To: Interested Parties, U.S. Equal Employment Opportunity Commission

From: Sharon M. Dietrich, Community Legal Services of Philadelphia, on behalf of advocates working on employment law issues faced by people with criminal records

Re: Social Science Research in Support of Advocates’ Memo on EEOC Policy Statements Concerning People with Criminal Records

Date: June 3, 2007

**Context for the Revision**

I. **Disparate Impact of Conviction Records on Racial Minorities**

a) **Overrepresentation as Prisoners**

Since 1926 when the federal government began systematically maintaining incarceration data, the percentage of African-Americans in the prison population has consistently exceeded their proportion in the general population.\(^1\) Over the years, the proportion of blacks that comprise state and federal inmates has steadily grown.

In 1986, the year prior to the EEOC’s adoption of the Policy Statement on the Issue of Conviction Records under Title VII, there were 522,084 prisoners, of whom 46.7% were African-American.\(^2\) By 1996, the prison population nearly doubled to over 1.1 million, of which African-Americans were 49%.\(^3\) Nearly ten years later, the number of state and federal prisoners climbed to over 1.4 million, of whom racial minorities constituted 60% (African-Americans were forty percent and Latinos were twenty percent).\(^4\)

According to 2005 Bureau of Justice Statistics data, in every state, the incarceration rates for blacks exceeded those of whites. (Emphasis supplied). The largest difference was in Iowa where the black rate was 14 times higher, followed by Connecticut, New Jersey and Vermont, where the rates were more than 12 times higher.\(^5\) The differential between whites and Latinos was more than 6 times higher in Connecticut and Massachusetts. When incarceration rates amongst minorities and whites are disaggregated by sex and age, the disparities are extremely stark. For example, of males between the ages of

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twenty-five and twenty-nine, 1:12 blacks were in prison compared to 1:91 whites and 1:38 Latinos.6

b) Overrepresentation as Probationers, Parolees and Jail Inmates

The sheer numbers of racial minorities with criminal records grow exponentially when those sentenced to probation, on parole, or held in jail, are added to the incarceration data. In 2005, the total correctional population was over 7 million, with about 5.6 million alone on probation, parole or in jail.7 Blacks and Latinos comprised 43% of probationers; 58% of parolees; and 54% of jail inmates.8 In other words, assuming no double counts in the data, over 3.5 million blacks and Latinos were in the correctional population in 2005 alone. This data likely excludes non-repeat offenders who had contact with the system in the years prior to 2005. Compared to their proportion in the general population—about 25%—blacks and Latinos are grossly overrepresented in the criminal system, and thus are disproportionately impacted by exclusionary criminal record employment policies. Our earlier memo cited recent audit and other studies documenting employer use of criminal records and their adverse impact on racial minorities. Here, we reference additional studies.9

II. Social Science Research Supporting Stronger Business Necessity Guidance

Given the overrepresentation of racial minorities among those with conviction records, and the use of criminal records to exclude them from the labor market, we urge the Commission to adopt stricter and clearer guidelines in its business necessity policy. Recent social science research supports this recommendation. The research shows, though not specifically limited to racial minorities, that the difference in offense rates between former and non-offenders is substantively small after seven years. Other studies demonstrate that offenders do age out of criminal activity.

8 Id. For data on jail inmates, see, Paige M. Harrison & Allen J. Beck, BJS, Prison and Jail Inmates at Midyear 2005, supra note 5, at 8. Jail inmates, as distinguished from prisoners, are persons confined before or after adjudication. Their sentences are usually a year or less, although jails also incarcerate persons in a wide variety of other categories. When jail inmates are added to federal and state prisoners, in 2005, the nation incarcerated nearly 2.2 million people.
9 See e.g. Harry J. Holzer, et al., Will Employers Hire Ex-Offenders? Employers Preferences, Background Checks, and Their Determinants, (2002) (finding that in several large metropolitan cities, over 60 percent of employers indicated that they would definitely or probably not hire an applicant with a criminal history); Mark Joseph, The Effects of Arrests on the Earnings of Young Men: Evidence from the National Youth Survey, The University of Chicago (2001) (concluding that the stigma of a criminal record contributes to substantial earning differentials between white and black young men); Shawn D. Bushway, The Impact of an Arrest on the Job Stability of Young White American Men, Journal of Research in Crime & Delinquency, Vol. 35 (1998) (finding that the use of criminal histories tends to result in applicants with records being labeled as deviants and thus excluded from the legitimate labor market); Jeff Grogger, Arrests, Persistent Youth Joblessness and Black/White Employment Differentials, UCLA The Review of Economics & Statistics, (1991) (finding that higher arrest rates among black youths contributed to their higher rate of joblessness).
a) Likelihood of Recidivating Diminishes after 7 years

In *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, the authors explored when a criminal record is relevant to an employment decision and its role in predicting future offending.\textsuperscript{10} Examining data of a cohort of 13,000 males, the authors concluded that “the risk of new offenses among those who last offended six or seven years ago begins to approximate (but not match) the risk of new offenses among persons with no criminal record.” The authors proposed that after such a period, the mark of a criminal record should be “washed away.”

In a 2007 report, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, the authors in the above referenced study, analyzed additional data sets, and, again concluded, that a recent criminal record is more predictive of short-term behavior than an older record from many years ago, the cut off being seven years.\textsuperscript{11}

b) Likelihood of Recidivating Diminishes Over Time

In *Assessing the Impact of Exposure Time and Incapacitation on Longitudinal Trajectories of Criminal Offending*, the authors followed the trajectories of a cohort of men from ages 18 through 33 to understand their “with-in person changes in offending over time” (known as developmental criminology), and found that the likelihood of re-arrest diminished to almost zero for 72 percentage of the cohort as they approached their late 20s and early 30s.\textsuperscript{12}

In *Desisting from Crime, Continuity and Change in Long-term Crime Patterns of Serious Chronic Offenders*, researchers examined the relationship between age and crime for serious youthful offenders and found that offenders do age out of criminal activity.\textsuperscript{13}

The aforementioned studies provide support for the “bright line” rules recommended in the business necessity section of our memo, but in particular bolster the recommendation in (3) suggesting a presumption that convictions not be considered if a person has not re-offended within seven years of conviction, or release from incarceration or parole.


