applicants about their criminal histories, declining to declare that Texas can consider applicants' histories as it sees fit but finding the EEOC did not follow the Administrative Procedure Act when it issued the 2012 guidance.

"The court holds that the guidance ... is a substantive rule issued without notice and the opportunity for comment," Judge Cummings said.

The order blocks the EEOC and the U.S. attorney general from enforcing the guidance against the state unless the agency reissues it after letting the public weigh in.

Texas sued in 2013 **seeking an injunction** blocking enforcement of the EEOC's April 2012 policy urging businesses to use criminal background checks on a case-by-case basis. The agency interpreted Title VII of the Civil Rights Act to reject blanket bans on hiring workers with criminal records, saying these policies can have a disparate impact on classes protected by federal discrimination laws. It also said it could bring suit against employers it finds unfairly disqualify workers for jobs based on their criminal histories.

The state attacked the policy on several fronts, asking the court to declare that it has the right to absolutely bar felons from serving in certain jobs, issue an injunction blocking the U.S. Department of Labor from issuing right-to-sue letters to complaining workers or enforcing its interpretation of Title VII, and find the EEOC violated the APA.

In denying Texas' request for declaratory judgment, Judge Cummings conceded that there are "many categories of employment" in which prior criminal history may be disqualifying but said there are many others in which employing workers with prior felonies would "pose no objectively reasonable risk."

"To find otherwise would be illogical," Judge Cummings said. "Thus, a categorical denial of employment opportunities to all job applicants convicted of a prior felony paints with too broad a brush."

Judge Cummings also declined to block the EEOC from issuing letters letting workers who claim they were unfairly denied jobs because of their criminal history bring suit in federal court, saying "the issuance of a right-to-sue letter is not a determination by the EEOC that a meritorious claim exists."

Texas Attorney General Ken Paxton cheered Thursday's decision despite the partial victory, saying the EEOC "overreached."

"Texas has the sovereign right to impose categorical bans on the hiring of criminals for such jobs as state troopers, school teachers and jailers, and the EEOC has no authority to say otherwise," Paxton said. "Requiring Texas to issue badges and guns to felons is bad policy and unlawful."

An EEOC representative said Friday the agency "is assessing the impact of the court's decision on enforcement activities."

An attorney with the NAACP Legal Defense and Educational Fund, which along with private attorneys and the National Employment Law Project filed an amicus brief supporting the EEOC, said Friday the group is "extremely disappointed" in the decision.

"The guidance illuminated what decades of court decisions and EEOC policies said about hiring policies that exclude people with records no matter how old the offense is or whether it's related to the job," the group said.

The EEOC is represented by Chad Readler, John Parker, Joshua Gardner, Justin Sandberg and James Powers of the U.S. Department of Justice.

Texas is represented by Ken Paxton, Jeffrey Mateer, Brantley Starr, Michael Toth, Andrew Leonie, Austin Nimocks and David Hacker of the state attorney general's office.

The amici are represented by Edward B. Cloutman of Cloutman & Cloutman LLP; Samuel Spital, Leah C. Aden and Coty Montag of the NAACP Legal Defense Fund; Robert Stroup and Dana Lossia of Levy Ratner PC; and Beth Avery of the National Employment Law Project.

The case is Texas v. EEOC, case number 5:13-cv-00255, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Jess Krochtengel. Editing by Aaron Pelc.

Update: This story has been updated with comment from the EEOC.