



LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W

A nonprofit, nonpartisan legal organization formed at the request of President Kennedy in 1963

TESTIMONY OF

THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW

SUBMITTED TO:

U.S. EQUAL EMPLOYMENT AND OPPORTUNITIES COMMISSION

**EEOC at 50: Confronting Racial and Ethnic Discrimination
In the 21st Century Workplace**

APRIL 15, 2015

**Testimony of the Lawyers' Committee for Civil Rights Under Law
Submitted Barbara Arnwine, President and CEO
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Chairwoman Yang and all of the Commissioners in attendance, on behalf of the Lawyers' Committee I appreciate the opportunity to provide this testimony in furtherance of the protection of the equal employment and civil rights of all Americans.

The Lawyers' Committee is a nonpartisan, nonprofit organization established in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law. The Committee fulfills its mission by using the skills and resources of the bar to address matters of racial justice and economic opportunity through legal actions, transactional legal services, public policy reform, and public education.

For over 50 years, the Lawyers' Committee has advanced racial equality in the areas of community development, criminal justice, educational opportunities, fair employment and business opportunities, fair housing and fair lending, immigrant rights, judicial diversity and voting rights. As a national leader in combating employment discrimination, the Lawyers' Committee has undertaken numerous initiatives, including the Access Campaign, a program that has attacked the indiscriminate use of criminal and credit history information through litigation, public education, federal, state and local legislative advocacy. Additionally, as co-chair of the Employment Task Force of the Leadership Conference on Civil and Human Rights – a coalition of over 150 organizations – I work with the larger civil rights community on numerous employment issues generally, as well as with the necessary enforcement agencies including the Equal Employment Opportunity Commission (EEOC) and the Department of Justice.

On its fiftieth anniversary, the EEOC faces a workforce environment that has many new and challenging features, but that in other respects is all too familiar. Technology has transformed the world of work in tangible ways for millions of employees, yet there is a discouraging sameness in many of the challenges faced by African Americans, Latinos, and other workers protected by the many federal anti-discrimination laws that the EEOC now enforces. Due to judicial doctrines that have emerged over the past 30 years, the courts are

increasingly closed to the kinds of efforts that the advocacy community and the private bar used effectively in the first decades of Title VII and the EEOC to achieve systemic changes in the practices of employers. These changes mean that the EEOC, and other federal agencies, have an increasingly critical role to continue bringing to account those employers who still fail to implement equal opportunity in the workplace, regardless of race, color, creed, national origin, age, or disability.

What is the evidence that discrimination persists in the workplace? Perhaps the most dramatic fact is that the ratio of the rate of unemployment for African Americans today is double the rate of unemployment of white workers seeking employment. Black unemployment was double the rate of white unemployment in the early 1970's when the Bureau of Labor Statistics began collecting and reporting separate information on unemployment rates for major ethnic groups. That ratio has remained essentially unchanged for the entire time that unemployment statistics have been reported by race. The ratio is somewhat less when comparing workers with similar educational attainment, but higher unemployment rates persist stubbornly for African Americans at every level. Poorer outcomes for African Americans are not explained by lower education or by any other objective factors.

IMPLICIT AND EXPLICIT BIAS IN THE WORKPLACE

The sad fact is that the explicit discrimination that existed for decades, when state statutes and union rules expressly excluded African Americans from many job opportunities, has been succeeded by a new and enhanced set of barriers to employment for African Americans and other disadvantaged groups. These added barriers range from a simple double standard in the minds of hiring managers — implicit bias that unconsciously results in African Americans being required to demonstrate superior qualifications to be considered — to new examples of explicit criteria, like criminal background checks, credit background checks, unemployment bias, and entry-level tests of various abilities, many of which have a devastating impact to deprive African Americans of equal opportunity to obtain jobs and advance in their careers. Furthermore, when these barriers are compounded with the added gender biases that continue to exist in the workplace, the EEOC's leadership becomes even more necessary than ever.

The ongoing implicit bias by employers is exemplified by the various matched pair studies conducted in the workplace. For instance, matched pair studies of hiring by employers for entry-level jobs have repeatedly shown that the majority of employers will interview a white candidate with a felony record before they will interview an African American applicant with a completely clean criminal background. Similar studies show that when resumes are carefully matched in all respects except for names, the applicants with names common in the white community (“Ashley” or “Jennifer”) get far more invitations to interview than applicants with names such as “Tamika” or “Latosha,” names commonly given to children in African American families. Not long ago the website Techyville posted an article entitled “Unemployed Black Woman Pretends to be White, Job Offers Skyrocket,” in which Ms. Yolanda White, seeking work in the insurance industry through monster.com, recounted the increased interest in her resume when she posted it under the name of “Bianca White.”¹

Criminal background checks

An explicit screening barrier that the EEOC has been scrutinizing in recent years is the use of criminal history to exclude applicants from consideration. Although the burden of this practice falls most heavily on communities of color, particularly the African American community, Americans of all races and from all walks of life are affected by these unnecessary exclusions from employment. Employers promote fair treatment for all employees, regardless of race, when they follow the evidence-based employment policies that the EEOC recommends to ensure that they apply job-related standards when they hire new workers, or evaluate existing workers or former workers.² The indiscriminate disregard of the past contributions to the business when long-time employees are terminated, or told they will not even be considered to be rehired for work they performed well in the past, simply because they were arrested or

¹ Available at <http://financialjuneenth.com/this-woman-got-a-lot-of-job-offers-when-she-pretended-to-be-white/>; originally posted on www.techyville.com on November 15, 2012.

² The recommended practices are included in EEOC “Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964,” April 25, 2012, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

convicted of a crime long ago, is not only a miscarriage of justice, but an unreasonable, stereotypical business behavior that should not be promoted.³

Current estimates are that 70 Million Americans have an arrest record for a criminal offense (that is, not including motor vehicle-related tickets and not including the “summary offenses” that some states use to treat minor misconduct similar to a speeding ticket).⁴

Moreover, in addition to providing incorrect data, criminal background check reports often inappropriately include information about sealed or expunged offenses such as juvenile offenses, or arrests that did not lead to conviction. Often, human resources officials are insufficiently trained to properly interpret these records. Evidence has shown that people of color are disproportionately affected by such misinformation. For example, when the Transportation Security Administration (TSA) began to require background checks of the 1.5 million workers employed in the nation’s ports, 22,000 workers (through July 2009) successfully appealed the accuracy and completeness of their FBI rap sheets (with more than 5,000 cases of such appeals still pending). While African-American and Hispanic workers represent a combined 30% of the port workers, they were 70% of the successful appeals of inaccurate criminal records. [See National Employment Law Project July 2009 report “A Scorecard of the Post-9/11 Port Worker Background Checks.”]

The irrationality of the automatic exclusion of American workers with past criminal arrest or conviction records is highlighted in a case in which the Lawyers’ Committee is co-counsel. In this situation, the facts reveal that the U.S. Census Bureau had virtually no problems in previous decennial head counts in hiring enumerators who were qualified, law-abiding persons who had old criminal records. But in 2010, many workers with criminal records, who had successfully served as enumerators in one or more prior Census counts, were denied timely

³ This is what the EEOC has asserted happened at the B.M.W. plant in Greenville, SC, in 2008. A new logistics contractor for the company ran criminal background checks on all existing employees, and refused to rehire 88 employees, 70 of whom (80%) were African Americans, who had been satisfactory employees for periods up to 14 years. All of these employees had been hired by the prior logistics contractor, who only screened employees for convictions in the previous seven years, so one or more of these employees appear to have been refused employment solely due to a conviction more than 20 years earlier.

⁴ National Employment Law Project, “65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment,” March 23, 2011, available at http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1

consideration for employment because they had an arrest record in the national F.B.I. criminal record database.

Census records for the 2010 process revealed that between 850,000 and one million applicants who had FBI arrest records⁵ were diverted into a separate screening process where fewer than one (1%) per cent were hired, while almost 30% of the applicants who remained in the regular pool were hired. The Plaintiffs' Expert Reports presented evidence that approximately 40% of the applicants diverted into the "low hire" pool due to their arrest records were African American, although only about 20% of all applicants were African American. On the other hand, while over two thirds of the total applicant pool consisted of white workers, fewer than 50% of the applicants diverted to the disfavored screening process because of arrest records were white. Statistical analysis confirmed that these percentages demonstrated disparate impact not only on African Americans, but also on Latino applicants. In July of 2014, the federal district court for the Southern District of New York certified a class of African-American and Latino applicants that attorneys in the case estimate numbers 300,000 to 450,000 workers.⁶ As this case continues to be litigated, one cannot deny the blatant inequities revealed by the facts in evidence. This case is representative of the larger issue at play which is the unfair and unjust exclusion of high proportions of potential American workers from the workforce because of bias and stereotypes.

As the Census case statistics illustrate, this is not a minor problem. But even employer policies that are limited to felony convictions have a devastating effect on the African American community. Recent research has estimated that between 30 and 35% of African American males of working age have a felony conviction record — about 7% are currently serving time for the felony conviction or a subsequent less serious offense, and 25% or more are in the community,

⁵ For the 2010 Census, almost 20% of the applicants for temporary jobs had arrest records in the F.B.I. database. An additional 10% of the applicants had an initial "name match" with an arrest record in the database, but on review the Census determined that the person with the record with a matching name was not the applicant.

⁶ *Houser et al. v. Blank, Secretary, U.S. Department of Commerce (originally filed as Johnson et al. v. Bryson)* (S.D.N.Y. Case No. 10-cv-3105).

⁷most of them trying to find employers that will give them a second chance. In contrast, fewer than 2% of non-Hispanic white males of working age are serving time and, in addition, fewer than 8% of non-Hispanic adult white males have a felony record and are in the community. And as I noted earlier, those white males with a felony record have an easier time getting an interview for an entry-level job than a similarly educated African American male with a clean record.

Credit history background checks

Another screening barrier, resulting in both and implicit and explicit bias against people of color is the use of credit history checks. At present, 47% of major employers use credit background checks during the hiring process to screen out employment applicants with poor credit.⁸ This percentage may be even higher for smaller companies. Credit reports were developed to help lenders assess the risks associated with making a loan, not the worthiness of holding a job. A spokesperson for TransUnion, one of the major credit reporting companies, even admitted in 2010: “We don’t have any research to show any statistical correlation between what’s in somebody’s credit report and their job performance or their likelihood to commit fraud.” Furthermore, any people have poor credit through no fault of their own. Poor credit can be the result of job loss or reduced pay, especially in the present bad economic times. Medical illness without healthcare coverage or with insufficient coverage is another leading cause of poor credit. Divorce can also have severe effects on a person’s credit. Credit reports do not reflect the circumstances surrounding debts or reasons for late payments.

Despite the fact that there is no proven link between personal credit reports and criminal behavior or performance of a specific job, employers still use these checks as a barrier to employment.⁹ Employers and credit reporting agencies have failed to offer any proof that credit history predicts success on the job. What studies have been done have shown that credit history has no relationship to success on the job.

⁷ Sarah Shannon, Christopher Uggen, Melissa Thompson, Jason Schnittker, and Michael Massoglia, “The Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010,” Princeton University, 2011, <http://paa2011.princeton.edu/papers/111687>); cited in Maurice Emsellem and Jason Ziedenberg, “Strategies for Full Employment Through Reform of the Criminal Justice System,” at 4, available at <http://www.pathtofull employment.org/full-employment-how-can-we-get-there-and-stay-there-why-does-it-matter/>

⁸ “SHRM Survey Findings: Background Checking – The Use of Credit Background Checks in Hiring Decisions,” Society of Human Resources Management July 19, 2012.

⁹ See *id.* at 14.

Additionally, research consistently shows that African American and Latino households tend to have worse credit, on average, than white households.¹⁰ The use of poor credit to cut off employment opportunities has had a disparate impact on minorities.¹¹ One in two African Americans has poor credit and one in three Latinos has poor credit as compared with one in four Caucasians with poor credit. Various factors contribute to these racial disparities including disproportionately high unemployment and rates of poverty, and high rates of foreclosures caused in part by the fact that persons of color are significantly more likely to receive high cost loans.

INTERSECTIONALITY OF RACE AND GENDER

As the EEOC looks forward to the new and ongoing challenges it must address, we urge the EEOC to consider the multiple factors affecting women of color and the particular remedies necessary to appropriately address these challenges. In effect, any interventions and policies must capture the interactive effects of race, gender, sexuality, and class, among other factors.¹²

For instance, even after accounting for the implicit and explicit biases presented through the use of criminal and credit history background checks, disparities in the workplace continue to detrimentally affect all women, particularly women of color, and ultimately entire families.

The legal framework necessary to effectively address racial and gender bias is still developing and we need the EEOC to exercise leadership in bringing these multiple factors to light. As Professor Kimberle Crenshaw has highlighted for over a decade in discussing the intersectionality of race and gender, the exclusionary consequences of failing to fully address the unique needs of women of color in the workplace is devastating the security of women and

¹⁰ See for example: Board of Governors of the Federal Reserve System, "Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit," 2007; Federal Trade Commission, "Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance," 2007; Robert B. Avery, Paul S. Calem, and Glenn B. Canner, "Credit Report Accuracy and Access to Credit," Federal Reserve Bulletin, 2004; Matt Fellowes, "Credit Scores, Reports, and Getting Ahead in America," Brookings Institution, 2006.

¹¹ Amy Traub, Senior Policy Analyst, *Discredited: How Employment Credit Checks Keep Qualified Workers Out of a Job*, Demos, 8-9, February 2013.

¹² "A Primer on Intersectionality," African American Policy Forum pp. 3-4, available at <http://static.squarespace.com/static/53f20d90e4b0b80451158d8c/53f399a5e4b029c2ffbe26cc/53f399c8e4b029c2ffb2e2b28/1408473544947/59819079-Intersectionality-Primer.pdf?format=original>

children, and families of all incomes.¹³ This intersectionality was initially exemplified in the case of *DeGraffenreid v General Motors* in which five African American women challenged the exclusionary hiring practices of auto maker General Motors.¹⁴ The case involved the segregation of women and African Americans in the workplace. Specifically, women were only permitted to work in front office jobs and African Americans were limited to heavy industrial work. However, the problem for African American women was even more acute because as women they were excluded from the industrial jobs and as African Americans, they were excluded from the front office jobs.¹⁵ The five plaintiffs argued that they had clearly been discriminated against on 2 levels - on the basis of race and because of their gender. Rather than decide the case consistent as a race and sex discrimination case, the court split it into two separate entities and ultimately court dismissed their case because neither white women nor African American men were similarly excluded. Essentially, the plaintiffs were unable to convince the court that GM had engaged in gender discrimination since obviously not all women were excluded, nor could they prove race discrimination because not all African Americans were excluded. As Professor Crenshaw states, “Race and gender discrimination was seen as group based and exclusive, not overlapping and multiply-constituted.”¹⁶ Hence, the discrimination that happened to these plaintiffs literally fell through the cracks.¹⁷

Implicit and explicit discriminatory practices continue to exist in the workplace today and unquestionably contribute to the pay inequity and high rates of poverty affecting families of color. Women in the U.S. who work full time, year round are paid only 78 cents for every dollar paid to their male counterparts.¹⁸ But the wage gap is even larger for many women of color

¹³ See generally, “A Primer on Intersectionality,” pp. 3-4, African American Policy Forum, available at <http://static.squarespace.com/static/53f20d90e4b0b80451158d8c/53f399a5e4b029c2ffbe26cc/53f399c8e4b029c2ffbe2b28/1408473544947/59819079-Intersectionality-Primer.pdf?format=original>

¹⁴ *DeGraffenreid v General Motors*, 558 F.2d 480 (8th Cir. 1977)

¹⁵ *Id*

¹⁶ “A Primer on Intersectionality,” pg.4, African American Policy Forum, available at <http://static.squarespace.com/static/53f20d90e4b0b80451158d8c/53f399a5e4b029c2ffbe26cc/53f399c8e4b029c2ffbe2b28/1408473544947/59819079-Intersectionality-Primer.pdf?format=original>

¹⁷ See generally, “A Primer on Intersectionality,” African American Policy Forum, available at <http://static.squarespace.com/static/53f20d90e4b0b80451158d8c/53f399a5e4b029c2ffbe26cc/53f399c8e4b029c2ffbe2b28/1408473544947/59819079-Intersectionality-Primer.pdf?format=original>

¹⁸ National Women’s Law Center (NWLC) calculations from U.S. Census Bureau, Current Population Survey, 2014 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2013 – People 15 Years Old and

working full time, year round, as African American women are paid only 64 cents, and Latinas only 56 cents, for every dollar paid to white, non-Hispanic men. These gaps translated into a loss of \$19,399 for African American women and \$23,279 for Latinas in 2013.¹⁹ Closing the wage gap is, therefore, particularly important for African American women and Latinas, who are already more likely to have lower incomes and to be in poverty than virtually all other groups.

When analyzing the pay inequities further, we see that the typical African American woman working full time, year round is paid 82 cents for every dollar paid to her white, non-Hispanic female counterpart. The gap is larger for Latinas working full time, year round, who are paid just 73 cents for every dollar paid to their white, non-Hispanic female counterparts.²⁰ The typical African American woman working full time, year round is paid 83 cents for every dollar paid to her African American male counterpart. The gap is smaller for Latinas working full time, year round, who are paid 93 cents for every dollar paid to their Latino counterparts.²¹

Because many women of color are heads of households, equal wages exacerbate poverty rates for many women of color and their families, even among lower-wage earners. In 2013, the Federal Poverty Level for a family of four was \$23,624.²² In 2013, an African American women working full time, year round who was a relatively low-wage earner did not earn enough to bring a family of four above the Federal Poverty Level. However, a white, non-Hispanic man working

Over by Total Money Earnings in 2013, Age, Race, Hispanic Origin, and Sex, available at http://www.census.gov/hhes/www/cpstables/032014/perinc/pinc05_000.htm (last visited Sept. 30, 2014).

¹⁹ Annual gaps are calculated by subtracting the annual total money earnings of African American women and Latinas working full time, year round from that of white, non-Hispanic men working full time, year round.

²⁰ NWLC Insecure and Unequal: Poverty and Income Among Women and Families, 2000-2013 (Sept. 29, 2014), available at <http://www.nwlc.org/resource/insecure-unequal-poverty-among-women-and-families-2000-2013>. Compares poverty rates for adults 18 and older for women and men, for white, non-Hispanics, Asian Americans and Native Americans. Only Native American women have higher poverty rates than Latinas and African American women. Additionally, African American men and Latinos are paid much less than white, non-Hispanic men as well. African American men working full time, year round make nearly 76 cents for every dollar paid to white, non-Hispanic men working full time, year round. For Latinos, the figure is 60 cents.

²¹ NWLC Insecure and Unequal: Poverty and Income Among Women and Families, 2000-2013 (Sept. 29, 2014), available at <http://www.nwlc.org/resource/insecure-unequal-poverty-among-women-and-families-2000-2013>. Compares poverty rates for adults 18 and older for women and men, for white, non-Hispanics, Asian Americans and Native Americans. Only Native American women have higher poverty rates than Latinas and African American women.

²² U.S. Census Bureau, 2013 Poverty Thresholds by Size of Family and Number of Children, available at <https://www.census.gov/hhes/www/poverty/data/threshld/index.html> (last visited Oct. 16, 2014). The Federal Poverty Level assumes a family of four with two adults and two children (\$23,624).

full time, year round who was a relatively low-wage earner for his racial group and sex earned \$35,000 per year, an amount sufficient to bring a family of four well above the poverty line.²³

The Lawyers' Committee has been actively working to eliminate such discriminatory practices in hiring and in the workplace and we know that in addition to working in the courts, that we must change the laws and pass legislation such as the Paycheck Fairness Act. Otherwise children of color and those in low-income communities will undeniably be relegated to a life of poverty if the mothers who head their households are not afforded adequate pay for their work. Even as the courts struggle to catch up, and work to further refine our nation's laws, we need the EEOC to provide leadership through our current laws and address these multiple factors affecting women of color by accounting for such intersectionality in all future guidance.

CONCLUSION

The enforcement of our nation's civil rights laws, particularly those in the employment context, is of paramount importance the Lawyers' Committee and the broader civil rights community. The EEOC plays a critical role in this process and for the past 50 years has been at the forefront of protecting the rights of American workers. The evidence presented in this testimony and by others in the broader civil rights community, highlights the continued need and importance of a strong and robust EEOC for the protection of all American workers and the Lawyers' Committee looks forward to working with the EEOC to make this a reality. Thank you.

²³ NWLC calculations based on U.S. Census Bureau, 2013 Current Population Survey data, Miriam King, Steven Ruggles, J. Trent Alexander, Sarah Flood, Katie Genadek, Matthew B. Schroeder, Brandon Trampe, and Rebecca Vick. Integrated Public Use Microdata Series, Current Population Survey: Version 3.0. [Machinereadable database]. Minneapolis: University of Minnesota, 2010. Public use microdata files are top-coded for certain categories which cause slight differences in data retrieved from Census' person income tables. These calculations refer to a Latinas whose earnings represent the 25th percentile of earnings for all Latinas, an African American woman whose earnings represent the 25th percentile of earnings for all African American women, and a white, non-Hispanic man whose earnings represent the 25th percentile of earnings for all white, non-Hispanic men. Earnings include wage and salary, farm, and business income.