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HIRING AN EX-CON: BACKGROUND CHECKS AND OTHER PRE-SCREENING TECHNIQUES

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I. INTRODUCTION

An increasing number of employers are recognizing the importance of conducting criminal background checks on both prospective and current employees. However, as set forth below, such a check must be conducted in accordance with State and Federal laws.

II. GENERAL CRIMINAL BACKGROUND CHECK

A. Types Of Searches

1. Social Security Number

- a. An employer may verify an applicant's identity by checking the applicant's social security number against credit bureau records.
- b. The search of the applicant's social security number typically provides the state and date of issue of the number, as well as all addresses, employers and names associated with it.

2. County criminal records search. This search verifies the applicant's criminal history in the jurisdiction searched.

3. Sex offender database research. This search verifies whether an applicant is listed in the state registry of sex offenders.

4. Motor vehicle record search. This search verifies whether an applicant has a valid driver's license, as well as the type/class of the driver's license, any restrictions on the license, and whether the applicant's license has ever been suspended or revoked. This search

is especially important if the prospective employee will be operating a motor vehicle on behalf of the employer.

5. Employment verification. This search verifies an applicant's prior employment and generally includes contacting an applicant's present and/or past employers. In addition to verifying the applicant's dates of employment, this search will confirm an applicant's job title, salary and reason for leaving the position.
6. Other background searches include: (a) statewide criminal records research; (b) multi-jurisdictional criminal records database search; (c) federal records search; (d) international criminal records search; (e) Pennsylvania child abuse history searches; (f) terrorist watch lists; (g) credit history report; (h) current address searches; (i) education verification; (j) professional license verification and (k) drug and alcohol testing.
7. An employer must verify an applicant's eligibility to work by requesting an Employment Eligibility Verification form (Form I-9). While citizens and nationals of the United States are automatically eligible for employment, they too must present proof of employment eligibility and identity and complete an Employment Eligibility Verification form (Form I-9).

B. Benefits Of Performing Criminal Background Checks

1. Minimize employer liability exposure for claims such as negligent hiring and/or retention.
2. Encourage applicants and employees to be honest concerning their backgrounds.

III. STATE LAW REGARDING CRIMINAL BACKGROUND CHECKS

A. New Jersey

1. New Jersey imposes extensive pre-employment screening requirements on certain types of employers, including schools and health care facilities. See 3A Empl.Prac.Guide (CCH) ¶ 31-23,6000 at 9185-28 through ¶ 31-23,651.08 at 9186 (2005).
2. New Jersey requires employers that seek to use criminal history information to reject a job applicant, or to terminate an employee, to provide the applicant or employee with adequate notice and opportunity to confirm or deny the accuracy of any information contained in his criminal history record. Furthermore, the subject of the request shall be afforded a reasonable period of time to correct or complete the record prior to a final determination or decision concerning the subject's eligibility for the position. N.J. Admin. Code 13:59-1.6 (a) (2006).

- a. **An individual is presumed innocent of any pending charges or arrests for which there are no final dispositions indicated on the record. Id.**
 - b. Moreover, any person violating Federal and State statutes or regulations governing access to and use of criminal history records information is subject to any applicable criminal or civil penalties and remedies. N.J. Admin. Code 13:59-1.6 (b) (2006).
3. Negligent Hiring And Retention
- a. In Di Cosala v. Kay, 450 A.2d 508 (N.J. 1982), the Supreme Court of New Jersey recognized the tort of negligent hiring or retention of an employee and held that an employer may be held liable for injuries to third parties arising from this negligence. To establish such a claim a plaintiff must demonstrate that the employer knew or had reason to know of the “particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons.” Id. At 516. A plaintiff must also demonstrate that the employer’s negligence was the proximate cause of the plaintiff’s injuries.

The Di Cosala Court pointed out that the tort of negligent hiring addresses a different wrong from that sought to be addressed by the respondeat superior doctrine. The tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual while the doctrine of respondeat superior was based on the theory that the employee was the agent for the employer.

- b. In Lingar v. Live-In Companions, 692 A.2d 61 (N.J.Super.Ct. 1997), the Superior Court of New Jersey held that an employer's liability should not be based solely upon the employer's failure to investigate an applicant's criminal history. Instead, the totality of the circumstances surrounding the hiring decision, including the work to be performed by the applicant, should be considered.

B Pennsylvania

1. Statutory Law

- a. Pennsylvania mandates that certain types of employers, including public and private schools and law enforcement agencies, obtain criminal history record information regarding prospective employees. See 24 Pa.C.S.A. § 1-111 (2005) (background check requirements for public and private

schools) and 53 Pa.C.S.A. § 752.3 (2005) (individual with felony or serious misdemeanor conviction may not be a law enforcement officer).

b. Pennsylvania also restricts the extent to which an employer may rely on a job applicant's criminal history in making hiring decisions.

(i) Pursuant to 18 Pa.C.S.A. § 9125 (2005), whenever an employer is in receipt of information which is part of an employment applicant's criminal history information file, it may use that information for the purpose of deciding whether or not to hire the applicant, only in accordance with this section.

(ii) Furthermore, an employer may only consider an employee's felony and misdemeanor convictions "to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." 18 Pa.C.S.A. § 9125(b). See also Campbell v. Acme Markets, Inc. 18 Phila. 524 (1989 Phila.Cty.Rptr.LEXIS 2 (Pa.C.P. 1989).

(iii) Moreover, the employer must provide written notice to the applicant if the employer decides not to hire the applicant based upon the applicant's criminal history record information.

aa. In Foxworth v. Pennsylvania State Police, 2005 U.S. Dist. LEXIS 33639, the plaintiff applied to become an officer with the Pennsylvania State Police. On his application the plaintiff noted that he had committed a theft when he was eighteen years old. This offense had been expunged from the plaintiff's criminal record and, therefore, was not revealed when the Pennsylvania State Police performed a criminal background check. However, as a result of his self-disclosure, the plaintiff was disqualified as a cadet. The District Court for the Eastern District of Pennsylvania held that 18 Pa.C.S.A. § 9125 did not apply in this type of situation because the term "criminal history" does not include information that is voluntarily provided by an applicant.

2. Common Law

a. Negligent Hiring, Supervision and Retention

(i) Pennsylvania Courts have held that an individual who has been harmed by an employee's conduct, may assert a claim against the employer for negligent hiring, supervising and retention of the employee. Such a claim arises under

Pennsylvania tort law, as well as under the Restatement (Second) of Torts § 317 and the Restatement (Second) of Agency § 213.

- (ii) An employer may also be liable for acts committed by a former employee if this employee inappropriately used information he had access to during his employment. See Coath v. Jones, 419 A.2d 1249 (Pa.Super.Ct 1980).
- (iii) In Vellafane v. Foundations Behavioral Health, 2005 U.S. Dist. LEXIS 11283 (E.D.Pa.), an employee of the defendant employer sexually assaulted a patient in a mental health facility. The defendant argued that it could not have known that the employee had any propensity for sexual misconduct or violence. In fact, the defendant had conducted a criminal background check and determined that the employee had no criminal record. Based upon these facts, the Court acknowledged that the facts may not have supported a pure negligent hiring claim against the defendant. However, the Court also found that there was sufficient evidence for the fact finder to conclude that the defendant failed to properly train and supervise the employee and, therefore, denied the defendant's Motion for Judgment on the Pleadings.

- (iv) In Barry v. Manor Care, Inc., 1999 U.S. Dist. LEXIS 5928 (E.D. Pa. 1999), the District Court for the Eastern District of Pennsylvania found that the plaintiff had demonstrated sufficient evidence of prior misconduct to defeat the employer's Motion for Summary Judgment where the plaintiff demonstrated that the employee had been disciplined for striking individuals during her previous employment and, in fact, had been arrested and charged with assaulting an elderly patient. Moreover, in evaluating the employee's performance, the defendant had noted concerns regarding the employee's treatment of residents and/or patients. Thus, plaintiff had presented sufficient evidence to proceed with her claim.
- (v) In Matt v. Pressley and Keystone Center Extended Care, 2006 U.S. Dist. LEXIS 25724, plaintiff James Walter Matt, Jr. was assaulted on the premises of Keystone Center Extended Care by former employee Clarence Pressley. Although the Court dismissed plaintiff's complaint which attributed liability to Keystone on the basis of respondeat superior, it denied Keystone's Motion for Summary Judgment on plaintiff's claims of negligent hiring and supervision. In

reaching this conclusion, the Court noted that the plaintiff had demonstrated sufficient evidence to allow his claims to proceed to the jury.

b. Defamation

- (1) Employers must be aware that a defamation claim may arise from statements the employer made regarding the reasons for terminating an employee in connection with a prior criminal conviction. See Chicarella v. Passant, 342 Pa.Super. 330, 337, 494 A.2d 1109, 1112 (1985) ; Beckman v. Dunn, 276 Pa.Super. 527, 536, 419 A.2d 583, 588 (1980).
- (2) A defendant employer may assert a conditional privilege as a defense to a defamation claim. This privilege exists when (1) an interest of the publisher of the defamatory statement is implicated; (2) an interest of the recipient of the defamatory statement or that of a third party is implicated; or (3) a recognized public interest is implicated. See Easton v. Bristol Myers Squibb Co., 289 F.Supp.2d 604. In Easton, several managers met with the plaintiff employee in order to allow the employee to explain a prior felony conviction. The Court found that only those people whose interests were implicated were present and, therefore, held that any

statements made during this meeting were made subject to the conditional privilege. In reaching this conclusion, the Court pointed out that this privilege “is regularly applied to such intra-organizational communications concerning employees.”

IV. FEDERAL LAW REGARDING CRIMINAL BACKGROUND CHECKS

A. Disparate Impact

1. In order to prevail under the theory that an employer’s criminal background check policy has a disparate impact on certain employees, the plaintiff must demonstrate that the policy causes a “disparate impact on the basis of race, color, religion, sex or national origin and that the respondent {employer} fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A).
2. The Equal Opportunity Commission defines an adverse impact as “{a} substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex or ethnic group.” 29 C.F.R. § 1607.16 (2006).
3. When presented with a challenge to its policy, an employer must establish that the policy is job related and consistent with business

necessity. Lanning v. SEPTA, 181 F.3d 478, 487 (3rd Cir. 1999).

B. EEOC Presumption Of Disparate Impact

1. The EEOC has adopted the presumption that any policy or practice which causes an adverse employment action to be taken based only on an individual's conviction record has an adverse impact on members of African-American and Hispanic communities. As these individuals are members of protected classes, an absolute bar to employment solely based on the fact that an individual has a conviction record is unlawful under Title VII. See Conviction Records, EEOC Compl.Man (CCH) ¶ 2088at 2113 (19998).
2. An employer may rebut the adverse impact presumption of a hiring/promotion policy by offering statistical evidence that the above groups are not convicted at a disproportionately higher rate than members of other groups or that the policy does not cause an adverse impact in the hiring process.
3. Once a disparate impact is established, an employer may still avoid liability by demonstrating that its policy is justified by a valid business necessity.

C. Federal Court Analysis - Disparate Impact

1. In Pollard v. Wawa Food Market, 366 F.Supp.2d 247 (2005), plaintiff was terminated after a criminal background check revealed

that she had more than one criminal conviction. The plaintiff claimed that her dismissal from employment resulted in unlawful discrimination. The Court held that because plaintiff's claims were based on a theory of disparate impact discrimination, she could not bring a 42 U.S.C. § 1981 claim which required intentional discrimination. The Court also dismissed plaintiff's claims for compensatory and punitive damages as to her Title VI claims because such damages were only available for intentional discrimination claims.

2. In El v. Southeastern Pennsylvania Transportation Authority, 2005 U.S. Dist. LEXIS 14133 (E.D. Pa. 2005), the defendant had a uniform employment policy regarding its paratransit subcontractors which prohibited these subcontractors from employing anyone who had a past felony conviction or misdemeanor conviction or any crime of moral turpitude or violence against person. This policy did not require consideration of how long ago the conviction occurred, the circumstances surrounding the conviction or the relationship between the conviction and the position sought.

The plaintiff, an African American male, disclosed on his application for employment that he had been convicted of second degree homicide forty years ago and had served three and one-half

years in prison for this crime. Despite this disclosure, the plaintiff received a conditional offer of employment contingent on the completion of a successful background investigation and regulatory requirements. The defendant eventually terminated the plaintiff's employment as a result of the prior criminal conviction. The plaintiff filed an action in Federal Court alleging violations of Title VII; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; Article 1, Section 1 of the Pennsylvania Constitution and the Pennsylvania Criminal History Record Information Act.

- a. To establish that defendant's policy had a disparate impact on minority employees, the plaintiff produced expert testimony that defendant's minority employees were dismissed from employment due to criminal convictions at a rate that is 200 percent greater than non-minorities. Based on this testimony, the Court found that the plaintiff had established a prima facie case that defendant's policy had a disparate impact on African-Americans in violation of Title VII.
- b. However, the Court also found that the defendant had met its burden of establishing that the policy was job related and consistent with business necessity and therefore granted the

defendant's Motion for Summary Judgment.

- i. In reaching this conclusion, the Court noted that defendant's policy did not automatically preclude a job applicant with a criminal history from a position with defendant but "... on a case by case basis gives such applications heightened scrutiny to determine whether the conviction is sufficient to find that candidate unsuitable for the position for which he or she has applied." Id. At *27.
 - ii. The Court also noted that paratransit drivers provide service to physically and mentally disabled passengers, are in close proximity with these passengers and are often alone with these passengers. Thus, defendant's policy "... reduces the risk of victimization of a population that is known to have an elevated risk."
3. In Field v. Orkin Exterminating Co., Inc., 2001 U.S. Dist. LEXIS 24068 (E.D. Pa. 2001), the plaintiff, a Caucasian woman, was terminated from her position as an office manager and bookkeeper after the defendant employer learned that she had been convicted of a felony within the past ten years.
 - a. The Court found that, despite the fact that she was Caucasian

and, therefore, not a member of a protected class, the plaintiff had stated a cognizable claim under Title VII. In reaching this conclusion the Court recognized that “a blanket policy of denying employment to any person having a criminal conviction violates Title VII.” *Id.* at 6. Although this rule evolved because of concerns about the possible disparate impact on minority job applicants, this protection applies to all job applicants.

b. The Court noted that a blanket policy regarding criminal convictions would not violate Title VII if the criminal conviction involved conduct which demonstrates a person’s lack of qualification for the job, such as an applicant for a bank teller position with a conviction for embezzlement.

4. In Green v. Mo.Pac.R.R.Co., 523 F.2d 1290 (8th Cir. 1975), the Eighth Circuit Court of Appeals was presented with the issue of whether the defendant’s policy of refusing to consider for employment any applicant who had been convicted of a crime other than a minor traffic offense had a disparate impact on African-Americans.

a. The Court found that the plaintiff had produced statistical evidence that defendant’s policy disqualified actual and

potential African-American job applicants at a substantially higher rate than Caucasians. *Id.* at 1295. The Court noted that the plaintiff could establish a *prima facie* case by using three types of statistical evidence: (a) statistics which show that the employment practice excludes African-Americans as a class, either nationally or regionally, at a substantially higher rate than Caucasians; (b) data which compare the percentages of African-American and Caucasian job applicants that are excluded by the employment practice; or (c) evidence that compares percentage of African-Americans employed by the defendant with the percentage of African-Americans in the region. *Id.* at 1293-94. The Court determined that the plaintiff had demonstrated through statistical evidence that the employment practice disqualified actual and potential African-American job applicants at a substantially higher rate than Caucasians. *Id.* at 1295. Moreover, Defendant could not demonstrate that its blanket policy of excluding applicants solely based on prior criminal convictions constituted a valid business necessity.

D. Disparate Treatment

1. In order to establish a *prima facie* case of discrimination under a

theory of disparate treatment, a plaintiff must demonstrate: (1) he belongs to a protected group; (2) he was qualified for the position; (3) he suffered an adverse employment action and (4) the circumstances of the adverse employment action create an inference of discrimination. See Sarullo v. United States Postal Service, 352 F.3d 789, 797 (3rd cir. 2003); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

- a. If a plaintiff succeeds in establishing a prima facie case, the burden of proof shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment decision. Id. See also Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) . Thus, a defendant may dispel the inference of discrimination by offering a satisfactory explanation for its employment decision. Id.
- b. If the employer meets the above burden of proof, plaintiff must demonstrate that the employer's stated explanation is pretextual and not worthy of credence.
- c. However, at all times the plaintiff retains the burden of persuading the trier of fact that a protected characteristic such as race, sex, or national origin, was a factor in the

employer's decision to take an adverse employment action against her. See Fuentes v. Perskie, 32 F.3d 759, 764 (3rd Cir. 1994).

E. Federal Court Analysis - Disparate Treatment

1. In Ramos v. EquiServe, Civ.A. No. 01-1407, mem.op. (D.N.J.) July 28, 2004) aff'd, 146 F.App'x 565 (3rd Cir. August 18, 2005), defendant dismissed the plaintiff from his temporary position solely because of the plaintiff's arrest history. In addition to a disparate impact claim, plaintiff alleged a disparate treatment claim. The Court found that the plaintiff had failed to establish a prima facie case and that the defendant's proffered reason for dismissing the plaintiff was pretextual. Thus, the Court dismissed plaintiff's disparate treatment claim. (For a further discussion of this case see Section V of these materials.)
2. However, in Smith v. American Service Company, 611 F.Supp. 321 (N.D.Ga. 1984) , aff'd in part and rev'd in part, 796 F.2d 1430 (11th cir. 1986), the Court held that the defendant had failed to proffer a reason for plaintiff's dismissal where the defendant gave inconsistent reasons for its failure to hire the plaintiff. Furthermore, the defendant failed to explain why it selected a Caucasian employee over the plaintiff, an African-American woman.

F. Recovery Under 42 U.S.C. § 1983

1. Under U.S.C § 1983

“Every person, who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable in an action at law ... for redress... “

2. In order to prevail on § 1983 claim, a plaintiff must establish that (a) the conduct complained of was committed by a person acting under the color of state law; and (b) the conduct complained of deprived the plaintiff of his rights, privileges or immunities provided for under the law or the United States Constitution. See Kost v. Kozakiewicz, 1 F.3d 176, 184 (3rd Cir.).

3. A municipality may be held liable under § 1983. However, it may not be held liable under a theory of respondeat superior. See Monell v. Department of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 56L.Ed2d 611 (1978). Furthermore, the plaintiff must identify a specific policy or custom that proximately caused the violation of the plaintiff’s protected rights. Berg v. County of Allegheny, 219 F.3d 261, 275 (3rd Cir). If the policy at issue is facially valid, the plaintiff

must then establish that the defendant's action was taken with deliberate indifference to its known or obvious consequences.

Bornstad v. Honey Brook Township, 2005 U.S. Dist. LEXIS 19573 (E.D. Pa. 2005).

4. The United States Supreme Court has recognized the difficulty of establishing a claim against a municipality based upon only one hiring decision. In Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997), a reserve deputy physically restrained plaintiff while conducting a traffic stop. The plaintiff alleged that the defendant county violated § 1983 because it did not adequately screen the deputy's background, which included guilty pleas for several misdemeanors such as assault and battery, resisting arrest and public drunkenness.

In dismissing plaintiff's claim, the Supreme Court noted that a court must "carefully test the link between the policymaker's inadequate decision and the particular injury alleged." *Id.* at 410. Furthermore, only where adequate scrutiny of an applicant's background would lead a reasonable policy maker to conclude that the plainly obvious consequences of the decision to hire the applicant would be a deprivation of a third parties federally protected right can the official's failure to adequately scrutinize the applicant's

background constitute deliberate indifference.”

5. In Maslow v. Evans, 2003 U.S. Dist. LEXIS 20316 (E.D. Pa. 2003), three female plaintiffs asserted that various representatives of the Pennsylvania State Police violated § 1983 because they failed to properly investigate the background of trooper Michael Evans who eventually sexually harassed the plaintiffs. The plaintiffs also claimed that the Pennsylvania State Police failed to properly supervise, instruct, train, counsel and discipline Evans.
 - a. The investigation into Evans’ background conducted by the Pennsylvania State Police revealed that while Evans was a city police officer, one of his supervisors alleged that Evans had made a racist comment and was overly aggressive. The investigation also revealed that Evans had sexually harassed a female at the Police Training Institute. Moreover, another police officer made negative comments about Evans’ sexual behavior. The officer conducting the investigation on behalf of the Pennsylvania State Police did not believe that Evans was an appropriate candidate for a trooper position. However, the Pennsylvania State Police’s hiring procedure prevented the hiring committee from considering the opinions of the investigating officer. Furthermore, the background

report given to the hiring committee could include only substantiated allegations.

- b. The Court dismissed the Plaintiffs' § 1983 claim. In reaching this conclusion, the Court noted that although the background investigation revealed unsubstantiated negative allegations about Evans' sexual history, the plaintiffs failed to demonstrate that his subsequent sexual misconduct directed to the plaintiffs was a plainly obvious consequence. Thus, while the investigating and hiring procedures of the Pennsylvania State Police were clearly deficient, it was not clear that improved procedures would have prevented the trooper's conduct. Accordingly, the Pennsylvania State Police did not act with deliberate indifference toward the plaintiffs.

V. EMPLOYER CONSIDERATION OF ARRESTS RECORDS

A. EEOC Position

1. The EEOC has determined that the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups. Policy Guidance on the Consideration of Arrest, EEOC Compl.Man. (CCH) ¶ 2094 at 2131-37 (1998).
2. Thus, such a policy is presumptively invalid unless an employer can

establish a business necessity for it.

3. An employer may make an adverse decision based upon an individual's prior arrest after it balances several factors:
 - i. The employer must consider whether the employee actually engaged in the conduct for which he was arrested. *Id.* at 2131. In making this determination the employer should examine the surrounding circumstances of the arrest, provide the individual with an opportunity to explain the arrest and conduct an additional investigation to assess the individual's credibility.
 - ii. The individual's conduct must be related to the job at issue and be relatively recent. An employer may undertake "close scrutiny of an applicant's character and prior conduct" regarding positions that, for instance, (a) are related to law enforcement, (b) give the employee easy access to the property of others, or (c) involve responsibility for the safety of others. *Id.* at 2134.

B. Federal Court Analysis

1. In Ramos v. EquiServe, Civ.A. No. 01-1407, mem.op. (D.N.J.) July 28, 2004) aff'd, 146 F.App'x 565 (3rd Cir. August 18, 2005), the plaintiff, an African-American, was an employee with a temporary

employment agency and received a job placement in the data collection department of defendant EquiServe. Plaintiff consented to an FBI criminal background investigation which revealed that plaintiff had been arrested several times in 1991 and 1992. As a result of this investigation, defendant dismissed the plaintiff. However, the Corporate Security Officer of EquiServe advised the plaintiff that he could return to work if he could provide documentation that the charges against him had been dismissed. The Third Circuit Court of Appeals found that the plaintiff had not demonstrated that conducting criminal background checks resulted in a discriminatory impact on a large number of minorities seeking employment. As plaintiff had failed to establish a prima facie case, the Court granted defendant's Motion for Summary Judgment on plaintiff's disparate impact claim.

2. In Clinkscale v. City of Philadelphia, U.S. Dist. LEXIS 9644 (E.D. Pa. 1998), the plaintiff alleged that his application for admission to the Philadelphia Police Academy was rejected solely because of the Academy's policy of excluding applicants with an arrest history, regardless of whether they were convicted. The Court found that the Academy's policy did not violate Title VII, 42 U.S.C. § 1983 or state anti-discrimination laws. In reaching this conclusion, the Court

noted the specific nature of the position at issue and recognized that even an “unjustified arrest may be indicative of character traits that would be undesirable in a police officer, such as a quick temper, poor attitude or argumentativeness.” Id. at *4. Furthermore, the hiring of law enforcement officers implicates “serious public safety concerns.” Thus, defendant’s policy was enforceable. Id.

VI. DEVELOPING POLICIES AND PRACTICES REGARDING CRIMINAL HISTORY INFORMATION

- A. An employer may properly condition employment on a background investigation. See ATM Corporation of America v. Unemployment Board of Review, 892 A.2d 859, 2006 Pa.Commw.LEXIS 21 (Pa.Commw.Ct. 2006).
1. In ATM Corporation of America v. Unemployment Board of Review, Id., defendant discharged an employee because the employee refused to consent to a background check. The Court held “[i]t is beyond peradventure that the Employer has a legitimate need to protect the confidential information of its customers to which the accounting department members, including Claimant, have daily access. A background check on these employees is a reasonable way to protect that confidential information, particularly where demanded by Employer’s financial partners and customers.”

2. Although there are risks associated with conducting an investigation into the criminal background of an employee or potential employee, as set forth above, these risks may be outweighed by the potential liability for negligent hiring or retention claims.
 - a. An employer can reduce the risks associated with conducting criminal background investigations by:
 - i. Conducting a narrow inquiry into prior conduct;
 - ii. Targeting information that is job related, fairly recent and consistent with the employer's business necessity;
 - iii. Making employment decisions only after considering how and to what extent the criminal history information is related to the job and taking the type of business in which the employer is engaged into account;
 - iv. Documenting all legitimate reasons why any and all adverse employment actions were taken;
 - v. Maintaining all criminal background information in as confidential a manner as possible;
 - vi. Using the criminal background information only in a manner consistent with the law of the applicable jurisdiction;

- vii. Notifying all prospective and current employees that they are expected to provide accurate information in response to specific questions posed to them by the employer and that providing false information can lead to a rejection of the employment application and/or termination of employment.