

### **"Hey, Jackie, Can We Talk?" The EEOC's Enforcement Guidance On Criminal Background Information**

By [Robin E. Shea](#) on April 26, 2012

Dear [Jackie](#),

How ya doin'? I'm not too bad . . . just keepin' my nose to the grindstone at work and enjoyin' the spring weather, and not a whole lot else . . . same old, same old.

Listen, hon. I know it's been a while since we've been in touch, but when I saw your new ["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."](#) -- no offense, but that is *not* a catchy title!! -- [I just had to sit right down and write yourself a letter.](#)

Can we talk?

Don't get me wrong, hon -- I'm cool with not usually considering arrest records in making employment decisions. I get all that adverse impact stuff, and I'm opposed to it, just like you. And I agree with you that we shouldn't be winking at the white guy's crime while getting all hot and bothered over the black or Hispanic guy who does the same thing.

But, *dang, girl!* I'm reading this thing, nodding my head, saying, "Uh-huh, uh-huh, yep, good point, amen, uh-huh," and then - *BAM!*

I hate to say it, but some of your numbers seem a little . . . dishonest. Like, OK. You say that "African Americans and Hispanics are arrested in numbers disproportionate to their population." I get that. But then you say (and I'm skipping a little - I'm trying to keep this letter from turning into *War and Peace*) "African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites."

*Huh?* Why talk only about drug offenses? What about murder, armed robbery, grand theft auto, [obstruction of justice](#), [using presidential campaign contributions to pay off your mistress so she won't squeal to the media about being pregnant and sink your campaign \(allegedly, allegedly!\)](#), and [breaking into the Democratic National Committee headquarters to commit a third-rate burglary?](#)





And why compare arrests (etc.) for drug offenses with the rate of drug use? Sweetie, I've been around the block a few times. Trust me, there are a lot of drug offenses besides "use." Like dealing. Or running a drug house. Or being in a high-speed chase with the cops because you have a stash in your car. Or stealing to buy your drugs. (How do I know all this? I was young once myself. *Kidding!*) They even kill each other over drug deals gone bad. And you didn't tell us whether the African Americans and Hispanics who were convicted were just a bunch of lovable stoner dudes who were too herbed out to keep from getting caught, or whether they were also doing some of this *serious* stuff. Don't we need to know that to be able to compare and to see whether discrimination is going on?

Honey, a girl's reputation is her most important asset. Don't lose it.

OK. Move on dot org. I've gotta ask ya -- have you *ever* had to hire somebody? 'Cause I gotta say, this thing sure doesn't *read* like it.

All this nice talk about how an employer should take into account how serious the crime is, and how it's relevant to the particular job applied for, and when the perp stops being at risk for being a recidivist, individualized assessments, reviewing sociological studies, validation under the [Uniform Guidelines on Employee Selection Procedures](#), "less discriminatory 'alternative employment practices'" even if the criminal information is "job related and consistent with business necessity" . . . and on and on and on, blah, blah, blah, blah, blah, zzzzzzzzz --

Sweetie, I *know* your heart's in the right place, but an employer can't go through all that malarkey with everybody who applies for a job! You know what Ann Landers used to say, may she rest in peace: [Wake up and smell the coffee, Buster!](#) Employers have to use the information they can get to predict who they think will do a good job. They do the best they can. Sometimes criminal information can help. It seems like you're trying to make it so hard for them that they won't use it any more. You wouldn't do that, would you? :-)



Then you start talking about other laws, and I was with you when you were talking about how you're still allowed to comply with a requirement of federal law. So it's ok to reject somebody if they [pled guilty to wearing a shoe with a bomb in it on an airplane](#) and can't get a federal security clearance that they need for their job at the nuclear power plant. Glad to hear it.

But you lost me again when you started talking about state and local laws, and how you can't use *them* as a defense. I get that Title VII would "preempt" state or local laws that allow employment discrimination or even require it, like [that old law in Virginia that wouldn't let people of different races get married](#) except that it wasn't an employment law. But do you really think Title VII preempts state laws that simply require criminal background checks for certain jobs and disqualify everyone -- of any race -- who's been convicted of certain crimes?

Sweetie, I feel like you're overreaching here. If you got slapped down by a court, it would break my heart. You know I'm serious.

You're saying that an employer has to disobey its state or local laws on criminal background information unless it can prove that the state or local requirement is "job-related and consistent with business necessity" . . . ?



Don't answer that -- I don't think I want to know.

Time's getting away from me, and I have to run some errands. [Eric Meyer](#) has five good "takeaways," and [Phil Miles](#) has links.

And, don't tell me, I already know [Daniel Schwartz](#) and [Jon Hyman](#) and even my own colleague [David Phippen](#) think you could have done worse, and I'm sure they are right. But I always thought you held yourself to a higher standard than that, young lady. Do you want to do just [the bare minimum](#), or are you a cut above?

\*Whew.\* OK, now I feel better. You know I get on your case only because I love ya. :-)

So, how is everything else at the EEOC? We really should go out for drinks soon. If you're up for it, give me a buzz. (Hahaha -- get it?)

Robin

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