



**Testimony of Ria Tabacco Mar
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**Hearing on
“Sense of the Council
on the Need for the Washington Metropolitan Area Transit Authority (WMATA)
to Establish a Returning Citizens Policy Resolution of 2014”**

(Proposed Resolution 20-619)

**Before the Council of the District of Columbia
Committee on Economic Development**

**Wednesday, February 19, 2014
9:00 a.m.
John A. Wilson Building, Room 412**

Good morning. My name is Ria Tabacco Mar, and I serve as Assistant Counsel with the NAACP Legal Defense & Educational Fund, Inc. (LDF). I am pleased to testify today in support of Proposed Resolution 20-619, which calls on the Washington Metropolitan Area Transit Authority (WMATA) to adopt a fair and nondiscriminatory background screening policy.

LDF is the nation's oldest civil rights law firm.¹ LDF has worked for more than seventy years to eliminate racial bias so that all Americans, regardless of race, may live, work, and thrive on equal footing. For this reason, LDF has serious concerns about employment policies, like WMATA's, that use criminal background information to unfairly and disproportionately limit opportunity for African Americans and other people of color. Currently, LDF represents four workers in administrative proceedings before the United States Equal Employment Opportunity Commission (EEOC). Each of them was unfairly denied a job at WMATA or one of its contractors because of their criminal records.

WMATA's Criminal Records Policy

While criminal background information can be a legitimate tool for employers when screening job applicants, WMATA's policy is unnecessarily punitive. It results in the rejection or termination of employees based on criminal history that is not related to the job at issue or occurred so long ago – in some cases, twenty or thirty years in the past – that it is largely irrelevant to any fair determination of employee honesty, reliability, or safety. For example, under WMATA's policy, a person who has *ever* had a felony conviction for drug possession is *permanently* disqualified from employment in a wide range of jobs including bus operator and custodian, even if the applicant has been drug-free and held a steady job for ten or twenty years.

Because it is so broad and restrictive, WMATA's policy needlessly excludes many qualified job applicants who want to work and who have a demonstrated track record of successful employment. For example, one of LDF's clients worked for a WMATA contractor for nearly four years driving a MetroAccess vehicle. In 2013, his employer lost its contract. When our client applied to two other contractors for the same position, he learned that he would no longer be allowed to work for *any* WMATA contractor, because of an assault conviction from 18 years before he started work as a driver. Another LDF client was fired from his job as a custodian for a WMATA contractor because of a 15-year-old drug conviction, even though he had been recommended by his supervisor for a full-time position at WMATA. The experiences of LDF's clients are, unfortunately, all too common.

¹ LDF has been a separate entity from the National Association for the Advancement of Colored People (NAACP) since 1957.

Title VII of the Civil Rights Act of 1964

We believe that WMATA's policy is not only unfair, but also likely violates federal and local antidiscrimination laws. Title VII of the Civil Rights Act of 1964 bars employers from using selection devices, like criminal background checks, that have a "disparate impact."² A selection device has a disparate impact when it disproportionately screens out candidates on the basis of race, sex, or another protected characteristic, and is not job related or consistent with business necessity.³

WMATA's policy likely has a disparate impact on African-American workers. While the number of Americans of any race who have a criminal record has increased dramatically in recent decades,⁴ African Americans and other racial minorities have been hardest hit by this national trend⁵ because of racial profiling and other discriminatory policies and practices in our criminal justice system.⁶ Here in the District, while rates of drug use are roughly equal across all races, a study revealed that African Americans are arrested for drug offenses far more often than their white counterparts.⁷

The EEOC's Enforcement Guidance

In April 2012, the EEOC issued enforcement guidance (Guidance) advising employers on how to use criminal background information responsibly and without

² The United States Supreme Court, in its landmark decision, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), recognized that Title VII prohibits not only overt racial discrimination, but also "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" that "operate to 'freeze' the status quo of prior discriminatory employment practices." Thus, employers can be liable under Title VII for employment practices that have a disparate impact on protected groups, unless they can demonstrate that the practice is job-related and consistent with business necessity. *Id.* at 431. Congress codified disparate impact liability under Title VII in the 1991 Civil Rights Act. *See* The Civil Rights Act of 1991, Pub. L. No. 102-166.

³ *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

⁴ *See* National Employment Law Project, *65 Million "Need Not Apply:" The Case for Reforming Criminal Background Checks for Employment* at 4 & n.2 (2011).

⁵ *See, e.g.*, Crime in the United States, 2009 U.S. Department of Justice — Federal Bureau of Investigation (Sept. 2010) tbl. 43, <http://www2.fbi.gov/ucr/cius2009/arrests/index.html>; Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006*, app. tbl. 2 (2010); *see also* Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy and the Civic Reintegration of Criminal Offenders*, 605 *Annals Am. Acad. Pol. & Soc. Sci.* 281, 288 & tbl. 2 (2006).

⁶ *See, e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *Invisible Punishment* 53 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing war on drugs).

⁷ Washington Lawyers' Committee for Civil Rights & Urban Affairs, *Racial Disparities in Arrests in the District of Columbia, 2009-2011: Implications for Civil Rights and Criminal Justice in the Nation's Capital* 13-17 (July 2013).

running afoul of Title VII.⁸ According to the EEOC, employers who choose to rely on criminal records should consider three factors: (1) the nature and seriousness of the offense, (2) the amount of time that has passed since the offense, and (3) whether the offense has any relationship to the job at issue.⁹ The Guidance also recommends that employers should give job applicants the opportunity to explain why they are qualified despite the past criminal offense.¹⁰

WMATA's policy does not comply with the EEOC Guidance because it disqualifies many job applicants and employees with certain convictions, regardless of how old the convictions are and whether they have any relationship to the job at issue, and without providing the opportunity to explain why the convictions are no longer relevant.

Conclusion

We do not deny that WMATA has the right to use criminal background checks. WMATA needs to take reasonable measures to ensure that its customers and property are safe. But WMATA's current policy simply goes too far. LDF firmly believes that WMATA can adopt a background screening policy that is fair and nondiscriminatory and that does not compromise public safety.

For these reasons, we wholeheartedly support passage of PR 20-619. Thank you for the opportunity to testify today.

⁸ Equal Employment Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e et seq. (April 25, 2012).

⁹ *Id.* at 15-16. The three factors are based on a 1975 decision by the United States Court of Appeals for the Eighth Circuit. See *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). In *Green*, the court concluded that an employer's policy that disqualified applicants for employment for any criminal conviction other than a minor traffic offense violated Title VII's disparate impact protections.

¹⁰ EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records*, at 18.