

U.S. COMMISSION ON CIVIL RIGHTS

+ + + + +

BRIEFING

+ + + + +

FRIDAY, DECEMBER 7, 2012

+ + + + +

The Commission convened in Suite 1150 at
1331 Pennsylvania Avenue, Northwest, Washington, D.C.
at 9:00 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner

VANESSA EISMANN, Parliamentarian

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

STAFF PRESENT:

MARGARET BUTLER, Acting Director, OCRE

PAMELA DUNSTON, Chief, ASCD

YASMIN ELHADY

ALFREDA GREENE

JENNIFER CRON HEPLER

DAVID MUSSATT, Director, MWRO

LENORE OSTROWSKY, Acting Chief, PAU

ELOISE PLATER

MICHELE YORKMAN

JOHN RATCLIFFE, Chief, BFD

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

JOHN MARTIN

CARISSA MULDER

MARLENE SALLO

ALISON SOMIN

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

I. Introductory Remarks by Chairman 5

II. Panel I: Government and Scholars Panel

 Carol Miaskoff, Acting Associate
 Legal Counsel, Office of Legal
 Counsel, EEOC 10

 Don Livingston, Partner, Akin,
 Gump, Strauss, Hauer & Feld,
 Washington, D.C. Office 15

 Harry Holzer, Professor of
 Public Policy,
 Georgetown University 20

 Alfred Blumstein, Professor of Urban
 Systems and Operations Research,
 Carnegie Mellon University 27

 Jeffrey Sedgwick, Keswick Advisors 32

 Questions by Commissioners 37

III. Panel II: Business and Advocacy Groups Panel

 Roberta Meyers, Director of the
 Legal Action Center's National
 H.I.R.E. Network 79

 Glenn Martin, Vice President of
 Development and Public Affairs,
 Director of the David Rothenberg
 Center for Public Policy,
 Fortune Society, Inc 86

 Lucia Bone, founder of
 the Sue Weaver CAUSE 94

 Julie Payne, General Counsel for
 G4S Secure Solutions, USA Inc. 99

 Richard Larson, President and Owner
 of Winning Works Team, Inc. 104

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

	<u>PAGE</u>
Garen Dodge, Partner Region Office of Jackson Lewis, LLP, Washington, D.C. and General Counsel for the Council for Employment Law Equity	109
Questions by Commissioners	115
IV. LUNCH	
V. Panel III: Trade Associations Panel Speakers	
Montserrat Miller, Arnall Golden Gregory LLP, National Association of Professional Background Screeners	147
Nick Fishman, EmployerScreenIQ	153
Todd McCracken, National Small Business Association	160
Jonathan Segal, Society for Human Research Management, SHRM	166
Richard Mellor, National Retail Federation	173
William Dombi, National Association for Home Care and Hospice	178
Questions by Commissioners	185
VI. Adjourn Briefing	221

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

P-R-O-C-E-E-D-I-N-G-S

(9:04 a.m.)

I. INTRODUCTORY REMARKS BY CHAIRMAN

CHAIRMAN CASTRO: Good morning. I'm calling this meeting to order. I'm Marty Castro, Chair of the U.S. Commission on Civil Rights and I want to welcome everyone this morning to our briefing on assessing the impact of criminal background checks and the Equal Employment Opportunity Commission's Guidance on the consideration of arrest and conviction records in enforcement decisions under Title VII and its impact on the employment of black and Hispanic workers.

It is now 9:04 a.m. on December 7, 2012. The purpose of this briefing is to look at the Guidance policy and the use of criminal background checks and determine whether it encourages or discourages the reentry by former offenders into the job market.

And this is, in my estimation, not a stand-alone issue. It relates, actually, to some of the issues that the Commission has looked at in the past.

One of those, most recently, is the issue of school discipline. And we have noticed in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 much of the literature that school discipline, to the
2 extent that it disproportionately treats or impacts
3 students of color, is likely to result in those
4 students leaving school.

5 Those students that leave school are
6 more likely to interact with the criminal justice
7 system. Those students who then interact with the
8 criminal justice system, other studies have found,
9 are more likely if they are black and Latino to have
10 disparate treatment or disparate impact in the
11 sentencing of their alleged violations.

12 And then we see when they come out of
13 prison there's challenges that they face in the job
14 market. And the Guidance that we're going to look at
15 today is something that on both sides of our aisles
16 here, on the Conservative side as well as on the
17 Democratic and Progressive side, we care very much
18 about.

19 And we're very pleased to bring together
20 a group of bi-partisan panelists from different
21 points of view to help educate us on the impact of
22 these issues, so that we can then present, hopefully
23 to the President and Congress, a report and
24 recommendations on the views of the Civil Rights
25 Commission.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Today's briefing brings to us 17
2 distinguished speakers who are going to provide us
3 with a diverse array of points of view and
4 perspectives. The speakers have been divided between
5 three panels. Panel I consists of government
6 officials and scholars. Panel II will consist of
7 advocacy and business spokespersons. Panel 3 will
8 consist of presenters from trade associations and
9 employee screening groups.

10 During each panel the briefing panelists
11 will have seven minutes to speak. After all the
12 panelists have made their presentations,
13 Commissioners will then have the opportunity to ask
14 them questions within an allotted period of time.

15 I will recognize Commissioners to speak
16 based on their indication of a willingness to do so
17 and I will attempt to make sure that the questioning
18 by the Commissioners is balanced.

19 In order to maximize the amount of time
20 and the opportunity for discussion between our
21 Commissioners and our panelists, I want to ensure
22 also that the afternoon panelists have their fair
23 share of time, I will be strictly enforcing the time
24 allotments given to both panelists as well as to the
25 Commissioners.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Panelists, you'll notice there's a
2 series of warning lights here that we've set up.
3 These are like traffic lights. So when you see green
4 that means go. When you see yellow that means speed
5 up, like it does, unfortunately when we're driving.
6 And then when you see red we ask you to stop.

7 I will be mindful, again, that we have
8 limited time so I don't want to have to cut off any
9 panelists mid-sentence. There will be opportunity to
10 continue the conversation when the Commissioners have
11 the opportunity to question you.

12 Again, I'll ask my fellow Commissioners,
13 as they have been in every one of our briefings, to
14 be considerate of the panelists and one another and
15 keep our questions concise. Try to please only ask
16 one question at a time, although I understand that
17 some questions require follow-up. But if we all
18 abide by this arrangement we'll be able to hear from
19 the panelists and be able to conclude each panel in a
20 timely manner.

21 So with those housekeeping matters out
22 of the way I'd like to now proceed with our first
23 panel. I will briefly introduce the panelists in the
24 order in which they're going to speak and then we'll
25 swear them in.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PANEL I: GOVERNMENT AND SCHOLARS PANEL

Our first panelist this morning is Carol Miaskoff from the EEOC where she is the Acting Associate Legal Counsel in the Office of the Legal Counsel of the EEOC.

Our second panelist is Don Livingston, a partner in the Washington, DC Office of Akin Gump Strauss Hauer & Feld, and a former EEOC General Counsel.

Our third panelist is Harry Holzer, Professor of Public Policy at Georgetown University and the former Chief Economist of the U.S. Department of Labor.

Our fourth panelist is Alfred Blumstein, Professor of Urban Systems and Operations Research at the Carnegie Mellon University.

And our fifth panelist is Jeffrey Sedgwick with Keswick Advisors and a former Director of the U.S. Department of Justice, Bureau of Justice Statistics.

I'll now ask each panelist to swear or affirm that the information that you're about to provide to us is true and accurate to the best of your knowledge, information and belief, is that true?

(Chorus of ayes.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRMAN CASTRO: Thank you. Ms.
2 Miaskoff, please proceed.

3 MS. MIASKOFF: Good morning, Chairman
4 Castro, distinguished members of the Commission,
5 thank you for the opportunity to appear today.

6 I am Carol Miaskoff, acting associate
7 legal counsel at the U.S. Equal Employment
8 Opportunity Commission. The EEOC, as you know, is a
9 bi-partisan Commission of five presidentially
10 appointed, and Senate confirmed commissioners. The
11 EEOC's mandate from Congress is to enforce Title VII
12 of the Civil Rights Act of 1964.

13 Title VII prohibits employment
14 discrimination on the basis of race, color, religion,
15 sex or national origin. It has applied now for
16 almost 50 years.

17 The EEOC enforces Title VII first by
18 investigating charges of discrimination brought to us
19 by job applicants, or employees, who assert that
20 covered employers violated the law, either by
21 treating them differently because of their race, for
22 example, or by applying to them a seemingly neutral
23 policy that nonetheless operates to
24 disproportionately exclude people of their race, but
25 is not job related and consistent with business

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 necessity.

2 When the EEOC investigates a Title VII
3 charge, it gathers the facts necessary to decide if
4 there is reasonable cause to find a violation.

5 My statement today will summarize the
6 EEOC's recent enforcement guidance on the
7 consideration of arrest and conviction records and
8 employment decisions under Title VII. The substance
9 of this Guidance is not a major departure from
10 existing precedent from the courts and from the EEOC.

11 In short, Title VII does not stop
12 employers from meaningfully considering criminal
13 history information when they make employment
14 decisions. As a Federal Court said when interpreting
15 Title VII for a hiring race discrimination case in
16 the 1970s, and as the EEOC's policy statements
17 reiterated in 1987 and 1990, "Criminal history may be
18 used to screen applicants by considering the nature
19 of the crime, the time elapsed and the nature of the
20 job."

21 However, under Title VII, the mere fact
22 of having a criminal record should not automatically,
23 and without consideration, bar a person from all
24 future employment.

25 The 2012 Guidance recognizes that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 reentry is a complicated issue, and that employment
2 discrimination is one piece of the puzzle, albeit a
3 real piece. The Guidance looks at the different
4 kinds of criminal history, that are now available
5 online, and some of the problems with its accuracy
6 and completeness.

7 The Guidance recognizes the other legal
8 duties faced by employers at the federal, state and
9 local levels and the concerns they have about
10 workplace safety and reducing theft. In this context
11 the Guidance reviews recent statistics about arrests
12 and incarceration in America and then breaks those
13 numbers down by race and national origin.

14 The Guidance is obviously about the
15 Title VII piece of this puzzle. It begins by
16 discussing disparate treatment, which occurs when
17 similarly qualified job applicants who disclose or
18 are found to have equivalent criminal records are
19 nonetheless given different employment opportunities
20 because of their race.

21 The Guidance then turns to disparate
22 impact, which was the focus of the EEOC's 1987 and
23 1990 policies. The new Guidance analyzes disparate
24 impact in the same fundamental way, but in greater
25 depth and in light of the 1991 Civil Rights Act,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 which formally added disparate impact to Title VII.

2 The 2012 Guidance gives a step-by-step
3 analysis to disparate impact. The first step is to
4 identify the particular policy or practice at issue.
5 In other words, the policy of excluding people from
6 employment if they have a criminal record or if they
7 have a record of a particular conviction and are
8 seeking a particular job.

9 The second step is to determine if there
10 is evidence that the policy or practice caused a
11 disparate impact. The EEOC's starting point, as the
12 national enforcement agency, is national criminal
13 justice data demonstrating that blacks and Hispanics
14 are arrested and incarcerated in numbers greatly
15 disproportionate to their representation in the
16 population.

17 This is not a legal conclusion in
18 itself. The employer is welcome to provide evidence
19 to demonstrate that its policy or practice does not
20 have a disparate impact. The EEOC also may gather
21 data itself that is unique to the particular case.

22 If disparate impact is found, the third
23 step is the employer defense of job-related and
24 consistent with business necessity. If that is
25 satisfied the final step is determining if there is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 an effective less discriminatory alternative the
2 employer refused to adopt.

3 Understanding business necessity is the
4 heart of the Guidance. The Commission states that
5 employers can reliably meet the standard in two ways.
6 The first involves validating the policy under the
7 Uniform Guidelines on Employee Selection Procedures.

8 The second way involves the basic test I
9 discussed above using a targeted screen to consider
10 at least the nature of the crime, the time elapsed
11 and the nature of the job and providing an
12 opportunity for individualized assessment.

13 Individualized assessment is not
14 burdensome and it is not complicated. Simply put, it
15 means that the employer tells an applicant or
16 employee that he may be excluded from employment
17 because of past criminal conduct. And then it gives
18 him an opportunity to explain or submit information
19 to put his criminal record into context so that the
20 employer can factually judge its relevance to the
21 employment situation.

22 The individual could provide
23 documentation of error in the record or information
24 about work experience, personal references, training,
25 bonding or other related factors. The goal of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Guidance here is to alert employers about the kinds
2 of information that may be relevant, not to mandate a
3 checklist of factors.

4 I will conclude there. There is more in
5 my written testimony that everyone is more than
6 welcome to read. Thank you.

7 CHAIRMAN CASTRO: Thank you, Ms.
8 Miaskoff. Mr. Livingston, please proceed.

9 MR. LIVINGSTON: Good morning. I'm Don
10 Livingston. I'll comment on what the Guidance says,
11 what the Guidance is, and the educational and
12 transformation consequences of the Guidance, some
13 perplexing issues and the failure of the Guidance to
14 recognize trust and reliability as important linkages
15 between lawbreaking and work. And I'll try to do
16 this all in under seven minutes.

17 The EEOC Guidance on the consideration
18 of arrest and conviction records in employment
19 decisions is presented in a lengthy document; but the
20 rule it establishes is simple: Employers commit race
21 discrimination if they choose law abiding applicants
22 over applicants with criminal convictions unless the
23 employer goes through a highly subjective decision
24 making process that involves the collection of
25 information and weighing of multiple factors,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 including the individual's particular circumstances,
2 education and training post-conviction, length and
3 consistency of employment history, and character
4 references.

5 If the applicant is rejected after
6 consideration of these factors, presumptively no race
7 discrimination occurs.

8 An analytical flaw in the Guidance is
9 that it does not explain whether or why it *is* race
10 discrimination to reject the applicant without
11 individualized assessment but it is *not* race
12 discrimination to reject the same applicant with the
13 individualized assessment.

14 The Guidance is not authoritative in the
15 way a law is authoritative. The Guidance is not a
16 regulation. Indeed, the EEOC has no authority under
17 Title VII to issue substantive regulations under
18 Title VII. The Guidance is not binding, even on the
19 EEOC, which is free to take inconsistent positions
20 during its own investigations or in litigation when
21 it sues employers.

22 As a general matter the Supreme Court
23 gives little deference to the EEOC's non-regulation
24 interpretations of Title VII. This is thoroughly
25 discussed in a study by Melissa Hart, called

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 "Skepticism and Expertise." It was published in the
2 Fordham Law Review in 2006. The EEOC's Title VII
3 Guidance is followed by the courts to the extent the
4 courts finds the Guidance persuasive based on
5 thoroughness, logic and fit with prior
6 interpretations and any others sources of weight.
7 That means simply that the court will consider the
8 EEOC's Guidance as it would any other argument.

9 The EEOC's Guidance already has played a
10 significant educational role. As result of the
11 Guidance, there has been greater awareness by
12 employers that their policies may be unnecessarily
13 restrictive. The Guidance has also been
14 transformational. From the heightened awareness from
15 education has come liberalization, a loosening if you
16 will, on the restrictions on the hiring of persons
17 with criminal records.

18 And because the Guidance implies an
19 expectation that the outcome of EEOC charge
20 investigation will hinge upon whether the employer
21 has weighed the multiple factors stated in the EEOC
22 Guidance, employers have changed practices to conform
23 with the EEOC's Guidance solely to avoid
24 entanglements with the EEOC, including litigation.

25 The Guidance, though, remains perplexing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 to employers. For example, employers do not
2 understand the EEOC's position that they commit race
3 discrimination if they reject an applicant with a
4 criminal history of violence unless the rejection
5 follows an individualized assessment.

6 Employers also do not understand why
7 they are at risk for an EEOC sex discrimination law
8 suit if they chose to hire a law abiding female
9 applicant over a convicted felon, who is male.

10 In addition, employers expect that the
11 individual assessment that they are being asked to
12 undertake will result in second guessing of their
13 decisions by the EEOC. Employers have been given no
14 guidance on how the individual decisions should be
15 made as, for example, how they should weigh the
16 various factors. They are rightly concerned that if
17 they follow the EEOC's approach and make subjective
18 case-by-case assessments of applicants' suitability
19 for work, as, for example, hiring some applicants who
20 have felony violence convictions but rejecting others
21 with similar convictions, they will face an increase
22 in the number of discrimination lawsuits by rejected
23 applicants.

24 Finally, by placing so much emphasis on
25 the issue of recidivism, discussions about law

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 breaking and work have de-emphasized two important
2 traits, trust and reliability, or conscientiousness.

3 Prior to the EEOC's Guidance, these
4 characteristics were considered important linkages
5 between law-abiding behavior and employment. Both
6 trust and reliability have been emphasized by the
7 EEOC, the U.S. Office of Personnel Management and the
8 United States Supreme Court as overriding interest
9 shared by employers, employees and consumers.

10 For example, the EEOC's Suitability and
11 Security Program Handbook, which the EEOC uses to
12 make its own hiring decisions for its own employees,
13 states that a history or pattern of practice of
14 criminal activity creates doubt about a person's
15 judgment, honesty, reliability and trustworthiness.

16 The U.S. Office of Personnel
17 Management's Introduction to Credentialing,
18 Suitability and Security Clearance Decision Making
19 Guide, states that criminal activity creates doubts
20 about an individual's judgment, reliability and
21 trustworthiness and calls into question an
22 individual's ability or willingness to comply with
23 laws, rules and regulations.

24 The EEOC's new Guidance seeks to reject
25 the common-sense notion that continues to hold sway

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 when the EEOC itself is hiring, that the willingness
2 to follow society's rules is relevant to whether the
3 employer can depend on the individual to faithfully
4 and honestly perform his or her job duties.

5 When an employer decides that a law
6 breaker cannot be trusted to faithfully perform on
7 the job, the employer should not be branded by the
8 EEOC with the allegation of race or sex
9 discrimination.

10 Thank you for your attention.

11 CHAIRMAN CASTRO: Thank you, Mr.
12 Livingston. Mr. Holzer, you may proceed.

13 DR. HOLZER: Thank you very much. Good
14 morning and thank you for inviting me today.

15 I'd like to very briefly make four
16 points about the Enforcement Guidance by the EEOC and
17 the broader issues of criminal records for
18 employment.

19 First point, the prevalence of arrests
20 and convictions among less educated men substantially
21 reduces employer willingness to hire them later in
22 life and worsens their employment outcomes more
23 generally, in a way that generates clear disparate
24 impacts on minority, and especially black men.

25 Now it's true that many young men enter

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and then exit prison with the very poor basic skills
2 and low levels of education, but their time in prison
3 further reduces their work experience and their
4 marketable skills. But on top of that the great
5 reluctance of most employers to hire men with
6 criminal records, regardless of their individual
7 characteristics, further worsens their employment
8 outcomes.

9 The large negative effects of
10 incarceration on post-release employment appears to
11 be a major reason for the continuing deterioration of
12 employment among young black men over the past few
13 decades. And, by the way, this is not because young
14 black men have an innately greater proclivity towards
15 crime, but instead because they have been the most
16 disadvantaged by economic changes in the labor market
17 that have reduced their legal opportunities.

18 Point number two. The use of criminal
19 background checks by employers can have both positive
20 effects on the employment of some minority men and
21 negative effects on others. And I believe both the
22 usefulness and the limitations of the information
23 should be considered when policies are made about
24 their use.

25 Now it is true that background checks

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 almost certainly reduce employment for black men and
2 others with criminal records. It is also true that
3 employer background checks seem to raise employment
4 for black men overall; presumably by reducing
5 statistical discrimination against men whom employers
6 suspect of such activity but who turn out to have
7 clean records.

8 Background checks can therefore play a
9 very useful role for some groups of workers and for
10 employers. But there are important limitations to
11 the positive effects of criminal background checks
12 that should be also noted. For one thing, there
13 appear to be many errors in these data. For
14 instance, the private provision of these records
15 often do not carefully distinguish arrests from
16 convictions.

17 And there appear to be many false
18 positives among apparent offenders, as well as false
19 negatives among non-offenders, suggesting that the
20 observed differences of criminal activity between the
21 two groups are really not as great as they seem to
22 be.

23 Furthermore, and I know Dr. Blumstein
24 will talk about this, the ability of criminal records
25 to predict future contact with the police diminishes

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 greatly after the first five to seven years in which
2 a past offender does not commit another crime. And
3 again, I'll defer to Dr. Blumstein more on that
4 record.

5 But importantly, these studies mostly
6 focus on the general probability of new arrests
7 rather than the commission of specific new felony
8 offenses. In most cases, the studies do not tell us
9 whether or not the arrest results in a conviction or
10 what type of offense occurred.

11 Accordingly, it is hard to ascertain the
12 risks of poor job performance, property damage, theft
13 or injury to coworker or customers associated with
14 any such re-arrest. Since so many offenders are in
15 fact convicted of non-violent felony drug conviction
16 or sales it is hard to know the extent to which the
17 risks that employers fear from these applicants are
18 really well founded.

19 Point number three. The very high costs
20 of previous criminal histories on employment are
21 borne not only by the offenders themselves, but also
22 by their families and their children, their
23 communities and the U.S. economy more broadly.

24 Accordingly, having some positive policy
25 efforts to improve employment outcomes for this group

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 are in the national interest. Now, low employment
2 after prison release appears to be quite highly
3 correlated with recidivism, and a number of very
4 prominent scholars believe that's a causal effect.

5 But the negative effects of low
6 employment and recidivism extend far beyond the
7 offender himself or herself. For instance, the
8 children of offenders are much more likely to engage
9 in negative behaviors and ultimately become
10 incarcerated themselves than similar children of non-
11 offenders. And it is likely that the low employment
12 and repeat arrests and re-incarceration among parents
13 help to generate these worse outcomes among the
14 children.

15 A lack of employment among offenders
16 almost certainly makes it harder for low-income, non-
17 custodial fathers with a child support order to make
18 their payments on time, thus, thus denying their
19 families and children an important source of
20 household income.

21 Children and youth growing up in low-
22 income neighborhoods where very few adult men work
23 seem to have worse outcomes in life themselves,
24 because of the absence of role models for work and
25 labor market contacts and connections.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And, finally, the overall U.S. economy
2 appears to suffer when so many adult men do not work.
3 Their lost earnings represent lost output and lost
4 productivity for the economy overall. And the
5 magnitudes of these effects are not trivial.

6 Finally, my last point. The EEOC
7 Guidance should be viewed as one of several
8 potentially effective legal and policy efforts to
9 reduce the barriers for employment among men with
10 criminal records and thus to improve their employment
11 outcomes.

12 Now, since employer reluctance to hire
13 men with criminal records appears to be a major
14 reason for why employment rates of offenders are so
15 low, attempts to limit the disparate impacts
16 associated with criminal records should be welcome as
17 long as they do not impose undue risks and burdens on
18 employers.

19 Now, in my opinion, the EEOC Guidance
20 does not seek to discourage employers, in any way,
21 from doing background checks. It simply tries to
22 encourage a more judicious use of the information so
23 gained.

24 Furthermore, the EEOC Guidance does not
25 seek to significantly raise the risks employers bear

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 from hiring offenders, it simply tries to encourage a
2 more accurate assessment of what those risks really
3 are.

4 As the courts have argued for decades,
5 the length of times since an offense is committed,
6 the nature of the offense and the nature of the job
7 should be taken into account when assessing the risk
8 of recurrence of any offense and what it implies for
9 job performance.

10 The mere existence of a prior record,
11 conviction or incarceration in and of itself may tell
12 us very little about such risks. Furthermore, a
13 range of individual factors, such as participation
14 and completion of employment and training program has
15 been shown to lower the risk of re-incarceration
16 quite dramatically. And so this individual
17 consideration should be taken into account.

18 Now there are a range of other policies
19 and programs that should be used to address the
20 employment barriers of former offenders. These
21 include the efforts of states to review statutory
22 limits on felony offender employment. Limiting
23 recidivism due to technical parole violations. Re-
24 entry programs, fatherhood programs and the like.

25 But I consider all of those efforts to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 be compliments to the EEOC Guidance and it should not
2 be viewed as a substitute for them.

3 Thank you.

4 CHAIRMAN CASTRO: Thank you, Mr. Holzer.
5 Dr. Blumstein.

6 DR. BLUMSTEIN: Mr. Chairman, members of
7 the Commission, thank you very much for the
8 opportunity to report to you on some of the research
9 that I've been doing over the past number of years.

10 It's clear that most public policy
11 issues involve some complex trade-offs, often between
12 one set of private interests and another set of
13 public interests. And there's an issue that's
14 involved here in terms of the use of background check
15 information in an environment where, number one, the
16 prevalence of positive background events, criminal
17 events, is not at all appreciated.

18 And second, because of the difficulty of
19 understanding where the risks are at any particular
20 point. The research I want to talk about is research
21 that Kiminori Nakamura and I started about five/six
22 years ago in recognition of the fact that many people
23 had some minor infraction, a crime, particularly when
24 they were young and stupid. Then, twenty or thirty
25 years later, they still can't get a job because of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that record in their background.

2 And it's that situation that impelled
3 the research, and that links to the issue of the
4 timeliness in the EEOC Regulations, the timeliness
5 that says if somebody did something stupid when he
6 was young, that should not hang over him for the rest
7 of his life.

8 So it's clear that there is tension
9 between those who feel that all information should be
10 available to an employer so that the employer can
11 make whatever wise decision he chooses to make, on
12 one hand, and the opportunity to limit the collateral
13 consequences of that event.

14 We started the research with 88,000
15 criminal-history records from New York of first-time
16 arrestees in New York State. We then drove down to
17 those who were convicted. We then looked at the risk
18 of a new event as a function of the time clean, since
19 that first event in 1980. It turns out that very
20 shortly after that first crime, there's a reasonably
21 high risk of recidivism, of committing a new crime,
22 shortly after that event.

23 But that risk declines. And so our
24 challenge was finding the nature of that decline and
25 when it got low enough to be considered negligible.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 One measure of low enough was when it became less
2 than that of the general population of the same age.
3 The second measure was when it got close enough to
4 the risk of people who had no prior records.

5 And so that was the basis for doing the
6 analysis. We had full criminal records and so we
7 could see the nature of the declining risk. It turns
8 out that most recidivism occurs within the first
9 three years after a previous event, so that the risk
10 falls off rather sharply after that. It gets down
11 under ten percent after that and becomes less than
12 the general population within four to seven years,
13 and somewhat longer if the comparison is to those
14 with no prior records.

15 One might challenge the contemporary
16 usefulness of what happened in New York in 1980. So
17 we got similar first-arrestees data from New York in
18 1985 and 1990. We also went to Florida and Illinois
19 and that enabled us to test the robustness of our
20 findings over time and state. And there was a
21 reasonable amount of variation over those first five
22 years.

23 But after that, the pattern becomes much
24 closer, because we're now dealing with a population
25 that avoided the high risk of recidivism in those

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 first few years.

2 Our first analyses were re-arrests for
3 any crime type. We then wanted to look at re-arrests
4 for crime types to which employers might be
5 particularly sensitive. So we looked at violent
6 crime type or property crime type. And those were
7 quite different.

8 So that we now have the basis for
9 sorting out what we call the redemption time, which
10 is when they get below the general population or
11 close enough within some small risk-tolerance of the
12 people who have no records.

13 And we found that of these 88,000
14 people, 40 percent had no subsequent arrests in New
15 York. It was their first and only arrest. Now about
16 ten of those 40 percent had an arrest in another
17 state, so that we were able to adjust our estimates
18 of redemption times, times when the risk was low
19 enough, to account for that variation.

20 We looked at individuals who were
21 convicted, but I can tell you that the risk pattern
22 of those who were convicted compared to those who
23 were merely arrested was not very much different.
24 You have a much smaller population, but conviction is
25 usually attributable not to innocence but something

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 associated with evidentiary possibility.

2 One particular target that I think we
3 want to talk about is the wide variety of the forever
4 rules that are present in statute and in corporate
5 policies. If you have ever done X, you cannot be
6 hired. And that totally precludes the possibility of
7 redemption, the possibility of people surviving what
8 they did wrong.

9 And arrest ubiquity is a particularly
10 important issue. There have been recent estimates of
11 arrest prevalence. we made an estimate about 40 years
12 ago that the chance that a male would be arrested
13 some time in his life was 50 percent. We were sure
14 that there was an arithmetic error, missed the
15 decimal point. That estimate is now higher because
16 we hardly had arrests for drugs or domestic violence
17 then. So the ubiquity of arrest is an important
18 consideration in terms of what employers view to be
19 meaningful.

20 CHAIRMAN CASTRO: And we're going to try
21 to, before we go to the last speaker in this panel
22 we're going to dial in our Vice Chair, is that right?
23 Madame Vice Chair are you on? Okay, well we'll
24 proceed, the phone's working so she can log on when
25 she's available.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Then we'll move ahead. Mr. Sedgwick,
2 please continue.

3 DR. SEDGWICK: Okay. Chairman Castro,
4 distinguished Commissioners, thank you for the
5 invitation to appear today. I'll try to keep this
6 brief and move quickly.

7 I want to start by asking you to think
8 about three numbers: 11,521, 7,739 and 4,685. The
9 significance in these numbers is there are 11,521
10 published articles on criminal careers, many of them
11 done by my colleague here, Al Blumstein.

12 There are 7,739 published articles on
13 predicting crime or criminality. And there are 4,685
14 published articles on recidivism. These are crucial
15 topics in understanding the risks involved in hiring
16 those with, or even without, criminal histories;
17 because, indeed, people who have no criminal history
18 still have a risk of committing an offense.

19 The question I would ask you is, does
20 the updated EEOC Guidance reflect an awareness or a
21 nuanced understanding of this available body of
22 knowledge? Also, does the EEOC updated Guidance
23 reflect awareness or nuanced understanding of the
24 multiple factors that contribute to problems
25 encountered by ex-offenders in the job market?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I'm referring here to such factors as
2 substance abuse or dependency, poor job skills and
3 employment history, and difficulties with inter-
4 personal relationships. Does the updated Guidance
5 address these issues in a constructive manner, or
6 acknowledge their presence in order to enhance
7 employment prospects for the ex-offender in aiding
8 successful re-entry -- a goal that we all share?

9 Does the updated EEOC Guidance reflect
10 awareness of or a nuanced understanding of the
11 available body of social science research on
12 statistical discrimination and the benefits of
13 criminal history background checks Professor Holzer
14 spoke to so eloquently and his research documents
15 quite concisely?

16 Does the Guidance reflect an
17 understanding that background checks do not inhibit
18 positive employment outcomes across the board? And
19 they in fact, as he noted, actually lead to an
20 overall improvement in minority hiring.

21 Also, does the EEOC Guidance reflect an
22 awareness or nuanced understanding of research by
23 scholars such as Devah Pager, who's done some very
24 good work identifying the actual sequencing of events
25 that leads to the way in which the presence or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 absence of a criminal event in one's background
2 effects one's employment prospects?

3 Does the updated EEOC Guidance reflect
4 awareness or nuanced understanding of the available
5 body of social science research on redemption that
6 Professor Blumstein has been working on so diligently
7 these years including the limitations of its, its
8 preliminary status, its potential for informing
9 employer assessment of job applicants, but also its
10 unsuitability for guiding an administrative or
11 regulatory bright line or uniform guidance?

12 Does the EEOC updated Guidance reflect
13 awareness or nuanced understanding of the way in
14 which employers use criminal history background
15 checks? SHRM has provided a great deal of survey
16 information on how and why employers use background
17 check information.

18 Oddly, in many cases, employers
19 demonstrate what seems to me to be a quite
20 sophisticated understanding of how to use this
21 information; and, in fact, they seem to be using it
22 in ways that, quite frankly, the EEOC Guidance
23 doesn't.

24 And finally, does the updated EEOC
25 Guidance reflect awareness or nuanced understanding

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of the insubstantial foundation of disparate impact
2 and social frameworks as justification for adverse
3 action by EEOC? In my written statement, I noted a
4 very long tradition and body of research on the
5 disparate prevalence of criminal records in the
6 United States, some of which --

7 VICE CHAIR THERNSTROM: I've been
8 listening to whoever's talking.

9 DR. SEDGWICK: I beg your pardon?

10 VICE CHAIR THERNSTROM: Oh.

11 CHAIRMAN CASTRO: It's Commissioner
12 Thernstrom.

13 DR. SEDGWICK: Oh, okay. Some of which
14 was done by Professor Blumstein, and research done by
15 other scholars such as Hindelang, Langan, and Sampson
16 and Lauritsen, concluding that the disparate impact
17 of criminal records reflects differential involvement
18 in imprisonable or arrestable crimes, not
19 discriminatory treatment of protected classes.

20 It also seems to me interesting that the
21 EEOC Guidance fails to recognize, engage and respond
22 to some of the questions that Professor Amy Wax asks
23 about disparate impact analysis, particularly looking
24 at the Griggs Decision and the standard in the Griggs
25 Decision, and the way in which continuing social

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 science research has undermined the foundations of
2 the court standard in the Griggs case.

3 And, finally, again, I'd ask whether or
4 not the EEOC Guidance takes account of the work of
5 Professor John Monahan at the University of Virginia
6 Law School that was mentioned in the Dukes v. Wal-
7 Mart case, questioning the use of social frameworks
8 like disparate impact analysis in a litigation
9 affecting racial discrimination.

10 As you can tell by the questions that
11 I've asked, my primary interest is that I want to see
12 social science research used. The scholars that we
13 have here have done some excellent work. What
14 concerns me is that I don't see that work, or an
15 understanding of that work, reflected in a
16 sophisticated and nuanced sort of way in the EEOC
17 Guidance.

18 And I would hope we all share an
19 agreement that we have 2.2 million incarcerated
20 people in the United States; 95 percent of them are
21 coming back to their communities. We have a vested
22 interest in making sure they come back prepared to
23 succeed in their re-entry into legitimate society.

24 My concern is I don't see social
25 science, and what it has to offer to that challenge,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 being used appropriately, or used in a sufficiently
2 sophisticated sort of way, in the EEOC Guidance.

3 I'll cede the rest of my 20 seconds back
4 to Al. I'll cover your debt.

5 (Laughter.)

6 CHAIRMAN CASTRO: Thank you. At this
7 point I want to open it up to our Commissioners.
8 Commissioner Kirsanow, please proceed.

9 COMMISSIONER KIRSANOW: Thank you, Mr.
10 Chairman. I also want to thank the panelists, this
11 was very informative. I want to thank the staff for
12 again putting together a great briefing. If, based
13 on what we've heard in the first panel, is any
14 indication of subsequent panels, this is going to be
15 an outstanding briefing that will inform us.

16 Professor Holzer, good to see you again.
17 You're becoming a regular. I live in inner-city
18 Cleveland and see the profound effects of failure of
19 re-entry into the workplace of ex-offenders. We have
20 a lot of people who probably could contribute to
21 society but because of the problem of failure of re-
22 entry. The problems of criminality is exacerbated
23 and with all the downstream effects talked about by
24 Mr. Blumstein.

25 However, I also have profound concerns

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 about this particular Guidance from a number of
2 perspectives. One is that I don't see --

3 CHAIRMAN CASTRO: Commissioner, could
4 you speak up a little? The other Commissioners over
5 here can't hear you.

6 COMMISSIONER KIRSANOW: Yes. One is I
7 don't see any safe harbors in the Guidance
8 whatsoever. I don't see any safe harbors in the
9 Guidance in two perspectives. One is, you know, if
10 there's a negligent hire lawsuit brought, what does
11 an employer do?

12 Number two, I understand the general
13 counsel of EEOC has said that this supersedes state
14 laws to the contrary. So if you got state laws out
15 there that say you've got to have criminal background
16 checks for certain industries, you comply with it in
17 good faith. And then you get slapped with a
18 disparate impact lawsuit.

19 That brings me to number three. I don't
20 see a judicious application of disparate impact
21 theory in this particular case. That is a subject
22 for a whole different hearing on the
23 Constitutionality.

24 But I guess most importantly here is I
25 know the EEOC maintains that this is not burdensome

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 or complicated, which would give surprise to a lot of
2 small employers that are arrayed here. It's not
3 complicated to me, necessarily; I practiced in this
4 area for 35 years. But to a mom and pop corporation,
5 company, they don't know what to do with this thing.

6 They do think it's ambiguous. They
7 suspect it's ambiguous for a reason so that there's
8 more expansive application of this particular policy.
9 And I guess one of the questions I would have is to
10 Ms. Miaskoff. What evidence, if any, did the EEOC
11 adduce during the hearing process to address whether
12 or not this was going to be burdensome or complicated
13 to smaller employers, or any employers whatsoever?

14 MS. MIASKOFF: Right. We heard during
15 the hearing process and through written comments that
16 the basic factors that we have enunciated here were
17 familiar to employers. And indeed that a lot of
18 employers already were following a process whereby
19 they would look at the basics, which are the three
20 factors.

21 And often, would give an opportunity to
22 an individual to explain the situation. And in fact
23 I think there is something in a recent SHRM
24 publication that also asserts that fact. So we got
25 the feedback that indeed a lot of employees already,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 almost on a common sense level, were following some
2 of these processes.

3 CHAIRMAN CASTRO: Commissioner Kladney,
4 then Commissioner Gaziano.

5 COMMISSIONER KLADNEY: I know you've
6 said it twice already but a number of our panelists,
7 not necessarily on this panel, but panels to follow,
8 have indicated that the EEOC Guidance prohibits
9 employers in some fashion from doing criminal
10 background checks. That's not the case, right? I
11 mean I'm just asking you to absolutely state that
12 again.

13 MS. MIASKOFF: N-O. No. It does not
14 prohibit criminal background checks.

15 COMMISSIONER KLADNEY: Right. I mean
16 they say that quite a bit. And so based on what you
17 said about the Guidance, if an employer is running a
18 business in which employees spend a lot of time one-
19 on-one with customers or other employees, and you
20 receive an application from someone who has a
21 criminal background that reveals the person was
22 convicted of a violent crime, a crime against a
23 person, and was only recently released from prison,
24 using the Green factors an employer could safely tell
25 that applicant, I'm sorry, you're not employable at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 my place of business, is that correct?

2 MS. MIASKOFF: Yes, that's correct.

3 COMMISSIONER KLADNEY: I mean you would
4 base the application and the Green factors with risk.
5 I'm mean it's not rocket science?

6 MS. MIASKOFF: No, I don't see it as
7 rocket science. The Green factors I think were
8 discussed in the later decision in El v. SEPTA, and
9 there the court came out and said that really what
10 we're talking about is assessing risk. And what the
11 Green factors do is they give a common-sense way to
12 start approaching that.

13 What's the crime? How long ago did it
14 happen? What's the job?

15 COMMISSIONER KLADNEY: Dr. Blumstein,
16 that's exactly what you talked about in your article
17 isn't it?

18 DR. BLUMSTEIN: Very much so.
19 Specifically focusing on the duration issue. We
20 didn't try in any way to assess the applicability of
21 a prior crime to the employer's needs. That is
22 clearly relevant. But ours was specifically
23 recognizing that lots of people get hung for a long
24 time, without any empirical basis for knowing when
25 long enough had occurred, that this individual should

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 no longer be seen as a threat.

2 COMMISSIONER KLADNEY: Thank you.

3 CHAIRMAN CASTRO: Commissioner Gaziano.

4 COMMISSIONER GAZIANO: Thank you. And
5 thank you all, I appreciated all the work that went
6 into your testimony and your appearance today.

7 I just want to state a little bit of my
8 background, and maybe even disagree to one thing the
9 Chairman said in his opening remarks. My day job is
10 at the Heritage Foundation where I help direct a
11 legal center. And on Monday our legal center is
12 sponsoring a program trying to expand the President's
13 pardon power. Co-sponsored with some ideological
14 people across the aisle.

15 And my colleague, Ed Meese, has helped
16 me appreciate the importance of re-entry programs
17 that help prisoners reenter and reentry programs
18 afterwards. This has been a great interest to me for
19 a number of years.

20 But the disparate impact overuse, the
21 overuse of disparate impact under Title VII, is a
22 very complicated and tricky area to get at this
23 problem. The federal government, state governments,
24 private individuals can do a lot more I think to help
25 prisoners reentry. And the disparate impact, as I've

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 seen used for the federal government in other
2 situations doesn't even exist.

3 But at least in the one point that I'll
4 disagree with our Chairman, is he noted our recent
5 examination of disparate impact in the school
6 discipline context, he said that we made certain
7 findings that disproportionate discipline by race
8 causes certain criminal pathways.

9 Honestly we found no such thing. We
10 collectively found no such thing. The Chairman and
11 some others may have found some. Some of us found
12 that the misguided attempt to require teachers to
13 discipline by race will probably backfire and have
14 some rather devastating effects for some of the
15 students who need more discipline. And for some of
16 the students who are in classrooms who are disrupted
17 by kids who are misbehaving where the teachers are
18 afraid that they can't discipline except to get the
19 numbers right.

20 Well I think this is another area where
21 going to heavy handed with the disparate impact
22 approach may backfire. Of course there is some
23 literature that suggests that if employers are
24 discouraged, even if they can go through some hoops
25 and consider criminal background checks, if the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 threat of a private or EEOC litigation will subject
2 them to liability, that instead of employing -- not
3 conducting background checks and employing more of
4 certain type of minorities that the guideline is
5 supposed to help, they'll employ less.

6 And my final question I think is to Mr.
7 Livingston. It also troubles me that the EEOC could
8 go two ways with the disparate impact under the Title
9 VII. First of all, I certainly agree they have no
10 authority to issue regulations. So the Guidance in
11 the guise in interpretive regulations is questionable
12 to me.

13 But the other is the two ways they could
14 go, Constitutionally, is to try to interpret the
15 disparate impact approach in a way that lessens the
16 Constitutional risk, that of requiring disparate
17 treatment that would violate the protection clause.

18 Or to expand their power to the almost
19 maximum extent possible. And that's generally the
20 bureaucratic temptation. To aggrandize power, to
21 increase leverage, to increase agency staff. In my
22 view have you studied the Constitutional implications
23 of this moth to the flame that EEOC may eliminate any
24 use of disparate impact if they cross the threshold
25 into an unconstitutional territory?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. LIVINGSTON: That's a big question.
2 What we do know is, for example, in a lawsuit that
3 EEOC has filed alleging disparate impact, that the
4 EEOC is asserting that men, white men, black men,
5 Hispanic men, are entitled to a remedy when they're
6 denied employment because of a criminal conviction
7 but that white women are not.

8 And that does raise some questions about
9 whether the statute is being applied in a way which
10 is consistent with the requirements of the Equal
11 Protection Clause.

12 Looking at it in my mind I want to
13 rephrase the question so it's easier --

14 COMMISSIONER GAZIANO: Please do.
15 Please do.

16 MR. LIVINGSTON: -- I'll give you a
17 different sort of answer. And it deals with the
18 Green case, and the Green factors, and the discussion
19 about, "Well nothing has really changed; the Green
20 factors are common sense factors that employers ought
21 to take into account when they make hiring
22 decisions."

23 A great deal has changed with the EEOC's
24 Policy Guidance with respect to application of the
25 Green factors. The Green factors, according to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Third Circuit Court of Appeals in a recent case, El
2 v. SEPTA, do not require individualized assessments:
3 the employer can look at particular crimes and
4 particular jobs and form bright line rules.

5 For example, "We won't hire someone who
6 has been convicted of theft for a cashier position if
7 the conviction occurred within the last five years."
8 And that takes into account the nature of the job.
9 The nature of the offense, and when the offense
10 occurred. Bright line factors.

11 The EEOC has rejected that and is
12 requiring employers to look at each person who
13 committed a theft individually. And that requires
14 subjective, individualized assessments of the type
15 that employers have been trying to work out of their
16 hiring systems for years out of concerns that when
17 hiring managers treat similarly situated persons
18 differently minorities may be disadvantaged; and
19 create disparate treatment litigation risk for the
20 employer resulting from the exclusion of women and
21 minorities from positions.

22 So I'd say that the Policy Guidance, by
23 requiring the individualized assessments and
24 preventing employers from establishing bright line
25 rules that would treat similarly situation persons

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the same, has an unintended consequence which is
2 opposite from what is intended by the EEOC's policy.

3 CHAIRMAN CASTRO: Would you like to
4 respond?

5 MS. MIASKOFF: Yes, I'd like to respond.
6 The Guidance does not require individualized
7 assessment. Period. Indeed, Mr. Livingston has been
8 telling you how we don't have rulemaking authority,
9 so we can't require it. But we don't require it in
10 the Guidance.

11 What we do is say is that it is at times
12 an important supplement to the Green factors. And
13 the Guidance does say that there will be situations
14 in which a bright line rule without the
15 individualized assessment will be fine under Title
16 VII.

17 CHAIRMAN CASTRO: Before I move on to
18 Commissioner Achtenberg I want to thank Commissioner
19 Gaziano for only disagreeing with one of the things I
20 said. So I think we're moving ahead.

21 (Laughter.)

22 Commissioner Achtenberg.

23 COMMISSIONER ACHTENBERG: Dr. Holzer,
24 you state in your testimony that the EEOC Guidance
25 should be viewed as one of several potentially

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 effective legal and policy efforts to reduce the
2 barriers to employment among men, I would imagine as
3 well as women, with criminal records. And thereby
4 improves their employment outcomes.

5 You also stated that in your view the
6 EEOC Guidance does not seek to discourage employers
7 in any way from doing background checks of
8 applicants. That seems to be in stark distinction
9 from the critique offered by Mr. Sedgwick and I'm
10 wondering if he would comment on the acuity of my
11 observation to that effect.

12 DR. HOLZER: Well, Mr. Sedgwick and I
13 agree that it's important to use social science
14 research, and I appreciate the plug you made for
15 that.

16 I very, very strongly disagree with Mr.
17 Sedgwick's reading of that evidence. And I read over
18 his testimony several times and I was, frankly, quite
19 troubled by some of the logical leaps that Mr.
20 Sedgwick makes, some of the inferences he draws.

21 Mr. Sedgwick, for instance, mentioned a
22 paper by Devah Pager and Bruce Western. And then he
23 infers exactly the opposite from that paper of what
24 the paper really shows that clearly what the authors
25 believe. And then he attacks the EEOC for not citing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that paper and accuses them essentially of dishonesty
2 in his written statement, which I found quite
3 amazing.

4 In many, many other places Mr. Sedgwick
5 reviews the evidence Al Blumstein has now generated a
6 body of work on how duration affects the probability
7 of re-arrest. There are other papers in the body of
8 research. There's several papers by the trio of
9 Kurleychek, Brame, and Bushway. Mr. Sedgwick cites
10 one paper, though there are several of them. All of
11 the papers except that one Mr. Sedgwick cites in fact
12 find after some number of years there is no remaining
13 difference in the probability of re-arrest.

14 Separate from the whole issue of the re-
15 arrest are the issues of for what crime and did a
16 conviction occur. So I have a very strong
17 disagreement with Mr. Sedgwick on how this research
18 should be read.

19 I'm not a lawyer and I won't pretend to
20 be. And one might have qualms about the EEOC from
21 legal grounds and Commissioner Kirsanow mentioned
22 some of those qualms and I'm not prepared to comment
23 on that. When I read the document from my vantage
24 point as an economist and social scientist, it seemed
25 to me to be a relatively sensible application of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Green factors plus other individual factors, which
2 this literature shows do matter - like having
3 completed an employment training program dramatically
4 reduces the likelihood of re-offense.

5 I don't think this imposes an enormous
6 burden on small businesses to check into these kinds
7 of personal backgrounds. I mean, they're readily
8 available if people choose to look at them. And we
9 know, we know that there are many employers, small
10 and medium size especially, that have blanket
11 refusals to hire people with a felony conviction who
12 don't look at the Green factors.

13 Now they may not state that publicly,
14 but thousands of these employers early in my career.
15 And many of them simply say that, they will not hire
16 anyone with a felony conviction.

17 Given that, none of us are arguing about
18 the Green factors, we all seem to agree on those. It
19 just seems to me that trying to clarify the issues
20 that should be taken into account is a potential
21 positive, though again I'll leave legal qualms to
22 other people.

23 And the other thing I'll say is the
24 status quo does enormous damage. Social and economic
25 damage, not only to these individuals but to their

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 families and their communities and the American
2 economy. The risks that we're now considering
3 imposing on employers are hypothetical and do not
4 seem to me to be very high.

5 So an honest assessment, an accurate
6 assessment of all of the costs and all the benefits
7 certainly leads me to believe that if we're erring in
8 a certain direction right now we're erring too much
9 in the direction of keeping these men and women from
10 employment and that maybe we should at least
11 reconsider some of these factors.

12 CHAIRMAN CASTRO: Okay. Next is
13 Commissioner Kladney followed by Commissioner Yaki,
14 Commissioner Heriot, Commissioner Kirsanow.

15 COMMISSIONER KLADNEY: Dr. Holzer, Mr.
16 Sedgwick cited that Amy Wax, and I think she's a
17 lawyer not a social scientist, I think that was the
18 social science you were referring to in his -- Do you
19 remember?

20 DR. HOLZER: No, not that one. I
21 referred to other ones.

22 COMMISSIONER KLADNEY: What I'd like to
23 ask you is, as you've said, I've surveyed thousands
24 of people early in my career. I think that's when
25 you got most of the information for the article that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you're here for. And one of your co-authors, Stolz,
2 wrote a subsequent article using a lot of that same
3 information.

4 And I was struck by when they said that
5 people who don't do criminal background checks,
6 employers who don't do criminal background checks,
7 hire white ex-offenders at a higher rate than people
8 of color. Do you recall that in Stolz's article?

9 DR. HOLZER: I do recall that. I
10 believe he is actually citing a result from Devah
11 Pager's doctoral dissertation, which is distinct from
12 the piece Mr. Sedgwick cited. And what that shows is
13 that race per se plays a very important factor in
14 these hiring decisions. Criminal records also play
15 an important factor in these hiring decisions.

16 Mr. Sedgwick tries to argue that these
17 papers show that's really race and not criminal
18 records. I don't read the evidence at all that way,
19 because it means that both of them matter. It's
20 certainly possible for multiple factors to be
21 important in determining the outcomes we care about
22 and this one of those cases.

23 So yes, race matters. White men who do
24 have criminal records seem to either have comparable
25 or slightly higher or slightly lower, depending on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the study, odds of being hired than a black man
2 without a criminal record. But when you look at all
3 of the data, all of the evidence, it's clear that
4 both of them matter very importantly and interact in
5 important ways.

6 COMMISSIONER KLADNEY: Dr. Blumstein, I
7 think again, and I'm not picking on you Mr. Sedgwick
8 honestly, I think Mr. Sedgwick said that --

9 DR. SEDGWICK: I'm comfortable with what
10 I said.

11 COMMISSIONER KLADNEY: I think he that
12 you cited that 80 percent of people recidivate after
13 college. I did recidivate back to school actually.
14 But 80 percent of people recidivate after their first
15 conviction. Does that go down with time, I mean
16 that's basically what we're talking about.

17 DR. BLUMSTEIN: In our study 40 percent
18 did not recidivate at all. So that 60 percent did.
19 So recidivism is widespread. But it's widespread for
20 a wide variety of crimes, many of which are of minor
21 concern to an employer or otherwise.

22 But from a research strength viewpoint
23 we chose to take this cohort of first-time arrestees
24 in 1980 and follow them through. We then tracked how
25 many of them had out of state arrests. Of those who

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 had no further arrests in New York we tracked those
2 who had out of state arrests, and so we were able to
3 find those.

4 But recidivism is reasonably high. And
5 recognize we took people who we thought had no prior
6 record in New York. And even among them recidivism
7 was high. And then obviously offending is going to
8 be high among lots of people who never had a prior
9 record, because we're all at risk, to the criminal
10 justice system in part. To our own misbehaviors as
11 well.

12 So 80 percent recidivating sounds high
13 and the studies of people released from prison that
14 came from BJS said that about two-thirds get re-
15 arrested for something. That means one-third didn't
16 get re-arrested, at least in the five years they
17 tracked them.

18 Whereas half of them went back to
19 prison. So that the recidivism studies are fairly
20 consistent but people look at different measures of
21 recidivism in different ways. Because the police
22 will look at re-arrest. The corrections people look
23 at re-incarceration. And those two may be totally
24 consistent, but they will then argue about whether
25 it's two-thirds or 50 percent.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 COMMISSIONER KLADNEY: Mr. Sedgwick,
2 would you agree that the passage of time reduces the
3 ability to recidivate?

4 DR. SEDGWICK: Oh absolutely. Oh,
5 that's a well-known fact in social science that there
6 is an age/crime curve. As people get older the
7 likelihood of them committing a crime declines.

8 COMMISSIONER KLADNEY: So it would be
9 important for employers to look at that?

10 DR. SEDGWICK: Absolutely. Absolutely.
11 Could I just, one other thing that I think is an
12 important point because the research that Al has done
13 on redemption so far, I think it's important to
14 understand that that is for first time arrestees.

15 His next wave of research is going to
16 look at people who have multiple prior offenses and
17 look at redemption times. It will be interesting to
18 see whether those redemption times are longer or
19 shorter. So one of the things here that I
20 appreciate in Al's research on redemption is that it
21 fits nicely with a body of literature on criminal
22 careers that I think is very interesting and ought to
23 be taken account of by employers; this research looks
24 at what are the markers of the beginning of a
25 criminal career that's going to be long and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 relatively intense. What are the markers of a
2 criminal career that's going to be serious as opposed
3 to not very serious.

4 I remember back in 1984 when I was the
5 deputy director of BJS, we were testing the FBI's
6 system for keeping and making accessible records. So
7 we asked the FBI to run us the longest rap sheet they
8 had, just to see what it was. It turned out it a
9 young man who was a turnstile jumper in New York
10 City, right? So, okay, there would be an example of
11 someone who has a very high volume criminal history
12 for a trivial offense, Okay?

13 So I guess the bottom line that I would
14 stress with the redemption research is it strikes me
15 as valuable. But it's much more valuable for an
16 employer in terms of assessing the risk of a
17 particular individual in the context of a variety of
18 other personal and familial and social
19 characteristics than it is to be cited by EEOC to
20 form a standard of how long a window, you know, of
21 look back an employer should have.

22 COMMISSIONER KLADNEY: The EEOC doesn't
23 do that in their Guidance, obviously.

24 MS. MIASKOFF: Correct.

25 DR. SEDGWICK: Although they keep

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 citing, "Well, it could be four to seven years." And
2 Al in his New York Times opinion essay in January
3 said, "Well, it's ten to 13."

4 DR. BLUMSTEIN: That's the harsher
5 standard.

6 DR. SEDGWICK: True. Although I
7 wouldn't call it harsher, because in a sense you're
8 saying there's two standards. One standard is when
9 does the risk of hiring this individual, given a
10 lapse of time from his last offense, match the
11 general population of the same age.

12 DR. BLUMSTEIN: Drop below.

13 COMMISSIONER KLADNEY: That's not what
14 he says.

15 DR. BLUMSTEIN: Dropped below.

16 DR. SEDGWICK: Okay. All right, so it
17 equals or falls below?

18 DR. BLUMSTEIN: Yes.

19 CHAIRMAN CASTRO: Commissioner Harriet,
20 please proceed.

21 COMMISSIONER HERIOT: Thank you. I'd
22 like to thank the panelists. And I've got a question
23 for Ms. Miaskoff. Something that Mr. Livingston said
24 that I thought was interesting, he suggested that a
25 rule that discourages reference to criminal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 backgrounds can have a disparate impact on females.
2 And we could draw that out and say that it has a
3 disparate impact on elderly Asian females if you
4 like.

5 And that makes me wonder, given that
6 lots of things have disparate impact, how does the
7 EEOC prioritize the disparate impact issues that are
8 out there? I guess maybe what I'm leading to here
9 is, is the idea here that Title VII requires you to
10 take some special interest in the interest of African
11 American's or is what's really driving this an
12 interest in ex-offenders generally?

13 I mean what, is race driving this or
14 something else driving this? And if race is driving
15 this policy then how do you prioritize which
16 disparate issues are going to get the EEOC's
17 attention?

18 MS. MIASKOFF: Right. Okay, two points
19 in response. And your question is about
20 prioritizing, which does acknowledge that the
21 disparate impact provision in Title VII now prohibits
22 disparate impact on any of the protected basis listed
23 in the statute. So that includes all of the different
24 qualities you just spoke of.

25 That said, when the EEOC does policy we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 look at the research that these gentlemen have been
2 talking about. We look at the data. And the data
3 that would overlap in terms of race and criminal
4 records is both, I guess, voluminous and stark and so
5 that drove our focus on those issues of --

6 COMMISSIONER HERIOT: It runs both ways.
7 I mean the elderly Asian female if employers who wish
8 to look at criminal background aren't able to. So is
9 this really a Title VII issue or is this an issue
10 where you're concerned about criminal background as
11 an issue by itself. The notion of integrating ex-
12 offenders into the economy. Or is this a special
13 concern that Title VII requires for African Americans
14 or Hispanics. What's going on here?

15 MS. MIASKOFF: Title VII is not an
16 affirmative action statute. So let's get that off
17 the table. As I think someone on the panel said --

18 COMMISSIONER HERIOT: What do you mean
19 it's not an affirmative action statute?

20 MS. MIASKOFF: It doesn't require
21 special consideration of race, I think with some of
22 the terminology we're using. So I wanted to step
23 back from that. I think as some people on the panel
24 were saying, because we all have gender, we all have
25 race, we all have national origin, et cetera.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Religion, some of us have.

2 Everyone, as you said, can be protected
3 by Title VII. In making the decisions about what to
4 do policy on, we are not denying anyone their rights.
5 We are, as a national agency, we are trying to focus
6 on issues which have a big impact on American
7 society, recognizing, yes, that it's very
8 complicated. And yes, that technically everyone is
9 protected by this law. I am, you are, we all are.

10 So we recognize that, but we look at the
11 national issues based on the research.

12 COMMISSIONER HERIOT: What do you mean
13 by the national issues? I mean, again, if it's true
14 that elderly Asian females are worse off under
15 Guidance, why does it work in one direction and not
16 the other?

17 MS. MIASKOFF: I'm not saying it doesn't
18 work. An elderly Asian woman could go forward and
19 bring a case to court if she so decided to do so
20 under Title VII. What I am saying is that with the
21 overlap of where the EEOC invests its resources to do
22 a policy statement.

23 We obviously watch the research and
24 therefore issues such as the overlap of race and
25 criminal exclusions that we're discussing here today

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 have been documented to be a major issue in the
2 American society.

3 COMMISSIONER HERIOT: In the sense that
4 it has a disparate impact on particular groups. But
5 there are always mirror images --

6 MS. MIASKOFF: I understand that.

7 COMMISSIONER HERIOT: Because then
8 you're not answering the question.

9 MS. MIASKOFF: I guess I'm not sure.
10 I'd ask you a question. How does one enforce Title
11 VII then? If there's always a mirror image, which
12 would stop one --

13 COMMISSIONER HERIOT: For intentional
14 discrimination. That's an easy question.

15 MS. MIASKOFF: I'm sorry?

16 COMMISSIONER HERIOT: By looking for
17 intentional discrimination.

18 MS. MIASKOFF: But Title VII itself
19 includes disparate impact now as well as intentional
20 discrimination. That is the law of the land now.

21 COMMISSIONER HERIOT: Can you name
22 something for me now that doesn't have disparate
23 impact? Any job qualification that doesn't have
24 disparate impact?

25 MS. MIASKOFF: Job qualification? Now a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 job qualification, by saying that you're implying
2 that it is a rule or a policy that the employer is
3 going to apply across the board. That is the kind of
4 situation that raises disparate impact concerns.

5 COMMISSIONER HERIOT: Is there any job
6 qualification that you can think of that wouldn't
7 have a disparate impact?

8 MS. MIASKOFF: Well I'm thinking out
9 loud. And if you had an individualized job
10 qualification, for example, I decided that I simply
11 was not going to hire anyone who's shorter than five
12 feet because I don't want to hurt my neck looking
13 down. You know, a very kind of individualized
14 factor, that would not be impact. That would be
15 treatment.

16 CHAIRMAN CASTRO: Mr. Holzer wanted to
17 respond. And then I'm going to let Commissioner Yaki
18 ask questions. We're running out of time and I want
19 to make sure all Commissioners have had an
20 opportunity to speak.

21 COMMISSIONER GAZIANO: I think Mr.
22 Livingston was looking to be recognized on this as
23 well.

24 CHAIRMAN CASTRO: Well, Mr. Holzer?

25 DR. HOLZER: So I want to make two quick

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 comments in response to Commissioner Heriot's
2 question. I don't see anything in the EEOC Guidance
3 that requires the employer to hire the black man with
4 the criminal record over the elderly Asian woman that
5 doesn't. The Guidance simply says be careful how you
6 use the information about that applicant's history.

7 It does not require anyone to
8 discriminate against the elderly Asian applicant. It
9 simply says do not put undue emphasis on that one
10 factor. So I don't see that it creates a disparate
11 impact on anybody else.

12 COMMISSIONER HERIOT: I didn't say
13 they'd be hired or not hired and that's the thing.
14 In the end either you get the job or you don't get
15 the job.

16 DR. HOLZER: It says do not use that one
17 characteristic of the black male applicant without
18 considering other factors. It does not require that
19 he be hired or that there be any discrimination
20 against the other applicant.

21 But I want to make a second point, again
22 going back to the evidence. Every study that I'm
23 aware of that's ever looked at this, finds that black
24 men are at the end of the hiring queue of employers;
25 that of all the demographic groups black men face

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 very substantial discrimination. Every audit study,
2 rigorous studies where they send out matched pairs of
3 applicants, find that employers are reluctant to hire
4 black men.

5 For many different reasons. Perhaps
6 some legitimate, perhaps not. And we know that the
7 fear of criminal records almost certainly is part of
8 that. And again, the work done by Bruce Western and
9 Devah Pager, our work and others, suggests that's an
10 important part of that fear. I know of no body of
11 evidence that says elderly women from Asia face
12 substantial discrimination in this market.

13 So the evidence clearly suggests there
14 is a large problem in this one area. Not these other
15 hypothetical examples. And the EEOC I believe has
16 made an attempt correctly or incorrectly, to address
17 these issues. But the notion that it requires
18 discrimination against these other applicants, I
19 didn't see that anywhere in the document.

20 CHAIRMAN CASTRO: Commissioner Yaki.

21 COMMISSIONER HERIOT: Ms. Miaskoff was
22 nodding, I just want to establish, you were agreeing
23 with him, right?

24 MS. MIASKOFF: Correct.

25 CHAIRMAN CASTRO: I'm going to let

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 Commissioner Yaki proceed. He's been patiently
2 waiting for his opportunity. So, Commissioner.

3 COMMISSIONER YAKI: Thank you very much.
4 It strikes me there are sort of two things that I'm
5 listening to here. One is, as referenced by the last
6 interchange, there's this confusion about what this
7 Guidance really does. To me what the Guidance does
8 is it opens up the pool for everyone to jump in a
9 little bit better than what's currently out there
10 right now.

11 It lowers the bar for exclusions of
12 people who formerly were sort of never allowed in to
13 the hiring pool to begin with. I mean part of the
14 problem that we have in this country for people who
15 have a criminal background. And who predominately,
16 in this case, are African American or Latino, is that
17 they can't even get in the door to begin with to even
18 get the interview.

19 I mean that to me is part of the big
20 problem. As someone who worked on this in local
21 government and understands how working with employers
22 who came to me about this regulation or that
23 regulation, part of the biggest hurdle was trying to
24 educate them about the fact that there's something
25 about giving someone the chance. But if you never

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 even give them the chance to explain themselves in
2 the first place by enacting a hard and fast rule
3 about a criminal conviction, you never get that
4 opportunity.

5 I mean am I right, Ms. Miaskoff, that in
6 many ways this is about -- this isn't a hiring
7 mandate as it is broadening the pool of prospects
8 that employers should be able to choose from in many
9 ways.

10 MS. MIASKOFF: Well it's not a hiring
11 mandate. And I think Dr. Holzer made that point
12 clearly also. It is cautioning against
13 discrimination.

14 COMMISSIONER YAKI: This to me, the
15 irony of this discussion, being in Washington, D.C.
16 is I think not lost on me. Because the underlying
17 tone of what you've talked about Mr. Sedgwick, Mr.
18 Blumstein and others has been redemption. About the
19 idea that someone can experience the conversion on
20 the Road to Damascus, give up their life of whatever
21 it was that they had before and become a productive
22 citizen.

23 We have that model in San Francisco,
24 it's called Delancey Street, where we have diversion
25 of drug other hardcore offenders within mainstream

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 back into normal life. And they create sort of their
2 own record through this program to graduate into real
3 work.

4 But nothing to me, what I don't
5 understand from an employer's perspective and perhaps
6 you can illuminate me on this, is why you would
7 object to what is really, by its own nature,
8 guidance. By its own nature it's not mandatory. It
9 is a requirement, it is imposed by law by Congress
10 for them to look into this. This is not something
11 that they just invented on their own. This stems
12 from a law enacted by Congress, signed into law by
13 the first President Bush in 1991.

14 But we sit here and we talk about, I
15 mean, there's something ironic about employers
16 sitting here talking about how we have to have these
17 requirements and this flexibility to do what we want
18 to do. To screen out who we don't want to do, when
19 we live in a city where you can break the laws of God
20 and still be re-elected to national office.

21 I mean, where people who stray, do
22 things all the time that are foolish, silly, arguably
23 outside the law, even get convicted of it and still
24 return to public life. It means all the time you,
25 and others, are making judgments all the time about

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 whether or not what someone did relates to what it is
2 you want them to do.

3 And why you can't extend that in very
4 possibility and every case, and in the interest of
5 African Americans and Latinos especially, that you
6 give that person the same kind of benefit of the
7 doubt in some ways to enter your work ranks is quite
8 frankly puzzling to me. And when we get to the
9 second panel what I'm going to ask is going to be
10 even tougher on this particular question.

11 But to me, explain to me why. It goes
12 back to the Bible, you know, those who are in glass
13 houses should not throw stones. And for all of us,
14 in all of our ranks, in all of our employment have
15 someone who may have done stupid. Something that
16 they aren't proud of. Maybe they got caught, maybe
17 they didn't. Maybe they had a friend who was a DA
18 who got them off so they didn't have to do it. So it
19 never appears.

20 A lot of these kids don't. They have a
21 bad public defender who just want to churn and burn a
22 case. You know, plead it out, get it out, it's on
23 their record. They don't have those kind of
24 benefits. So why isn't it logical and why doesn't it
25 make sense for EEOC to say to you just can't say no;

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 you've got to give everyone a second chance to prove
2 themselves.

3 And to do that you can't automatically
4 bar them from entering your doors.

5 CHAIRMAN CASTRO: To whom do you direct
6 that question, is that Mr. Sedgwick?

7 COMMISSIONER YAKI: Sedgwick or Mr.
8 Livingston or whoever.

9 CHAIRMAN CASTRO: I'm happy --
10 (Simultaneous speaking.)

11 CHAIRMAN CASTRO: So go ahead. Then I'm
12 going to have Commissioner Kirsanow do the last
13 question.

14 MR. LIVINGSTON: I'm happy to prove the
15 adage that fools rush in where wise men fear to
16 tread, by volunteering to answer your question.

17 The issue of employment for persons who
18 come out of prison is a very significant issue that
19 needs to be addressed in a very thoughtful way. And
20 we can't have a society where if you commit a crime
21 and go to jail you can never work. That's
22 unacceptable to everybody in the room and should not
23 happen in this country.

24 The question though is who decides what
25 the rules will be? Will it be the people, through

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 their elected representatives in Congress? Or will
2 it be an agency, using discrimination laws, that is
3 not answerable to the electorate.

4 And so it's not a question of whether
5 the rules are good. It's not --

6 COMMISSIONER YAKI: Excuse me.

7 MR. LIVINGSTON: You asked me to answer
8 and I'll give you my --

9 COMMISSIONER YAKI: No, no, I'm going to
10 ask you that. But you set up an immediate
11 bifurcation which I don't understand. These laws
12 were enacted by people elected to a body, delegated
13 those authorities to that body. That body is
14 responsible and there is oversight done by both
15 Executive and Legislative branches on it. So I don't
16 want there to be --

17 MR. LIVINGSTON: Well there you go. You
18 just answered my question. This body was delegated
19 authority for that body. We have a Congress and they
20 should deal with this issue in a very thoughtful way,
21 with input and opportunities for people to express
22 their opinions.

23 The EEOC Guidance was issued without the
24 opportunity to comment. And then the rest of us are
25 told that these will be the rules the EEOC will

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 follow and it flows right back to the conversation
2 which you just heard. Is EEOC using this as an
3 opportunity to step into a space where Congress won't
4 act and generally try to formulate rules that will
5 apply to everybody? Or is it enforcing
6 discrimination laws?

7 And to tell you the truth I don't know
8 which it is. So EEOC policy guidance says that the
9 use of criminal records by employers will result in
10 disparate impact on Hispanics and Blacks. But, the
11 EEOC has a lawsuit pending where EEOC is alleging
12 that it discriminates against men, including white
13 men, and that's the claim the EEOC is pursuing.

14 So I'm not arguing with you about
15 whether there should be rules or whether we ought to
16 be more thoughtful in the way we address this issue
17 of jobs for persons with criminal convictions. We
18 should, I agree. It's whether EEOC is the agency
19 that should be doing that.

20 CHAIRMAN CASTRO: Mr. Kirsanow you have
21 the last question. If it could be brief so we could
22 conclude on time.

23 COMMISSIONER KIRSANOW: Thanks very
24 much, Mr. Chairman. One quick observation, I keep
25 hearing that this is only a guidance, but when you're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 on the receiving end of an EEOC Guidance that is the
2 functional equivalence of even a statute, if not a
3 regulation.

4 And I keep hearing it's not a hiring
5 mandate but in Ricci v. DiStefano, we saw that it
6 transforms into a hiring mandate. When you're
7 concerned that you may have liability on a disparate
8 impact claim you may have to put a thumb on the scale
9 in terms of disparate treatment. And that is not
10 theoretical. That happens in practice all the time.

11 So again, another lack of a safe harbor.
12 Three safe harbors that aren't being provided. But
13 this goes to I think, the job relating and business
14 necessity, I'm going to go back to the law. Under
15 disparate impact claim the employer must establish
16 that the particular device, test, rule, policy that
17 is facially neutral is job related and consistent
18 with business necessity.

19 I think it was Don Livingston who said
20 that criminal convictions are such a device test that
21 are perhaps different from other device or tests,
22 like you have in Griggs v. Duke Power where you had
23 this facially neutral requirement that you have a
24 high school diploma or pass a certain test. That's
25 not job related, or not even consistent with business

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 necessity.

2 Here you've got a criminal conviction
3 that says more than somebody was convicted of
4 embezzlement so he should be barred from being a bank
5 teller. Somebody was convicted of rape so he
6 shouldn't be working in a assisted living center.

7 But it goes beyond that in terms of
8 reliability, trustworthiness, it's an indication of a
9 number of things that have been shown pursuant to
10 possibly the highest standard we have jurors prudence
11 and that is beyond a reasonable doubt.

12 So to what extent is this actually
13 consistent with, disparate impact in terms of job
14 necessity? And do we have any data that show whether
15 or not those individuals who have criminal
16 convictions perform worse or better than those who've
17 been hired without criminal convictions? Because it
18 seems to me that's what goes directly to the job
19 necessity.

20 Are these people qualified, do they
21 perform the job without any kinds of problems? Are
22 they there every single day? Do they perform as well
23 as those without criminal convictions? That's the
24 true inquiry here when it comes to the law.

25 MS. MIASKOFF: Well, thank you for that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 question. And I actually couldn't agree with you
2 more, that is the data that we need. And we would
3 love it.

4 COMMISSIONER KIRSANOW: Hold it, hold
5 it! Data that we need? We don't have this and yet
6 we're issuing guidances?

7 CHAIRMAN CASTRO: Commissioner, please.
8 Let's --

9 COMMISSIONER KIRSANOW: I'm astonished
10 by this. We don't have data that goes to the exact
11 issue here. We don't have any data on this? Is that
12 what people are telling me?

13 MS. MIASKOFF: What I'm saying to you is
14 that is why in the Commission's Guidance you see two
15 factors. The first factor is that, for job
16 relatedness, is the uniform guidelines on employee
17 selection procedures. Ideally, the kind of data that
18 would be meaningful for that pool would be studies
19 that used a criminal record and correlated that with
20 subsequent workplace behaviors.

21 We did a lot of research. We found one
22 study to that effect. Therefore, that is why the
23 courts have turned to working with the basic
24 framework that Green court set out in the 70s. Now I
25 think it's also a very important question that you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 raise.

2 That yes, the original disparate impact,
3 the Supreme Court cases, they deal with job
4 qualifications, like high school diploma, like scores
5 on a skills test, et cetera. And clearly having a
6 criminal record or not is a different beast.

7 I think the Third Circuit in
8 Philadelphia gave a very thoughtful opinion in El
9 where it really dove in and tackled the issues
10 presented by that. That we're looking at assessing
11 risk in this situation, not necessarily determining
12 someone's level of arithmetic or reading.

13 And, indeed, I think that that tension
14 has been recognized throughout the development of the
15 law in this area, was very fully addressed by the
16 Third Circuit. And indeed, that is the task that is
17 pursued, I guess, by the second way we talk about
18 establishing job related consistent with business
19 necessity. Assessing the risk of the crime to the
20 job. Looking at the time that has elapsed and
21 looking at any other facts that can be enlightening.

22 COMMISSIONER KIRSANOW: I respectfully
23 submit --

24 CHAIRMAN CASTRO: Excuse me, Ms.
25 Miaskoff, we're actually going to conclude this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 panel, Commissioner, since we've got Panel II. So --

2 COMMISSIONER KIRSANOW: This is very
3 important. I'd respectfully submit that risk is only
4 one aspect to look at. You have to look at not just
5 the risk, that's maybe what the EEOC is looking at
6 because it's focused on the criminality of this. But
7 it's also for the employer, is this guy going to be a
8 good employee.

9 (Chorus of voices.)

10 COMMISSIONER YAKI: Would you do that
11 for any single person that comes in? That's
12 ridiculous, Peter, that's to put a standard on anyone
13 walking in the door about whether or not you think
14 they're going to go, but that's regardless of what
15 their background is. Regardless.

16 (Chrous of voices.)

17 CHAIRMAN CASTRO: I want to thank this
18 panel for the opportunity to share your information
19 with us. As you can see it's a very passionate issue
20 for all of us. So I'm sure we'll continue this
21 conversation with Panel II. Thank you again for the
22 time and the information. I'll ask Panel II to begin
23 to come forward, don't be afraid.

24 (Laughter.)

25 CHAIRMAN CASTRO: And we'll ask staff to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 begin to change the nameplates. Commissioners, don't
2 stray too far away.

3 (Whereupon, the hearing in the
4 aforementioned matter went off the record at 10:34
5 a.m. and went back on the record at 10:40 a.m.)

6 **PANEL II. BUSINESS AND ADVOCACY GROUPS PANEL**

7 CHAIRMAN CASTRO: All right, we'll get
8 started with Panel II. I know that Gaziano will be
9 in shortly. First of all I'd like to briefly
10 introduce you to the panelists. And I'll do that
11 again, as I did earlier, in the order in which they
12 will be speaking.

13 Our first panelist is Roberta Meyers,
14 director of the Legal Action Center's National
15 H.I.R.E. Network.

16 Our second panelist is Glenn Martin,
17 vice president of Development and Public Affairs and
18 director of the David Rothenberg Center for Public
19 Policy at the Fortune Society, Inc.

20 Our third panelist is Lucia Bone,
21 founder of the Sue Weaver CAUSE, that's for Consumer
22 Awareness of Unsafe Service Employment.

23 Our fourth panelist is Julie Payne,
24 general counsel for G4S Secure Solutions, USA Inc.

25 Our fifth panelist is Richard Larson,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 president and owner of Winning Works Team, Inc., and
2 former vice president of HR at Universal Studios
3 resort.

4 And our sixth panelist is Garen Dodge,
5 partner in the Washington, D.C. Region Office of
6 Jackson Lewis, LLP and general counsel for the
7 Council for Employment Law Equity.

8 I think you were all here earlier and
9 you know the system of warning lights. Seven minutes
10 turns yellow, start wrapping up. And red, we'll move
11 on.

12 Okay, I'd like everyone to please, now
13 I'll ask you to swear or affirm that the information
14 that you're about to provide to us today is true and
15 accurate to the best of your knowledge and belief, is
16 that correct?

17 (Chorus of ayes.)

18 CHAIRMAN CASTRO: Okay, thank you. Ms.
19 Meyers, please proceed.

20 MS. MEYERS: Thank you, Commissioners,
21 for hosting this briefing to discuss the impact of
22 criminal record checks on Black and Latino job
23 seekers in the labor market.

24 I'm Roberta Meyers, director of Legal
25 Action Center's National Helping Individuals with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Criminal Records Reenter Through Employment Network,
2 which is also known as H.I.R.E. The Legal Action
3 Center is the only non-profit law and policy
4 organization whose sole mission is to fight
5 discrimination against people with criminal records,
6 histories of addiction or HIV and AIDS. And to
7 advocate for sound public policies in these areas.

8 H.I.R.E., which is a project of the
9 Legal Action Center, aims to increase the number and
10 quality of job opportunities available to people with
11 criminal records by changing public policies,
12 employment practices and public opinion.

13 Since 2001 my project has provided
14 leadership on public policy advocacy and technical
15 assistance and training all across the country to
16 private and public agencies on strategies to
17 eliminate or reduce the number of criminal record
18 barriers faced by job seekers in the labor market.

19 And just for the record, we've also been
20 working with a number states to create safe harbor
21 protections for employers, which we know is a big
22 issue.

23 As a proponent of the EEOC Guidance and
24 Policy, and I think for other proponents that support
25 it, I am not arguing for the elimination of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 background checks in hiring decisions. I'm a
2 consumer, I'm a mother, I'm a grand-daughter. I am
3 arguing for logical and responsible policies and
4 procedures that allow all qualified job seekers a
5 fair opportunity to compete for jobs.

6 And I am arguing against the allowance
7 of indiscriminate uses of criminal background checks
8 and screening policies that overtly and covertly
9 limit opportunities for people of color.

10 For the past decade we have used the
11 EEOC Guidance as a policy model that states could
12 adopt as a fair employment standard to give more
13 qualified individuals with criminal histories a fair
14 opportunity for employment and qualify for
15 occupational licensing.

16 We have also used it to educate
17 employers on the use of criminal records in hiring
18 decisions. While conducting these educational
19 activities over the years we have also worked with
20 other legal and policy groups to encourage the EEOC
21 to strengthen its position on employer's use of
22 records, criminal record screenings, as well as urged
23 them to become more rigorous in its investigation of
24 criminal record-based claims of discrimination.

25 Therefore, we considered it a tremendous

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 victory when the EEOC released this update of the
2 Guidance it had released nearly 30 years ago that
3 discouraged employers from establishing blanket bans
4 against hiring people with arrest and conviction
5 records.

6 The update of the EEOC Guidance includes
7 provisions that we were really excited about that put
8 employers on notice that categorical exclusions for
9 people with certain arrest and conviction records may
10 violate Title VII.

11 It emphasized the earlier recommendation
12 that job applications not ask about criminal records.
13 And if they do ask that they limit inquiries to
14 conviction records for which exclusion would be job
15 related with business necessity, offered a series of
16 examples of common policies and practices that may
17 violate Title VII and informed local and state
18 governments that barring people with certain criminal
19 records from jobs or occupational licenses could
20 violate Title VII.

21 This issue has become of greatest
22 importance because as the National Employment Law
23 Project reported there are over 65 million
24 individuals with criminal records in this country.
25 Two, a criminal record is usually the number one

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 automatic disqualifier for employment. And we know
2 that many employers, public and private, will go as
3 far as noting on job postings such a thing.

4 And we cannot ignore that criminal
5 records serve as a double stigma for people of color.
6 In 2006, H.I.R.E. partnered with the Center for
7 Community Alternatives in New York to conduct a
8 project that we called Unchaining Civil Rights, which
9 identified, documented and described the
10 institutional and structural exclusions in what we
11 called the Four E's. Employment, Education,
12 Enfranchisement and Equality, and the ways that these
13 exclusions result in de facto discrimination of
14 racial minorities.

15 We concluded that structural and
16 institutional barriers to employment, education and
17 enfranchisement for people with criminal records are
18 more than collateral consequences. They are an
19 abrogation of fundamental civil rights.

20 The release of Michelle Alexander's book
21 in 2011, the New Jim Crow, catapulted this issue into
22 mainstream media and has really forced the country to
23 take note and acknowledge that people of color are
24 significantly and disproportionately represented in
25 the criminal justice system.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And that a criminal record has become a
2 surrogate for race-based discrimination throughout
3 the U.S. Employment statistics for blacks and
4 Latinos, particularly males, continue to be worse
5 than any other demographic.

6 The experimental audit studies of Devah
7 Pager out of Princeton University encapsulates the
8 real challenges faced by black and Latino males with
9 or without criminal histories in the labor market.

10 In the last study she and Bruce Western
11 conducted in 2004 in New York City they concluded
12 that a black male without a criminal record was less
13 likely to get a job than a white male with a criminal
14 record. And my colleague Glenn here will talk a
15 little bit more about that study.

16 Needless to say a black man with a
17 criminal record barely stood a chance of getting a
18 callback for a job. Race discrimination and race
19 bias is pervasive in the job market and we have to
20 attack it from every angle to which it exists.

21 We respectfully ask that the members of
22 the Commission on Civil Rights consider supporting
23 the EEOC's position on limiting the use of criminal
24 background checks in employment decisions, as well as
25 work with H.I.R.E. to promote criminal record

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 barriers as civil and human rights issues as they
2 are.

3 Here are a few additional thoughts. Few
4 states, only 14, have laws prohibiting discrimination
5 against individuals with criminal records in public
6 and/or private employment and/or for occupational
7 licensing. And as you know there is no federal law.

8 Therefore, we need federal enforcement
9 agencies to commit to ensuring that qualified
10 individuals with criminal histories are given a fair
11 chance and opportunity to work and not face
12 discrimination.

13 Most states give unfettered access to
14 criminal record information indefinitely, which
15 perpetuates the lifelong stigma suffered by millions
16 of individuals with criminal records who are
17 disproportionately people of color.

18 Until now, the employer community was
19 not very concerned about being challenged on their
20 discriminatory hiring practices because the threat of
21 a criminal record-based, or even a race-based
22 discrimination lawsuit, seemed more unlikely and
23 remote than the negligent hiring liability suit.

24 Employers must continue to be encouraged
25 to not consider arrests that did not result in a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 conviction as well as old or minor convictions that
2 really cannot justifiably be considered relevant to
3 the ability or the potential behavior of an
4 applicant.

5 I have a series of other recommendations
6 that's in my written testimony and I hope that you
7 will consider them. Thank you.

8 CHAIRMAN CASTRO: We will. Mr. Martin.

9 MR. MARTIN: Thank you. Good morning,
10 Mr. Chairman and members of the Commission. Thank
11 you for holding this important briefing on the EEOC
12 Reissuance of Arrest and Criminal Record Guidance,
13 which was originally issued under the leadership of
14 Clarence Thomas at the time.

15 I think personally, and my colleagues
16 do, that the Guidance is reasonable, fair and
17 flexible. I'm pleased to see that it enjoyed bi-
18 partisan support for its passage.

19 I represent an organization called the
20 Fortune Society, we've been around for over 46 years
21 serving people who have been involved in the criminal
22 justice system. Either helping them to reintegrate
23 on the back-end, about 2,500 people. Or running
24 alternatives to incarceration programs, keeping
25 people out of jail and prison on the front end and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 meeting their needs in the community where it doesn't
2 jeopardize public safety.

3 Some of the services we offer include an
4 array of programs, education, employment (We place
5 600 people with criminal records in jobs each year),
6 housing, drug and alcohol treatment, mental health
7 services, fatherhood initiatives. And we're an
8 advocacy organization.

9 And I'd also like to mention that our
10 185 staff, half of them are people who have done time
11 in prison. Half of them are people who have some
12 sort of involvement in the criminal justice system.
13 As well as a third of our board, by way of our by-
14 laws. It's very deliberate. We put value in the
15 cultural competency that our staff, our professional
16 staff, brings to the table.

17 It's also made us a bit of experts on
18 the hiring of people with criminal records. So much
19 so that we worked with the Department of Justice to
20 create a tool kit just two years ago, which was
21 helped launched by the Attorney General Eric Holder,
22 on how to successfully hire people who were formerly
23 incarcerated who also have the professional
24 credentials to do the job.

25 Today my written testimony focuses on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the Devah Pager, Western Study because I served as
2 the project manager on that study when I was the co-
3 director of the National H.I.R.E. Network at the
4 Legal Action Center.

5 As you might know, it was the largest
6 audit study ever conducted in the United States. It
7 was a replication of an original study that was done
8 in Milwaukee, where the main criticism was that
9 Milwaukee is not a very diverse labor market, hence
10 the replication in New York, a much more diverse
11 labor market.

12 And the major findings, which has been
13 stated a number of times this morning, is that a
14 white person with a criminal record just out of
15 prison has a better chance of getting a job from an
16 employer than their equally qualified black
17 counterpart who has never been arrested.

18 And then when you attribute the criminal
19 records of the black job seeker his call backs are
20 reduced another 50 percent. Very stark findings.
21 The study was housed at the New York City Commission
22 on Human Rights, one of the agencies in New York
23 State which is charged with enforcing our anti-
24 discrimination law, which I should say is over 40
25 years old. It applies to employers with ten or more

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 employees, so that includes small Mom and Pop shops.

2 It's much more prescriptive than the
3 EEOC regulations. There's many more mechanisms for
4 relief under our anti-discrimination law. And the
5 bill was originally sponsored by a very conservative
6 Republican in Long Island New York.

7 Just before I came here to this
8 testimony I checked in with colleagues at the New
9 York City Commission on Human Rights. Last year
10 there were only 14 meritorious complaints filed by
11 people with criminal records that they moved forward
12 on.

13 So contrary to the rumor the sky is not
14 falling as a result of having these sort of anti-
15 discrimination laws on the books.

16 So I'd like for you to indulge me for a
17 minute because I took the opportunity to read the
18 testimony of some my colleagues on the way here on
19 the train yesterday evening and I was somewhat
20 disturbed by some of the things that I read, which is
21 what encouraged me to deviate a bit from the
22 presentation that was specifically about the study.

23 Maybe it's because I was involved in
24 helping the EEOC Guidance to move forward as an
25 advocate. Maybe it's because I did six years in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 prison myself before I started doing this work 11
2 years ago. Maybe it's because I'm a black man. But
3 definitely because I'm an American.

4 With all due respect to my fellow
5 presenters, first, curtailing the legitimate use of
6 background check is not my intention or the intention
7 of the agency I work for. I think Pandora's Box is
8 wide open on background checks in the United States,
9 we're not going to close it. I wouldn't ask
10 employers to stop using background checks where
11 appropriate any more than I would say that credit
12 card companies should stop using credit checks to
13 make decisions about who should get a credit card.

14 I do have issues with the accuracy, how
15 the information is used and if the subject has an
16 opportunity to respond to what's contained in the
17 background check. But when I was at the National
18 H.I.R.E. Network, we worked with the National
19 Association for Professional Background Screeners
20 eight years ago.

21 And we agreed that there was need for
22 additional rigor, we agreed, we both acknowledged
23 that the field needed to respond or that somewhere
24 down the line there may be a strengthening of the
25 Fair Credit Reporting Act.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 At the Fortune Society, where we hire a
2 number of people with criminal records, we do
3 background checks on all qualified applicants to make
4 decisions because we have legitimate liability
5 concerns ourselves.

6 So the Background Check company response
7 to the new EEOC Guidance was a bit surprising to me.
8 These agencies are conduits of information, as they
9 should be, not necessarily experts in the
10 interpretation of civil law and surely not suggesting
11 that Title VII applies to them.

12 Secondly, the argument that Black and
13 Latinos have a predisposition for being criminals is
14 just categorically false, not supported by evidence
15 and irresponsible. I look no further than the Bureau
16 of Justice Statistics, crime statistics.

17 Thirdly, some of the research findings
18 suggest that the expansion of the utilization of
19 background checks can have a positive effect for
20 black men without criminal records. That obviously
21 is in response to employer liability and legitimate,
22 and sometimes not so legitimate liability concerns,
23 but we all know at this point criminal record-based
24 discrimination easily serves as a surrogate for race-
25 based discrimination. Whether it's intentional,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 deliberate or unintentional.

2 So the idea of parsing out black
3 applicants, which some of the other presenters are
4 going to suggest, to find the good black applicants
5 from the bad black applicants feels very un-American
6 to me, especially when I think back to the 2004 State
7 of the Union Address where it was President Bush who
8 suggested that when the gates of the prison open we
9 need to give people a second chance and that it
10 should be a road to a better life. And how do you
11 get a better life if you don't have access to the
12 labor market?

13 Finally, looking at the time, based on
14 much of testimony that will be given -- oh, I have
15 one other thing to say.

16 In response to this concept that we need
17 to be doing more background checks to parse people
18 out, surely allowing more disparate impact
19 discrimination to reduce disparate treatment
20 discrimination, where Title VII makes both illegal,
21 is not something we should be doing.

22 We should be moving forward full
23 throttle in the enforcement of the prohibitions on
24 both. Anything less than that would be assault on
25 the Rule of Law.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And finally, if we listen to some of the
2 testimony that will be presented here today, I myself
3 would probably not be sitting here in front of you.
4 I myself would probably have been categorically
5 excluded from the \$16,000 a year job I first took 11
6 years ago. Yet today I run a \$20 million agency, I'm
7 in charge of fund-raising, communications and
8 advocacy.

9 I hire a number of people who have been
10 involved in the criminal justice system. I hire a
11 number of people who have not been involved in the
12 criminal justice system. But anything that
13 categorically denies people a job opportunity based
14 solely on their criminal record would have had a huge
15 impact on me.

16 And again, I would hate to think of
17 where I would be sitting as opposed to sitting here
18 today. Thank you for the opportunity.

19 CHAIRMAN CASTRO: Thank you, Mr. Martin.
20 Ms. Bone, you may proceed.

21 MS. BONE: It's a great privilege to
22 appear before the United States Commission on Civil
23 Rights in honor and in memory of my sister, Sue
24 Weaver. And for other innocent victims whose tragic
25 deaths could have been prevented had an employer done

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 a proper criminal background check before hiring that
2 individual.

3 My name is Lucia Bone, and I'm the
4 Founder of Sue Weaver CAUSE. CAUSE is Consumer
5 Awareness of Unsafe Service Employment. It's a non-
6 profit organization proactively keeping you and your
7 families safe, one service worker at a time.

8 We promote the important of proper
9 annual criminal background checks on anyone working
10 in our home or with a vulnerable population. We
11 educate you, the consumer, on the importance of
12 knowing who you hire to work in or near your home or
13 your family.

14 At one time or another we all need to
15 invite a stranger into our home for maintenance or
16 delivery. We trust the companies we hire to send
17 safe workers into our homes. But how do we know that
18 that trust is well placed. My sister, Sue Weaver,
19 thought it was. She was wrong.

20 Sue hired a very reputable Florida
21 department store, Burdine's, to have her air ducts
22 cleaned. No background checks were done on the
23 workers they sent into the client's homes. The work
24 was subcontracted out and two convicted felons were
25 sent into Sue's home to do the service work.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 A single woman, home alone, two
2 convicted felons. Six months later one of the
3 workers, Jeffrey Hefling, a twice convicted sex
4 offender on parole returned. He raped Sue, he
5 murdered her, he set her body and her home on fire in
6 an attempt to destroy the DNA evidence.

7 Had Burdine's done a criminal background
8 check they would have found both men were not
9 suitable to be working in their client's homes. And
10 my sister might still be alive today. A criminal
11 background would have saved Sue's life.

12 Since Sue's death I have campaigned
13 tirelessly to educate and bring awareness to the
14 importance of proper background investigations and
15 the importance of knowing who you hire. We need
16 federal legislation requiring national background
17 checks on individuals entering consumer's homes or
18 working with vulnerable populations.

19 This type of consumer safety legislation
20 would better protect unsuspecting individuals like my
21 sister. Not only do background checks make good
22 business sense, they save lives. It is absurd that a
23 person with multiple convictions for violent sexual
24 assaults would be engaged as a home repairman. Yet
25 it happens over and over again.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Everyone has the right to work, but not
2 every job is right for everyone. Criminal background
3 investigations provide employers an invaluable tool
4 to help them place employees in job appropriate
5 positions, better protecting co-workers and clients.
6 Background checks prevent tragedies.

7 I believe the EEOC focused its recently
8 updated policy on helping minority ex-offenders seek
9 employment without paying regard to any victims.
10 Everyone deserves a second chance, but not at the
11 expense of innocents, such as my sister. Sue did not
12 commit the heinous crimes that Hefling committed.
13 Burdine's should have known about his criminal past
14 and not send him into consumer's homes.

15 Is it too much to ask that employers
16 take appropriate steps to ensure the safety of their
17 clients from their employees? Unfortunately, my
18 sister paid the ultimate price because a background
19 check was not conducted that would have alerted
20 Burdines to who Hefling was.

21 That doesn't mean that Hefling couldn't
22 have been hired, just that armed with the knowledge
23 of his criminal history, Burdine's shouldn't have
24 sent him into my sister's, or anyone's, home. I'm
25 gravely disappointed that no victims were represented

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 at the July 2011 meeting of EEOC. The Commission did
2 not consider victim's side but solely focused their
3 attention on the plight of ex-offenders.

4 Unfortunately, it appears they singled
5 out background checks as the leading cause of why ex-
6 offenders fail to find a job. Ignoring other
7 difficulties such as drug and alcohol addictions,
8 lack of education or vocational training. Or lack of
9 family structure. And ignored the beneficial side of
10 screening.

11 Rather than take steps to engage
12 employers to rely on criminal background checks,
13 their actions will cause employers to conduct less,
14 not more screening. No attention was paid to such
15 critical issues as why employers rely on background
16 checks to ensure safer workforce. How its new policy
17 would discourage the use of background checks. And
18 how victims advocacy groups felt about any change in
19 policy.

20 I personally attended the 2011 hearing
21 and was insulted that the EEOC showed no interest in
22 hearing from any victims. It was apparent that the
23 hearing was only a formality. Their focus was on
24 protecting ex-offenders.

25 In addition, they made a serious error

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 by failing to allow the public to view and comment on
2 the Guidance before it was issued. They need to
3 suspend the Guidance and listen to victims and their
4 families and victims right organizations and others
5 representing vulnerable populations. And not ignore
6 their comments and letters as has been done in the
7 past. All views need to be heard and considered
8 before a new policy goes into effect.

9 The Guidance must balance the safety of
10 public and innocent consumers against the employment
11 concerns of ex-offenders. While sadly it is too late
12 for my sister, it is not too late for others.
13 Without background checks used to qualify individuals
14 that work or care for our families, or do service
15 work in our home, we are knowingly risking the safety
16 of our loved ones.

17 Under these guidelines the EEOC is
18 actually forcing employers to make decisions on job
19 applicants without the proper use of the resources
20 that would allow an applicant to be placed in an
21 appropriate position for their skill and their
22 character.

23 When the EEOC weighed the risk and
24 benefits of the proposed policy Guidance, it should
25 have balanced the safety of innocent consumers and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 ex-offenders. It did not. Its Guidance is
2 unacceptable and it should be revoked. Thank you.

3 CHAIRMAN CASTRO: We're sorry for your
4 loss.

5 MS. BONE: Thank you.

6 CHAIRMAN CASTRO: Thank you for sharing
7 that with us. Ms. Payne.

8 MS. PAYNE: Chairman Castro and members
9 of the Commission, thank you so much for this
10 opportunity to speak to you today. My name is Julie
11 Payne and I am the senior vice president and general
12 counsel of G4S Secure Solutions USA.

13 We are a leading security company in the
14 United States. We employ over 33,000 security
15 officers, nearly 8,000 of whom are armed. G4S
16 provides security services to nearly every sector of
17 our country's critical infrastructure, including
18 nuclear power plants, government buildings and
19 facilities, chemical plants and refineries, ports,
20 airports, railways, public transit facilities,
21 detention facilities and financial institutions.

22 G4S has clients and responds to the
23 public - who expect us to deploy security officers
24 who are professional, well trained and trustworthy.
25 In order to meet this expectation, to comply with our

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 contracts and to comply with law, our screening
2 process is one of the most thorough in the industry.

3 Our clients expect, and most require,
4 that G4S supplies security officers that have passed
5 an extensive criminal background check. I am here
6 today to cast light on the EEOC's targeting of
7 companies, including my own, over legitimate and
8 necessary business practices.

9 In April of 2010, David Coleman, an
10 individual with two prior convictions for theft,
11 applied for a position with G4S in Pennsylvania. G4S
12 did not hire Mr. Coleman as a result of his
13 convictions. He filed a charge of discrimination,
14 claiming that our refusal to hire him was based on
15 his race and that use of criminal background checks
16 adversely impacts African Americans.

17 The EEOC Philadelphia Office expanded
18 the agency investigation beyond the charging party,
19 to include G4S applicants and employees across the
20 United States. The EEOC sent a series of requests
21 for information that were incredibly extensive and
22 burdensome and sought vast amount of information
23 related to our hiring policies.

24 They requested information about every
25 employee and applicant of G4S, its parent companies,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 its subsidiaries, its affiliates, its successors, its
2 predecessors, agents and assigns. It sought the
3 information for a period of time dating back to the
4 date when G4S first implemented its policy regarding
5 criminal convictions to the present.

6 G4S, formerly known as Wackenhut in the
7 United States, was founded in 1958 and has relied on
8 criminal background screening from the beginning. As
9 a result of this inquiry, we have hired multiple
10 lawyers, statisticians, experts, to assist us with
11 complying with the onerous requests. We have spent
12 hundreds of thousands of dollars to an uncertain
13 result.

14 The EEOC Guidance and its application in
15 the Coleman case demonstrate that the EEOC is focused
16 on using individual cases for expanding claims to
17 national prominence. This not only dilutes the
18 claims filed by individuals who have turned to the
19 EEOC for specific redress, but it also puts employers
20 on the defensive as class claims are extremely costly
21 and highly unpredictable.

22 In our case, because we would fail to
23 hire an individual who has two previous convictions
24 for theft, we are now being asked to defend the use
25 of criminal background checks in every hiring

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 decision we have made over a period of decades.

2 The EEOC also ignores the significant
3 risk to G4S and other employers if they fail to do
4 background checks. We have a duty to perform a
5 reasonable investigation on potential employees. And
6 this standard of care can be higher in industries,
7 such as my own, where we serve, transport and protect
8 the public.

9 Litigation against employers in the area
10 of negligent hiring and negligent retention makes the
11 EEOC Guidelines and enforcement plan a very difficult
12 no-win situation for employers.

13 Another no-win situation for security
14 companies is that most states, with very few
15 exceptions, require that a background check be done
16 before security officers can be licensed to work.
17 Those with felony convictions, or certain misdemeanor
18 convictions, are not authorized to work as security
19 officers in most states.

20 The EEOC is aware of the statutory
21 scheme but counters that state and local laws are
22 preempted by Title VII. Therefore, by simply
23 complying with state and local licensing laws,
24 private security companies are put in an untenable
25 position.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Congress has also sought to expand
2 access to FBI criminal background checks for private
3 security companies. G4S is a member of and has
4 worked with the National Association of Security
5 Companies in support of the Private Security Officer
6 Employment Authorization Act, which was passed in
7 2004.

8 The enactment of this legislation was a
9 clear public policy decision by Congress in support
10 of more expansive and stringent criminal background
11 checks for security officers. Within the law it
12 states that "The American public deserves the
13 employment of qualified well trained private security
14 personnel as an adjunct to sworn law enforcement
15 officers; and private security officers and
16 applicants for private security officer positions
17 should be thoroughly screened and trained."

18 Criminal background checks draw upon the
19 most rigorous standard of our U.S. Criminal Justice
20 system that is: proof beyond a reasonable doubt.
21 Regardless, the EEOC has determined that in certain
22 circumstances there are reasons for the employer not
23 to rely on a conviction record when making an
24 employment decision.

25 The EEOC is requiring that employers

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 substitute its judgment for that of our criminal
2 justice system. This is illogical. Given the burden
3 that must be met for a conviction to occur, employer
4 reliance upon a criminal background check is far less
5 likely to lead to individual discrimination.

6 G4S should not have to bear the legal,
7 financial and reputational risk of hiring persons who
8 have been convicted of theft into positions where the
9 opportunity for theft is great. And where our
10 customers have entrusted us to protect their assets.

11 We cannot give guns and badges, keys and
12 combinations, pass codes and access to servers
13 containing personal and sensitive information, and
14 our trust to those who are at high risk of abusing it
15 or offending again.

16 I thank you for this opportunity.

17 CHAIRMAN CASTRO: Mr. Larson.

18 MR. LARSON: Good morning, everyone.
19 Holiday wishes to you and your families, your loved
20 ones. The city looks beautiful this time of year.
21 Thank you for the opportunity to participate in this
22 very important conversation regarding the use of
23 criminal histories during the employment process.

24 As reflected in my executive summary, I
25 have managed the hiring of thousands of men and women

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 from using large scale job fairs to senior level
2 executive searches. In each instance the goal has
3 been simply to identify the most suitable candidates
4 for the organization.

5 Some of the best people I have hired did
6 not have a strong first impression, or make one, or
7 attend a ranked U.S. News and World Report Top 50
8 University. Beyond the immediate assessment as to
9 whether the candidate can perform the tasks
10 identified in a job description, there are other
11 crucial variables such as interpersonal skills,
12 critical thinking skills, leadership potential, brand
13 awareness, work ethic, problem solving capabilities,
14 positive attitude, teamwork and demonstrated judgment
15 to make good, solid decisions.

16 Reasonable people often disagree as to
17 who the best candidate for a job may be. I have seen
18 hiring managers strongly at odds with the HR manager
19 as to which candidate is the right fit for the
20 particular job.

21 I believe obtaining an accurate criminal
22 history is an important component in any disciplined
23 hiring process. Indeed, a thorough background check
24 with a detailed criminal history is the single most
25 effective tool that employers can use to mitigate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 their risk, which leads me to the April 25th, EEOC
2 Guidance document. I make two key points.

3 First, my impression is the rationale
4 behind the Guidance does not yet resonate with small
5 business whose HR managers do not have ready access
6 to the educational training awareness offerings of
7 major industry groups and to outside legal counsel.

8 I draw this observation as I present
9 classes on employment law and practices to HR
10 managers. I would venture to say that if we were to
11 conduct focus groups with HR managers from smaller
12 companies nationwide we would often find a lack of
13 understanding as to the issues raised in the guidance
14 document.

15 HR managers view themselves in a
16 gatekeeping role to prevent negligent hiring claims
17 and the thought that their company could be sued by
18 an ex-offender for not being hired is counter-
19 intuitive.

20 When I announced to my Rotary Club this
21 week that I would be participating in today's
22 discussion, I was immediately approached by many
23 small business owners who knew nothing of this issue
24 and were concerned.

25 Accordingly, I believe governmental

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 agencies as well as private sector industry groups
2 have an obligation to provide educational awareness
3 on the Guidance so that all employers have an equal
4 opportunity to understand the EEOC's current focus on
5 this issue.

6 My second observation is that companies
7 that do understand the rules, have often moved
8 forward to create an interactive process to
9 thoroughly vet concerns raised by the disclosure of
10 the criminal history to determine whether the
11 conviction relates to the open position under
12 consideration.

13 I have worked with companies that have
14 been engaged in this process long before the April
15 Guidance document was issued. The interactive
16 process allows the ex-offender to provide court
17 records, often required by the company. Some
18 companies also want to see the affidavit supporting
19 the arrest to get a better understanding as to what
20 actually took place at the time.

21 The ex-offender is given the opportunity
22 to make a statement and to address concerns. A
23 helpful tool in this process can be a comprehensive
24 set of questions that need to be addressed. Another
25 tool may be a matrix of data points weighting the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 various factors for a review.

2 Such tools provide scrutiny as to the
3 nature of the event, when it took place, age of the
4 offender at the time, intervening work history and
5 recommendations of previous employers and other key
6 factors to be considered.

7 When all of the relevant factors have
8 been gathered the stakeholders, such as the hiring
9 manager, the HR manager and the risk manager, make a
10 business decision as to whether or not the behaviors
11 underlying the criminal conviction correlate to the
12 open job.

13 A person convicted of possession of
14 stolen property may not be deemed suitable for a
15 warehouse position but may be deemed suitable for a
16 landscape gardening position. And sometimes the
17 decision not to offer any position is necessary to
18 serve the best interest of the company and to prevent
19 downside risks.

20 Whatever the outcome of this step-by-
21 step, case-by-case individualized interactive
22 process, documentation of the thorough measures the
23 company took to vet and debate these issues will
24 provide the basis for a defense against both a
25 negligent hiring charge and a failure to hire charge.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 In conclusion, even when a criminal
2 history is not a factor there will be many close
3 calls as to who gets hired. And when criminal
4 histories are a factor there will often be many close
5 calls as to who gets hired. But who better to make
6 these decisions than the employer who knows its own
7 business operations far better than any third party?

8 Thank you.

9 CHAIRMAN CASTRO: Mr. Dodge.

10 MR. DODGE: Good morning, Mr. Castro and
11 distinguished members of the Commission. Thank you
12 very much for the opportunity to speak today. As you
13 can tell my voice is going, so I apologize in
14 advance.

15 I appear today on behalf of my law firm,
16 Jackson Lewis, as well as the Council for Employment
17 Law Equity.

18 Both Jackson Lewis and the Council for
19 Employment Law Equity strongly support the
20 appropriate use of criminal background checks in
21 employment. Such record checks before the
22 commencement of employment are highly effective and
23 vital tools to prevent criminal recidivism in the
24 most harmful contexts, protect at-risk populations
25 and assist employers in making fully informed hiring

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 decisions as well as protecting employees, their
2 clients and customers, their assets and the public at
3 large.

4 As background, the Council for
5 Employment Law Equity is a non-profit coalition of
6 major employers committed to the highest standards of
7 fair, effective and appropriate employment policies.
8 Jackson Lewis is a national law firm of more than 730
9 lawyers in 49 offices, all of whom are dedicated to
10 the representation of management in labor and
11 employment issues. I'm a partner at Jackson Lewis
12 and serve as co-chair of the government relations
13 practice group.

14 Larry Bossidy, the former chairman for
15 Honeywell, once said: "Nothing we do is more
16 important than hiring and developing people. At the
17 end of the day you bet on people, not on strategies."

18 Mr. Bossidy was right. Nothing is more
19 important to a company than who it hires. However,
20 betting on people we hire means more than simply
21 accepting the first candidate and blindly hoping for
22 the best.

23 Instead, the employer's recruitment and
24 hiring process is its biggest and best opportunity to
25 shape not only its workforce but its future. But as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 employers, we face a dilemma, as you've heard from
2 some of the other panelists, which is only
3 exacerbated by the EEOC's new rule.

4 As those of you who are lawyers
5 understand, we live in a litigation happy
6 environment. Civil lawsuits alleging an employer's
7 vicarious liability for torts committed by employees
8 or claims such as negligent hiring or retention give
9 little quarter for missed steps in hiring.

10 In addition, the EEOC, as you've heard
11 before, is now with this Guidance taking aim squarely
12 at employers, second guessing their decisions and
13 undertaking high-profile, class action type
14 litigation.

15 So stuck between this "rock" of tort
16 liability and the "hard place" of statistical second
17 guessing for those not hired, employers are faced
18 with near impossible choices in how and whether to
19 screen perspective workers.

20 But as a matter of policy, employers
21 should not be forced to bet in the dark. Society
22 should actually encourage employers to utilize
23 criminal background checks when appropriate in their
24 estimation and judgment as part of the hiring
25 process.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Risk is inherent in many aspects of the
2 world we live in but we should not force employers to
3 risk employee hiring decisions when the tools exist
4 right now to aid them.

5 So why should employers use criminal
6 background checks? Let me just give you a few
7 examples, and others are cited in my testimony.

8 Back in 2010, Amy Bishop, a biology
9 professor, walked into a meeting and shot and killed
10 three of her colleagues, wounding three others. A
11 background check at the time of her hiring would have
12 revealed that eight years earlier she had pled guilty
13 to and had a misdemeanor conviction for assault and
14 disorderly conduct for punching a woman in the head
15 at a restaurant.

16 Another example: Lisa Keebler, a mother
17 of three young children, arrived home to find a meter
18 reader waiting for her. When she left her vehicle
19 and went into the house, the man approached. He
20 asked about reading the meter. Keebler demanded that
21 the guy leave but then he began to attack her. He
22 beat her; he raped her. A background check came back
23 the day after his arrest for this assault, revealing
24 several convictions for arson, criminal mischief,
25 burglary, theft and other crimes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Another example: Edwin Harber, an over
2 the road truck driver, picked up a 17-year-old
3 hitchhiker at an Indiana toll plaza. In the sleeping
4 compartment of the truck, he repeatedly assaulted,
5 beat and raped her, even threatening to kill her.
6 Had his employer done a complete criminal background
7 check in addition to the one performed for the
8 vehicle infractions, the company would have learned
9 that in the year before they hired him he had been
10 arrested for doing similar bad things. In fact, he
11 had a long history of violent sexual crimes.

12 Another example involves George
13 Augustine's employer who failed to do a criminal
14 background check before they hired him as an elevator
15 operator. Had the company done so it would have
16 learned that he had a lengthy criminal history.
17 Indeed, he was a registered sex offender. But in
18 2003, he assaulted and attempted to rape a woman
19 while at work.

20 At the time of his hiring in 1994, as a
21 custodian for a community center, Anthony Moore was
22 not subject to a criminal background check. He began
23 working in the community center, and in 1997 he took
24 one of the young girls in his charge into a weight
25 room and committed various heinous acts. Had the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 center done a criminal background check, it would
2 have discovered an expansive criminal record
3 including crimes of violence.

4 There are many, many, many other
5 examples cited in my written testimony. So contrary
6 to an earlier panelist, these concerns are not
7 theoretical. They are real. And they're of grave
8 concern to employers and others you've heard on this
9 panel.

10 So these examples are things that all
11 employers want to avoid. And in fact, as Ms. Payne
12 noted, it's our obligation as employers to safeguard
13 our workers and customers as well as the general
14 public.

15 These risks are not only physical. For
16 example, the U.S. Department of Commerce noted that
17 30 percent of business failures are due to poor
18 hiring practices. Annual losses generated by poor
19 hires, absenteeism, drug abuse and employee theft,
20 amount to \$75 billion a year. There are other
21 statistics cited in my testimony.

22 But all of this real risk is lost in
23 much of the EEOC's Guidance. Rather than focusing on
24 job relatedness, business necessity, the kinds of
25 things that employers typically take into

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 consideration when they factor all this in, the
2 EEOC's Guidance largely is based on statistical
3 analysis, the front-end if you will, of the disparate
4 impact theory.

5 Employers must be given the opportunity
6 and the discretion to make their own informed
7 decisions as to whether a perspective prospective
8 employee is an acceptable risk. They need to have
9 available, relevant and appropriate information.

10 Thank you very much.

11 CHAIRMAN CASTRO: Okay, Mr. Dodge, I
12 also want to thank your firm for the public service
13 you do. One of your partners, James Botana, is a
14 member of the Illinois State Advisory Committee. So
15 we appreciate your supporting that.

16 Let me open by asking you a question and
17 then I'll open it up to my colleagues. Each of the
18 cases that you outlined there, there was not a
19 criminal background check that was conducted. And I
20 think what we've gathered from this morning's panel
21 and from other panelists here today is that the EEOC
22 is not saying don't do criminal background checks.
23 They're setting forth guidelines to ensure that those
24 background checks are not done in a way that violate
25 Title VII.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 So had those folks that you just
2 outlined in your presentation done a criminal
3 background check, as the EEOC says they should have,
4 these instances would not have occurred. So I don't
5 understand why those are relevant to the EEOC
6 Guidance. And if anyone else wants to respond after
7 that.

8 MR. DODGE: I understand your question,
9 thank you. The point is criminal background checks
10 are important and critical. And what is lost in the
11 discussion of the EEOC Guidance is the effect that
12 this Guidance is actually having out there in the
13 real world.

14 For example, the EEOC indicated in the
15 middle of its Guidance document that one of its "best
16 practices" was for employers to take the question off
17 the application form, "have you ever been convicted
18 of felony say in the last, let's say seven
19 years..."... They want to ban the box, if you will,
20 through an administrative process generated at the
21 EEOC.

22 The message that sends to employers is
23 okay, we better take this question off our
24 application form and if we don't do it at least some
25 regions of the EEOC have indicated that they are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 going to take a special, hard look at those employers
2 who leave that on.

3 So you're right the EEOC Guidance
4 doesn't flat out prohibit the use of criminal
5 background checks. But what I'm saying is out in the
6 real world it's sending the message to companies,
7 like Ms. Payne's and others, that you do so at your
8 own risk. At great risk. Think of the expense and
9 the aggravation in compliance simply with the request
10 for information related to one individual involving
11 the example cited by Ms. Payne.

12 What we're hearing from medium and small
13 sized employers in particular is because of the
14 complexity of the Guidance, because of the risk that
15 is poses to them, that in fact it is chilling
16 behavior. And some employers are reporting back to
17 us - and we operate nationally so we hear stories
18 anecdotally that in fact it has been having the
19 consequence where employers are really second
20 guessing do we even do criminal background checks at
21 all.

22 CHAIRMAN CASTRO: And is that the case
23 in the examples you gave us? Did the ban the box
24 chill those particular employers from doing the
25 background checks?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. DODGE: Those were cases several
2 years ago, prior to the Guidance. So no, those --

3 CHAIRMAN CASTRO: They don't relate to
4 the Guidance at all, in this particular instance.

5 MR. DODGE: I'm not familiar with
6 reported decisions after the issuance of the April
7 2012 EEOC Guidance. I haven't heard of any cases
8 since then.

9 CHAIRMAN CASTRO: Mr. Martin have --

10 MR. MARTIN: I would just like to add
11 for the record that the ban the box doesn't tell
12 employees to never consider the criminal record.
13 What it suggests is that if job seekers with criminal
14 records had an opportunity to get their foot through
15 the door and make the case that they're the most
16 qualified candidate that, if I can use a sports
17 analogy, that if you get everyone up to the start
18 line it's better chance for them to compete for the
19 job.

20 And the criminal record should be taken
21 into account. And you should do a background check,
22 just not on the initial applications. I just want to
23 clarify that. And 30 jurisdictions have done it and
24 about --

25 MS. MEYERS: Forty-three.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MR. MARTIN: Forty-three jurisdictions
2 have already done it around the country, including
3 states. Entire states.

4 CHAIRMAN CASTRO: Commissioner Kirsanow
5 and then Commissioner Kladney.

6 COMMISSIONER KIRSANOW: Thank you,
7 Chairman. I'm going to go back to the law again,
8 sorry for burdening everybody. This is to Mr. Dodge,
9 I apologize for asking you a question given -- this
10 goes to the issue of job necessity again and job
11 relatedness.

12 I was listening to some of the scenarios
13 that you described. And when you talk about job-
14 relatedness typically what we talked about is when
15 somebody has been convicted of embezzlement that bars
16 him from being a bank teller, that shouldn't bar him
17 from being say a laborer.

18 But in a couple of the examples you
19 cited, for example I think it was the meter reader
20 example, I didn't hear anything about breaking and
21 entering, for example, which would seem to me for a
22 meter reader probably to be the most specific job
23 related criterion under the EEOC Guidance.

24 To what extent do you find from what you
25 hear from clients that the Guidance might bar them

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 from considering criminal convictions as a indicator
2 of a broader host of issues related to job
3 relatedness?

4 MR. DODGE: That's a good question. So
5 if you're literally looking at the EEOC Guidance you
6 might come away from that thinking that the only way
7 I can exclude somebody from a job currently is if
8 they've committed a similar type of crime related to
9 this job. So bank teller, embezzlement.

10 But sometimes, I think folks will bear
11 me out on this who do this a lot, there may be
12 related crimes that also effect whether or not that
13 person is a trustworthy person and you can trust them
14 with money. So it shouldn't necessarily be for the
15 exact same crime, it could be for a related band of
16 crimes, if you will.

17 COMMISSIONER KIRSANOW: Just a follow-
18 up, with the exception of Ms. Bone, I haven't heard
19 anybody ask for the wholesale rescission of the
20 Guidance. I would ask for anybody would like to
21 contribute, perhaps Ms. Payne, if you were going to
22 suggest just one way of improving the Guidance,
23 presuming that it's not going to go away -- and by
24 the way have you heard of the PeopleMark case by any
25 chance?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MS. PAYNE: I'm sorry?

2 COMMISSIONER KIRSANOW: The PeopleMark
3 Case?

4 MS. PAYNE: I'm not familiar with it.

5 COMMISSIONER KIRSANOW: You may want to
6 take a look at it in relation to the EEOC. But in
7 any event --

8 CHAIRMAN CASTRO: That is not a
9 solicitation for her --

10 COMMISSIONER KIRSANOW: It's not legal
11 advice either. But to what extent would you suggest
12 just one improvement, among many perhaps, to the EEOC
13 Guidance?

14 MS. PAYNE: Well you're boxing me in a
15 little bit asking when you ask about just one
16 improvement. Certainly from my perspective, because
17 of the industry in which I operate, the issue with
18 state law where Title VII preempts state law and the
19 fact that state law requires us to do background
20 checks and requires us to not employ people who have
21 been convicted of felonies or certain misdemeanors.
22 That's just an untenable position for us.

23 COMMISSIONER KIRSANOW: Does in fact,
24 given that this is a Guidance, and I understand the
25 GC supposedly said it that it preempts or supersedes

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 state law, does anyone have an opinion as to whether
2 or not that is, frankly, an accurate opinion? Does
3 it in fact preempt state law in your Guidance of
4 EEOC?

5 CHAIRMAN CASTRO: After that I'm going
6 to have Commissioner Kladney.

7 COMMISSIONER KLADNEY: What was the
8 question Commissioner, these microphones are not --

9 COMMISSIONER KIRSANOW: Does the EEOC
10 Guidance preempt state law, does it supersede state
11 law? Is there some kind of federal supremacy here
12 with respect with EEOC Guidance. I keep hearing it's
13 merely a Guidance but then there is a suggestion that
14 it preempts state law.

15 MS. PAYNE: Well what I can tell you
16 from my real experience is that when we received the
17 EEOC charge and when the discovery in that case began
18 to take place, in our position statement we were very
19 clear that we are required to do these background
20 checks by state law. Actually in Pennsylvania it
21 happens to be more locally controlled in the
22 jurisdictions within Pennsylvania.

23 And the EEOC proceeded with its
24 investigation to the tune of, again like I said we've
25 spent hundreds of thousands of dollars. So they are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 not appreciating the fact that in Pennsylvania we
2 were actually required to do this background check.

3 CHAIRMAN CASTRO: Commissioner Kladney.

4 MS. MEYERS: Pennsylvania also has its
5 own state anti-discrimination law that probably was
6 part of that action that's also being considered as
7 well, right?

8 MS. PAYNE: Correct.

9 CHAIRMAN CASTRO: Commissioner Kladney.

10 COMMISSIONER KLADNEY: Mr. Larson, I
11 noticed in your statement, how difficult is it to
12 implement this type of program have you found, to
13 implement this type of program into a hiring process
14 as compared to any other kind of requirement you're
15 required to by government, say ADA or something like
16 that?

17 MR. LARSON: It's another component to
18 consider in the employment matrix. But once there's
19 clear understanding as to what the requirements are
20 then companies can, I think, quite readily put
21 together a list of questions or some other vetting
22 process to make a reasonable determination.

23 For example, an applicant or an employee
24 comes forward and says, my back's hurting. I think I
25 might need some sort of reasonable accommodation,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 given my chronic back issues. Companies today are
2 well versed in this. They have a vetting process to
3 understand the nature of the request. The current
4 job duties, very often we'll send that off to the
5 doctor for his or her opinion and a determination can
6 be made.

7 So in my experience once the groundwork
8 is laid there's foundational education and training
9 as a component to this. Then determinations will be
10 made on a case-by-case basis and not be too
11 burdensome.

12 I think the point where we are now is
13 there's a lack of awareness as to the Guidance. How
14 to set up the framework to deal with this issue, you
15 know, make wise decisions but avoid the risk that the
16 EEOC is concerned about as a practical matter I think
17 once the framework is understood.

18 But I think we're in a time right now
19 where there's a lot of uncertainty as to how to do
20 this.

21 COMMISSIONER KLADNEY: Mr. Dodge, in
22 that regard, your company or law firm puts on
23 seminars, is that right?

24 MR. DODGE: That's right.

25 COMMISSIONER KLADNEY: Have you put

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 seminars on about this?

2 MR. DODGE: Yes, we have. I've done
3 probably ten webinars myself. Some for different
4 groups and clients, as well as our firm has put an
5 analysis up on our website as well as webinars and
6 seminars on what we think employers should be doing
7 based on this Guidance.

8 COMMISSIONER KLADNEY: I mean I want to
9 thank you for clarifying Commissioner Kirsanow's
10 position on the burglary versus, I think the meter
11 reader person was a sexual assault person, is that
12 correct?

13 MR. DODGE: I think that's right.

14 COMMISSIONER KLADNEY: I mean that's
15 kind of like committing burglary when you do that as
16 well, you break and you enter and you do bad stuff.
17 So these types of things like when Mr. Larson talks
18 about a matrix of jobs versus crimes, you would agree
19 with that?

20 MR. DODGE: Well I know some employers
21 have done that. I know some CRAs have put that
22 together as well. I think it's probably an
23 individualized determination based on the company if
24 that matrix scenario makes sense in your situation.
25 I know certainly things in the Guidance we've taken

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 away as a law firm and have made recommendations to
2 our clients. I think overall it's sort of encouraged
3 employers to dust off their criminal policies and to
4 take a look and to more closely monitor whether what
5 they're looking for accurately is what they need to
6 do.

7 COMMISSIONER KLADNEY: I mean I did
8 notice in your statement, I mean I was sitting there
9 going left, right, left, right. I mean I just kept
10 getting hit in the jaw, you know. I mean it was
11 pretty strong about the criminal background.

12 And you were very strong about drugs and
13 alcohol, at least that was my impression. And I was
14 just wondering, okay people get convicted of using
15 drugs. They get convicted of using alcohol and it's
16 bad. People who get convicted of DUI usually have
17 drive DUI quite a few times before they wind up in
18 the felony prison sentence.

19 What about the people in AAA, NA, say in
20 your firm you have over 1,000 employees with lawyers
21 and stuff like that. I'm not casting any aspersions,
22 but I bet you that there's somebody in there going to
23 AA or NA or something like that. Is that something
24 you should consider as an employer?

25 MR. DODGE: No, I mean --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 COMMISSIONER KLADNEY: Let me finish.
2 Because a lot of those people have issues along the
3 way.

4 MR. DODGE: Sure. So obviously it
5 interplays with the Americans With Disabilities Act,
6 if somebody is a recovering alcoholic or recovering
7 addict, obviously there are ADA considerations. But
8 if somebody is driving a company vehicle and they've
9 got DWIs, clearly that is a relevant consideration.

10 So in simply practicing law, if somebody
11 is a recovering alcoholic, I would say probably not.
12 But in some industries it is going to be a relevant
13 consideration.

14 COMMISSIONER KLADNEY: So what you're
15 saying is --

16 CHAIRMAN CASTRO: I'm sorry,
17 Commissioner Kladney, I'm going to have to move on.

18 COMMISSIONER KLADNEY: One more
19 question, Mr. Chairman. So what you're saying is
20 that you bring a focus to this Guidance and you use
21 it to help you put people in positions where they can
22 help you as opposed to cause you liability? Is that
23 fair?

24 MR. DODGE: That's fair.

25 COMMISSIONER KLADNEY: Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 CHAIRMAN CASTRO: Commissioner Gaziano,
2 and then we'll follow up with Commissioners Yaki and
3 Achtenberg.

4 COMMISSIONER GAZIANO: I want to thank
5 this panel as well, but especially I'd like Ms. Payne
6 to bring, if you would convey my thanks, or at least
7 mine, or at least mine, I hope all of our thanks to
8 all of your colleagues. There are some federal
9 agencies that are vindictive when people publicly
10 challenge what they perceive as an abuse.

11 I've seen that before and I've it
12 possibly with the EEOC. So it's doing great service
13 to this Commission that you give such concrete
14 testimony. And it would be very harmful to this
15 Commission were we not to try to follow up and watch
16 what happens to your company's case.

17 But I've also appreciated, the last two
18 panels have helped crystallize where there's
19 agreement and disagreement. I'd like to maybe state
20 that so that we can really join where there are
21 differences. I think we at least all in this room,
22 and almost everyone agrees that criminal background
23 checks shouldn't be used as automatic, definitive.
24 That it's important for people to consider employing
25 those with criminal records when possible.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I think we also will concede that the
2 EEOC Guidance doesn't automatically say that someone
3 will have liability in an enforceable way, since they
4 can't issue regulations at all. But the state of the
5 world, as I understand it is, prior to these
6 guidelines some companies were probably engaging in
7 criminal background checks too automatically,
8 reflectively using them too heavy handedly.

9 Some weren't using them enough in
10 situations like Ms. Bone's unfortunate loss occurred.
11 And as I understand it from the last panel with the
12 exchange with Commissioner Kirsanow, the EEOC had a
13 hunch and it decided that overall too many companies
14 were using it too loosely but without data. And
15 that's what bothers me.

16 Without data they acted on their hunch
17 and they designed a Guidance that was designed, and
18 I'd like any disagreement with this, they designed a
19 Guidance that increased the costs of using criminal
20 background checks to discourage it. And increased
21 the liability for those who acted on a prior felony.

22 In their wisdom or hunch that would
23 improve America. But without data. And by the way,
24 it has certainly had the effect of increasing the
25 cost of companies to use criminal background, that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 was its intent. It was meant to chill and meant to
2 increase, because they wanted to effect behavior.

3 Does anyone disagree with that kind of
4 summary? Some of you may think that's great and
5 that's good, other people may be concerned. But does
6 anyone disagree with that characterization of where
7 we are?

8 MS. MEYERS: I will say I don't
9 completely agree. I think the EEOC, and I agree and
10 I can see that yes there is definitely a lot more
11 data that is needed. However, organizations like
12 mine who help people every day, we get the calls
13 every day from individuals who are struggling in the
14 labor market, who are struggling to deal with their
15 criminal history.

16 Whether it's one case or a slew of cases
17 where they're attempting to enter or re-enter the
18 labor market and are blatantly being told no we're
19 not hiring you because you have criminal history.

20 We do agree that more data needs to be
21 collected. The EEOC has accepted letters from
22 organizations like ours talking about and sharing the
23 stories of the many thousands of clients who have
24 come through our doors. Many of which we have helped
25 get jobs without having to litigate. Where we've

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 advocated on their behalf.

2 So there's a lot of cases that didn't
3 need to be filed because these individuals found non-
4 profit organizations like ours that are able to meet
5 with employers and advocate on behalf of that
6 individual. Discuss what's on their history, make
7 sure that that person has had the opportunity to
8 present the evidence of rehabilitation that they had
9 obtained up to that point and then for the employer
10 to then consider actually hiring that person.

11 And so they've taken some of that
12 information and also used it, we believe, in their
13 decision. But I do agree that part of the work and
14 what organizations like ours have been pushing for
15 them to do is to bring some light to this issue and
16 to get more businesses to think about the way that
17 they're conducting their hiring practices so that we
18 can make sure there's a fair opportunity.

19 COMMISSIONER GAZIANO: -- se the levers
20 they have to put pressure on them.

21 MS. MEYERS: I think all enforcement
22 agencies do that. I think all employment agencies
23 have that ability to do that.

24 MR. MARTIN: I'd like to respond to your
25 question. First I have a hard time with the fact

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that we're talking about the Guidance as if it hasn't
2 existed for many, many years. This is a re-issuance
3 of the Guidance, it's not that much of a departure
4 from the original Guidance.

5 COMMISSIONER GAZIANO: Yes, but the EEOC
6 is very proud of it. And why go to the trouble if it
7 wouldn't have some effect?

8 CHAIRMAN CASTRO: Let him finish his
9 answer.

10 MR. MARTIN: Maybe, let me finish my
11 answer and then I'll respond to that as a second
12 question. So I wanted to respond to the question you
13 asked about additional costs. I mean every time I've
14 talked to employers, I've done focus groups with
15 employers. A big part of my job is engaging
16 employers, hearing what they have to say.

17 It always starts with liability.
18 Everything is liability, I'm going to face liability.
19 I'm going to be sued. I'm going to have to spend a
20 lot of money to respond to that. Clearly that
21 happens in real life. So idea of the EEOC giving
22 Guidance to employers to avoid that liability down
23 the line, and by virtue of a small investment up
24 front, I mean the background check companies, with
25 the proliferation of them, the cost has gone down

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 considerably.

2 So to me there's a financial savings.
3 And is there not a financial savings in finding the
4 most qualified candidate up front? Whether that job
5 seeker is someone who'd been involved in the criminal
6 justice system or not. If I'm an employer to me it's
7 all about the bottom line. And if the bottom line
8 means I'm better able to sort through candidates to
9 find the most qualified candidate, that sounds like a
10 win/win in my opinion.

11 CHAIRMAN CASTRO: We'll move on to
12 Commissioner Yaki and then Commissioner Achtenberg
13 after that.

14 COMMISSIONER YAKI: Thank you very much,
15 Mr. Chair. Ms. Payne, your quote was "we cannot give
16 guns and badges, keys and combinations, pass words" -
17 -

18 CHAIRMAN CASTRO: Can you speak up a
19 little bit, Commissioner Yaki, I can't hear you.

20 COMMISSIONER YAKI: This thing doesn't
21 work. Your statement was "we cannot give guns and
22 badges, keys and combinations, passwords et cetera to
23 convicted felons" or something like that, right?

24 MS. PAYNE: Something like that, yes.

25 COMMISSIONER YAKI: Okay. And the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 reason why is because you're concerned about their
2 ability to perform their jobs in a way for the
3 security operations that you have, private, public,
4 whatever, around the country and the world that G4S
5 has, correct?

6 MS. PAYNE: Correct.

7 COMMISSIONER YAKI: Do you give your
8 employees psychological tests?

9 MS. PAYNE: Not in all cases. We do
10 where they're located at certain facilities where
11 clients require it and where they're armed.

12 COMMISSIONER YAKI: Do you know if the
13 employees in the Jimmy Mubenga case were given
14 psychological tests?

15 MS. PAYNE: That case does not emanate
16 from my particular area of responsibilities.

17 COMMISSIONER YAKI: Have you heard of
18 Jimmy Mubenga?

19 MS. PAYNE: I've heard the name, but I'm
20 not familiar with the case.

21 COMMISSIONER YAKI: It involved a G4S
22 employees at a detention center at Gatwick where an
23 asylum seeker was asphyxiated during deportation.
24 There's a concept called "carpet karaoke" that's on
25 the YouTube video.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MS. PAYNE: Sir, I'm sorry you're
2 talking about a case that emanated from an affiliate
3 company in Europe and the UK and I'm just--

4 COMMISSIONER YAKI: Well is it owned by
5 G4S?

6 MS. PAYNE: It is owned by G4S, but that
7 is not my area of responsibility. So I'm not --

8 COMMISSIONER YAKI: So let's talk about
9 the U.S., are you familiar with the Coke County
10 Juvenile Detention Center in Texas? I mean it's just
11 cases of sexual assault by guards on juveniles were
12 alleged in that instance by one of the other
13 companies that you acquired, Wackenhut GEO, for
14 example. I mean do you know if all, have you done
15 retroactive background checks on all the employees
16 where the companies have been acquired like GEO, that
17 Wackenhut, Cornell --

18 MS. PAYNE: Sir, we did not acquire the
19 GEO Company, we divested ourselves of the GEO Company
20 in 2002.

21 COMMISSIONER YAKI: Was Wackenhut not
22 part of your --

23 MS. PAYNE: Wackenhut is the
24 predecessor, well excuse me. Wackenhut was the name
25 of the company trading in the U.S. before it was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 purchased by a predecessor of G4S. But at the time
2 Wackenhut was purchased it divested itself of its
3 correction business, which became GEO. So we have
4 not owned GEO or it's --

5 COMMISSIONER YAKI: You're not involved
6 any more in the lawsuits, so let me just ask you
7 this. Do you know whether or not how long your
8 prohibition on hiring people with felonies goes back
9 in terms in your refusal to give anyone, I mean how
10 far does it go?

11 MS. PAYNE: We have not been able to
12 establish the exact date that our policy went into
13 place. We do know that as far as the Wackenhut
14 Corporation is concerned it came into existence over
15 50 years ago. And some form of background screening
16 has been used since the beginning.

17 COMMISSIONER YAKI: Then let's go back
18 to things that are G4S. Do you know about Cell 36?

19 MS. PAYNE: No, sir.

20 COMMISSIONER YAKI: Cell 36 is a
21 detention cell in Gaza that the Children Defense
22 International has claimed that the children are being
23 tortured in there. And whether they're true or not
24 it just asks me the question, the allegations against
25 G4S employees are, I assume, that you, subsidiaries,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 affiliates, whatever you want to call them.

2 To me it begs the question of you sit
3 here and you talk about how we're not going to give
4 anyone with this kind of record a chance in our
5 organization, but your organization has a number of
6 different lawsuits, complaints, allegations, whatever
7 by its own employees dealing with violent acts.
8 Deliberate acts, cruelty acts.

9 And I'm just trying to figure out how is
10 it that in your rigorous screening process these
11 kinds of individuals somehow get through? I mean is
12 there something else going on there? Are you not
13 administering the kind of tests, I guess it goes to
14 my point of how do you really know who it is that
15 you're getting unless you conduct, I assume you
16 conduct a reasonable inquiry into the background into
17 each of these people to determine whether or not
18 they're qualified to serve the security needs of your
19 customers around the world.

20 MS. PAYNE: Sir, I cannot speak to the
21 screening practices or policies of some affiliated
22 companies that exist in other parts of the world,
23 that's not my area of responsibility.

24 COMMISSIONER YAKI: Maybe I'm mistaken,
25 it says G4S,--

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 MS PAYNE: I understand --

2 COMMISSIONER YAKI; -- the British
3 Defense Minister calls it the G4S Company. Other
4 company is called the G4S. How can you sit here and,
5 well I mean are you saying that you're like
6 McDonald's, you franchise it out to people and you
7 only have some of the standards?

8 CHAIRMAN CASTRO: Can we let her
9 complete her answer and then we do need to move on to
10 Commissioner Achtenberg.

11 MS. PAYNE: Thank you. My
12 responsibility lies here in the United States for a
13 very specific affiliate of G4S. And I'm not aware of
14 many of the things of which you're bringing up today.

15 COMMISSIONER YAKI: It's too bad. You
16 should, because it is your company and you're here
17 talking about how you need this for your hiring and
18 yet you have allegations of how your employees may be
19 performing acts that may or may not be legal in other
20 places as well. Many of the same acts that you're
21 condemning out a whole group of people for without
22 doing a real inquiry about it.

23 CHAIRMAN CASTRO: Thank you,
24 Commissioner Yaki. Commissioner Achtenberg and then
25 the last question will go to Commissioner Kirsanow.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 COMMISSIONER ACHTENBERG: Thank you, Mr.
2 Chairman. Thank you, Mr. Martin, for pointing out
3 something that I had wanted to comment on. Namely
4 that the EEOC Guidance is built upon EEOC Guidance
5 that promulgated in the past. I would also point out
6 that providing Guidance is a tried and true function
7 of various enforcement and regulatory agencies.

8 There's nothing that is a departure from
9 standard practice by issuing guidance, far from it.
10 The EEOC Guidance, at least in my view, is an
11 important update responding to both new practices.
12 New public, new policy research that has been
13 promulgated. New court decisions that mean that
14 employers benefit got, aren't harmed by, the EEOC
15 giving further elucidation of ways in which they
16 might view particular actions being taken by
17 particular employees.

18 So I was very glad that you point that
19 out, Mr. Martin. I'm wondering whether or not, given
20 your specific expertise in the development of hiring
21 practices that relate to this area, if there's
22 anything about the EEOC Guidance that you think can
23 be improved upon? Or anything that you find
24 particularly problematic. And after that I'd like to
25 ask Ms. Meyers if she would comment similarly.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. MARTIN: That's a good question.
2 Thank you. I would respond very similarly to what
3 someone said earlier, which is if I had my druthers I
4 would like to see some sort of safe harbor built into
5 it, because in every engagement I've had with
6 employees, again starts out with liability concerns.

7 And in New York State for instance,
8 although we've had an anti-discrimination law on the
9 books for years, it was only a couple of years ago
10 that we passed legislation to create a safe harbor
11 which gives a rebuttable presumption to employers who
12 exercise due diligence by doing background checks and
13 following the factors in the anti-discrimination law.

14 MS. MEYERS: I would agree. That's the
15 same, another particular area that would be helpful I
16 think in our work with offering more protections or
17 seeking more protection for employers in states. As
18 I mentioned earlier that, as an advocacy
19 organization, we've been working with legislators and
20 with policy advocates in states around the country to
21 figure out a way to address that and to possibly
22 legislate around that particular issue.

23 And it would be helpful to have more
24 discussion about that and how it could relate and
25 serve as a complimentary factor as part of the whole

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 hiring process and consideration that employers will
2 undertake.

3 CHAIRMAN CASTRO: Mr. Kirsanow, you have
4 the last question.

5 COMMISSIONER KIRSANOW: Thank you very
6 much, Mr. Chairman. And again, thanks to the
7 panelists. And to Ms. Payne I want to thank you for
8 coming to testify in a matter of important public
9 concern, despite that your company is smeared by
10 relationships you don't even have. And companies
11 that exist in foreign countries that are not even
12 subject to the EEOC Guidance about a matter that
13 actually shows that imperfect policies are imperfect
14 and establishes the need for criminal background
15 checks.

16 But my question goes to Ms. Bone and
17 that is you indicated there is no testimony at the
18 EEOC hearing from victims, but do you know if anyone
19 requested to testify?

20 CHAIRMAN CASTRO: Speak up, I'm sorry.
21 Use the microphone there.

22 MS. BONE: To my knowledge they did not.
23 And more than one occasion I wrote to the EEOC asking
24 to look at victims and victim advocacy groups.

25 COMMISSIONER KIRSANOW: They did not ask

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for people to testify?

2 MS. BONE: To my knowledge they did not.

3 COMMISSIONER KIRSANOW: My question is
4 did anyone ask to testify, and you just said you
5 wrote?

6 MS. BONE: I did.

7 COMMISSIONER KIRSANOW: Yes, Mr. Dodge?

8 MR. DODGE: Yes, I'm somewhat familiar
9 with that. The way the witnesses went at that EEOC
10 hearing, there were a number of us that were seeking
11 to have other witnesses testify. But the EEOC Chair
12 chose the panelists at the EEOC, so it wasn't like
13 these Commission panels, which are, I would say
14 representing, representative all different points of
15 view on the issue. The EEOC hearing was very much
16 focused on one side of the inquiry.

17 COMMISSIONER KIRSANOW: Mr. Chair, could
18 you indulge me? I have a real quick question for Mr.
19 Martin --

20 CHAIRMAN CASTRO: Real quickly, as long
21 as you agree to give me the same power the EEOC Chair
22 has to pick the panels.

23 (Laughter.)

24 CHAIRMAN CASTRO: Go ahead.

25 COMMISSIONER KIRSANOW: What is your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 opinion of a guidance that would permit employers to
2 use criminal background checks with sufficient safe
3 harbors out there and allow them to go fully and
4 robustly in questioning about somebody's background,
5 but only after such as under the Americans With
6 Disabilities Act, a job offer has been tendered
7 already?

8 MR. MARTIN: Good question. Because
9 even as an advocate I've been on the fence about
10 that, mostly around the impact on small employers and
11 whether it would be overly burdensome on small
12 employers.

13 I think in concept it would lend itself
14 to the issues I care about, which is opening up doors
15 for people and then being able to isolate when the
16 criminal record is taken into account, similarly
17 under the Americans With Disabilities Act.

18 But if I were to support something like
19 that an advocate for it I may be open to, for
20 instance, maybe suggesting that certain small size
21 employers be exempted from it. Although the biggest
22 abusers to be quite frank, are the large employers.
23 Not the small to medium size employers.

24 Small to medium size employers actually
25 are the ones who typically hire people who are

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 formerly incarcerated because they tend to work with
2 agencies like our, because they don't have their own
3 HR departments and they rely on us for their initial
4 screening. And for them, in their mind, whether it's
5 real or not, it helps to reduce liability concerns
6 because they have a sense of who they're getting
7 through the door.

8 COMMISSIONER KIRSANOW: Thank you very
9 much.

10 CHAIRMAN CASTRO: Thank you, on behalf
11 of the Commission, to all of the panelists. We
12 appreciate your time. And this concludes Panel II.
13 We are taking a break now for a quick lunch. We will
14 commence exactly at 12:30 back in this room. So I
15 would ask Panel III to be ready and at your panel
16 seats at 12:30. Thank you.

17 (Whereupon, the hearing in the
18 aforementioned matter went off the record at 11:57
19 p.m. and went back on the record at 12:38 p.m.)

20 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N
21 (12:39 p.m.)

22 CHAIRMAN CASTO: Okay, we're back on the
23 record. It is now 12:39, and this is the beginning
24 of Panel III which is our final panel. I don't know
25 if all the panelists were here earlier in the day,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 but just to quickly summarize the housekeeping rules.

2 Every panelist will have seven minutes
3 to make a presentation. Thereafter we will ask a
4 question, we, meaning the Commissioners. You will
5 notice there's a series of lights, like traffic
6 lights. Red light means stop. Green light, go.
7 Obviously yellow, speed it up and try to get your
8 comments done as soon as possible when that light
9 comes on.

10 There will be an opportunity after your
11 remarks in the engagement with the Commissioners to
12 elaborate on topics you did not have the opportunity
13 to elaborate on.

14 **PANEL III: TRADE ASSOCIATIONS**

15 CHAIRMAN CASTRO: So I'd like to briefly
16 introduce the panelists. Our first panelist is
17 Montserrat Miller with the Arnall Golden Gregory LLP,
18 and she's also counsel to the National Association of
19 Professional Background Screeners.

20 Our second panelist is Nick Fishman,
21 cofounder and executive vice president with
22 EmployeeScreenIQ. Our third panelist is Todd
23 McCracken, president of the National Small Business
24 Association.

25 Our fourth panelist is Jonathan Segal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 with Duane Morris LLP and the Society for Human
2 Resource Management. Our fifth panelist is Rich
3 Mellor, vice president for loss prevention for the
4 National Retail Federation. Our sixth panelist is
5 William Dombi, Vice President for Law, National
6 Association for Home Care and Hospice.

7 I'll now ask each of you to swear or
8 affirm that the information that you're about to
9 provide to us is true and correct, true and accurate
10 to the best of your knowledge and belief. Is that
11 so?

12 (Chorus of ayes.)

13 CHAIRMAN CASTRO: Okay, thank you.

14 Ms. Miller, please proceed.

15 MS. MILLER: Thank you. Good afternoon,
16 Chairman Castro and distinguished members of the
17 Commission. Thank you, Chairman, for the correct
18 pronunciation of my name. As you can imagine it's
19 often just Miller.

20 My name is Montserrat Miller. I'm a
21 partner with the firm, Arnall Golden Gregory, based
22 here in Washington, D.C., and I serve as Washington
23 counsel to the National Association of Professional
24 Background Screeners.

25 NAPBS is a trade association

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 representing screening professionals involved in
2 employment and tenant background screening. Founded
3 in 2003, NAPBS represents 681 members, many of whom
4 are engaged in employment and tenant background
5 screening across the country.

6 The majority of these member companies
7 are small businesses with 25 or less employees,
8 although our membership includes a range of companies
9 from Fortune 500 companies to small local businesses.
10 Collectively, NAPBS member companies conduct millions
11 of background checks each year.

12 NAPBS member companies provide
13 background checks for private employers, volunteer
14 organizations, nonprofits, government, public
15 utilities, health care, higher education and publicly
16 held corporations. The Association exists to promote
17 ethical business practices in compliance with the
18 Fair Credit Reporting Act, equal employment
19 opportunity and state consumer protection laws
20 relating to the background screening profession.

21 NAPBS provides educational programs
22 aimed at empowering members to better serve clients
23 and to maintain standards of excellence in the
24 background screening profession including a company
25 accreditation program, individual Fair Credit

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Reporting Act certification program as well as a
2 provider exam.

3 Over the past ten years there has been
4 an increase in the number of background screenings
5 and there are several contributing factors such as
6 increased security concerns after 9/11 and greater
7 emphasis by employers to focus on safe hiring to
8 protect their business, employees and customers.

9 Employers value a good hire over a bad
10 hire and seek to ensure that the right person is
11 hired for the right job to avoid injury to customers,
12 injury to other workers, regulatory noncompliance,
13 potential litigation, shareholder suits or employee
14 theft and fraud.

15 In addition, there has been an increase
16 in the number of federal, state and local lawmakers
17 enacting laws mandating checks especially for the
18 most vulnerable populations such as the disabled,
19 children and the elderly. In many states, background
20 checks are required for a variety of private sector
21 positions and state licenses.

22 One important factor to bear in mind
23 with this increase in the number of background
24 screens is an associated increase in employers and
25 the public's desire to know more about individuals.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 With the desire for greater knowledge comes an
2 increase in the number of individuals conducting
3 their own online Google searches as well as an
4 increase in the number of instant online searches
5 available to the general public.

6 However, there is a distinction between
7 a Google search or an instant online search and a
8 background report created by a professional
9 background screening company under the requirements
10 of the Fair Credit Reporting Act.

11 A professional screening firm providing
12 background reports for employment purposes is
13 required to follow strict procedures pursuant to the
14 Fair Credit Reporting Act and other state and local
15 laws that limit how information is reported. Use of
16 an instant online website or search engines offers
17 none of the consumer protections afforded under the
18 Fair Credit Reporting Act and other applicable laws.

19 We believe that background screening is
20 an effective tool used by employers to protect
21 employees, customers and assets from risks such as
22 theft in the workplace, employee-on-employee violence
23 as well as ensuring that only appropriately screened
24 individuals deliver goods or provide services in our
25 homes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 To be clear, background screening is not
2 conducted to keep individuals out of the workplace
3 or, for instance, to impair reintegration of ex-
4 offenders into the workplace. Rather, background
5 screens are conducted to facilitate the right person
6 for the right job.

7 Background screens provide employers
8 with information to make informed hiring decisions.
9 The federal government, including the EEOC, fully
10 appreciates and values background screening,
11 conducting millions of checks each year.

12 The Supreme Court, in a recent decision
13 regarding the use of background checks, *NASA versus*
14 *Nelson*, confirmed the value of such checks and said
15 this in its opinion, and I quote, "The government has
16 an interest in conducting basic background checks in
17 order to ensure the security of its facilities and to
18 employ a competent reliable workforce to carry out
19 the peoples' business," end quote.

20 Further the Court said, and again I
21 quote, "Like any employer, the government is entitled
22 to have its projects staffed by reliable, law-abiding
23 persons who will efficiently and effectively
24 discharge their duties," end quote.

25 The private sector is no different.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 NAPBS member companies are not insensitive to the
2 frustrations some have in finding employment
3 especially in time of national economic stress, and
4 we also appreciate the strong desire to reintegrate
5 ex-offenders into American society.

6 However, attempts to ease unemployment
7 frustration or reentry desires should not come at the
8 expense of keeping people and businesses safe from
9 physical or financial harm. Also our experience is
10 that ex-offenders are hired and their criminal
11 history does not serve as a permanent bar to
12 employment.

13 In the interest of time I will not
14 restate what our previously provided written comments
15 cover regarding the use of background screens and
16 compliance under the Fair Credit Reporting Act as
17 well as NAPBS's concerns with the EEOC guidance's.
18 Those are already stated in the written testimony we
19 provided.

20 In conclusion, we would ask that the
21 Commission consider the following. First, we can all
22 agree that reintegration of ex-offenders into society
23 is important. The use of background screening is not
24 the dominant cause of the troubles ex-offenders face.

25 The problems facing ex-offenders go well

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 beyond an employer's use of background screening in
2 the hiring process. Substance abuse, lack of
3 education and established work habits, the absence of
4 a stable family relationship can and should be looked
5 at as problems facing ex-offenders. These are issues
6 we must continue to address.

7 Second, we need to change the discussion
8 from focusing too much on placing constraints on or
9 discouraging the use of criminal history information
10 in the employment context and focus more on greater
11 public discussion about current and potential
12 programs geared to helping ex-offenders such as the
13 Federal Work Opportunity Tax Credit, WOTC, which
14 provides a tax credit for employers who hire ex-
15 offenders. There are also similar state programs.

16 And another is certificates of
17 rehabilitation or certificates of good standing which
18 could provide safe harbors for employers who hire ex-
19 offenders depending on how they are drafted.

20 With that, again we appreciate the
21 opportunity to provide this testimony to the
22 Commission given the importance and value of
23 background screening, and appreciate the Commission
24 holding this briefing as well. Thank you.

25 CHAIRMAN CASTRO: Mr. Fishman, please

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 proceed.

2 MR. FISHMAN: Chairman Castro,
3 distinguished members of the Commission, thank you
4 for having me here today. My name is Nick Fishman.
5 I'm the co-founder, chief marketing officer and
6 executive vice president at EmployeeScreenIQ.

7 Our company conducts employment
8 background checks for over 3,000 organizations across
9 the United States and abroad. We work with those who
10 serve vulnerable populations such as schools,
11 overnight camps and home health care agencies,
12 hotels, airlines and banks, to name a few.

13 We provide these clients with a wide
14 range of services, all of which allow them to make
15 better informed hiring decisions. Today I'd like to
16 share with the Commission my experience and
17 perspective as a professional background screener.

18 I'll focus my remarks on how our company
19 conducts criminal background checks. I'll also
20 highlight the findings from our annual background
21 screening marketplace survey completed by a random
22 sampling of over 2,000 human resource professionals
23 since 2010.

24 Our business is based on the core belief
25 that background checks are necessary for employers to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 have the information they need to make informed
2 hiring decisions. Employers agree. Our 2010 survey
3 revealed that 90 percent of all U.S. businesses
4 perform criminal background checks on perspective
5 employees. At the time, 70 percent said that these
6 checks were growing in importance.

7 Our clients tell us that their most
8 valuable assets are their employees, but if they're
9 not screened properly they can become their biggest
10 liability. Every new hire is a potential risk.
11 Employers simply want to know that they're bringing
12 in the right people and putting them in the right
13 positions.

14 As for perspective job candidates, 96
15 percent of the employers that we surveyed indicate
16 that applicants understand and accept the needs for
17 these checks. Furthermore, these candidates must
18 provide written consent before a search can commence.

19 The FCRA requires that we, as a consumer
20 reporting agency, ensure maximum possible accuracy in
21 all of our reports. This is a responsibility that
22 our company takes very seriously. That means that
23 with every background check we take steps to verify
24 the information before it's reported to the employer.

25 We go to the most current, accurate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 source each and every time. We confirm the
2 identifiers on a record belong to the subject of a
3 report such as the name and date of birth and/or
4 Social Security number, and follow standards for
5 acceptable and legal reporting.

6 As a result of our meticulous process,
7 we stand by the accuracy of the information we
8 report. Our dispute rate is just 0.15 percent, and
9 when disputes do occur we handle them quickly so that
10 in the unlikely event the information needs to be
11 modified it can be done without penalizing the
12 candidate or unnecessarily delaying the hire.

13 We've heard the argument that the use of
14 criminal background checks is creating an underclass
15 of unemployable Americans. Based on the feedback and
16 statistics that we pull from our survey that simply
17 is not the case.

18 In fact, our 2012 survey revealed the
19 majority of employers do not eliminate a candidate
20 solely on the basis of a criminal record. Seventy
21 percent of our responders said that when they find a
22 criminal record on a job applicant that person is
23 denied employment less than ten percent of the time.

24 When asked which is more important,
25 qualifications or lack of a criminal record, 73

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 percent indicated that qualifications were, in fact,
2 more important. And that's up from 70 percent in
3 2011.

4 These results demonstrate the
5 willingness on the part of employers to look at
6 qualifications and consider the needs of the business
7 before eliminating candidates based on criminal
8 history. In fact, 92 percent of those surveyed in
9 2011 indicated that they reach out to candidates or
10 consider job relevance when a check contains adverse
11 information. Many that did not go back to the
12 candidate indicated that they were in regulated
13 industries that barred them from hiring those with
14 criminal records.

15 Lastly, it's important to note that when
16 a criminal record is revealed, the report does not
17 include protected class information. Employers
18 review the report and contemplate if the type of
19 record found would reasonably suggest a pattern of
20 behavior. Our clients are looking for reasons to
21 include, not exclude.

22 The EEOC Guidance on criminal records
23 have caused tremendous confusion among our clients.
24 There are three main areas that are causing the most
25 confusion. First, the EEOC recommends as a best

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 practice that employers defer the job application
2 question that asks if a person has been convicted of
3 a crime.

4 The recommendation is not feasible for
5 many clients who have bonafide job qualifications
6 that require exclusions based on certain types of
7 crimes. Clients are understandably confused about
8 when they can and should ask about criminal history,
9 and also when they should conduct a background check.

10 Delaying the question can cause both the
11 employer and the candidate to invest heavily in an
12 opportunity or even quit their job only to be
13 disqualified later in the process.

14 Secondly, there's no relief or
15 consideration for employers that have state law
16 conflicts. Employers who have traditionally
17 conducted background checks and excluded certain
18 applicants based on criminal standards defined by
19 state law are now between a rock and a hard place.
20 In some instances, there's simply no way to abide by
21 the law without setting aside the Guidance.

22 Finally, the EEOC adds a new requirement
23 for employers to conduct an individualized assessment
24 when a criminal record is found. The Guidance does
25 not recommend any particular means of conducting an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 assessment, and we're hearing a wide and variable
2 range of practices that employers are considering to
3 meet this requirement. Until tested in the courts,
4 no one really knows what's sufficient.

5 To add to the confusion, public
6 statements by EEOC field office attorneys have warned
7 employers that they'd better think twice before
8 conducting a criminal background check. This type of
9 statement can certainly have a chilling effect on
10 employers.

11 We suggest focusing on programs that
12 offer training to those with criminal records.
13 Identify programs that help those with convictions
14 get on their feet, whether offering assistance with
15 drug rehabilitation, finding a safe place to live, or
16 helping them find gainful employment.

17 We also suggest looking at some of the
18 laws that have been enacted across the country to
19 help those with criminal records succeed in the
20 workplace. Illinois has established a certificate of
21 rehabilitation and offers employers legal protection
22 if they were to hire someone with one of these
23 certificates. The State of Ohio just passed a law
24 that offers a certificate of employability.

25 Both our experience with our clients and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 our survey findings suggest that employers are using
2 background checks in a reasonable manner. Enacting
3 laws that inhibit their ability to perform proper due
4 diligence is not the answer. In fact, they can lead
5 to devastating consequences for the company, their
6 employees, their customers and the public.

7 Our research, while limited, does not
8 support a finding of widespread discriminatory
9 practices based on the use of criminal background
10 checks, and such research if it exists was notably
11 absent in the recent EEOC Guidance. It just isn't
12 fair to ask employers to ignore information that
13 could make them liable or keep them in the dark.
14 Thank you.

15 CHAIRMAN CASTRO: Thank you. Mr.
16 McCracken, you can proceed.

17 MR. MCCRACKEN: Thank you, Mr. Chairman,
18 members of the Commission. Good afternoon, my name
19 is Todd McCracken. I'm the president of the National
20 Small Business Association, and we are pleased to be
21 here today to provide our perspective.

22 The NSBA was founded in 1937 to advocate
23 for the interests of small businesses in the U.S. It
24 is the oldest small business organization in the
25 United States. We're representing more than 65,000

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 small businesses throughout the country in virtually
2 all industries and in widely varying sizes.

3 The topic that we're here to talk about
4 today, it is an unfortunate fact of life that not
5 everyone is law-abiding. It is also a fact of life
6 that not everyone should be employed in certain types
7 of jobs. We do not want some people entering other
8 folks' homes. We do not want child molesters working
9 in daycare centers, and we do want embezzlers
10 handling large sums of cash.

11 Employers want to provide a safe place
12 for their employees to work and do their best to
13 prevent workplace crime. They want to do their best
14 to ensure that the employees that they send to
15 customers' homes as technicians, repair people or
16 sales folks do not inflict harm on their customers.

17 They need to take steps to prevent
18 theft, fraud and embezzlement. Criminal background
19 screening is an important tool, sometimes is very
20 nearly the only tool that employers have to protect
21 their customers, their employees and themselves from
22 criminal behavior.

23 Given that fact, small businesses are
24 willing to comply with reasonable rules designed to
25 ensure that criminal background screening is not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 having a disproportionate impact on minorities. But
2 they also want to know that those rules do not
3 endanger their employees or customers, do not
4 substantially increase their risk of being victims of
5 property crimes, or do not increase their risk of
6 being held liable for the tort of negligent hiring.

7 Government, however, has an obligation
8 to articulate rules that are comprehensible and can
9 actually be implemented. It is fundamentally unfair,
10 and in practice, counterproductive for the rules to
11 be so opaque that nobody can understand them. It
12 leads to a situation where the rules that cannot be
13 understood are effectively ignored.

14 As I will discuss in detail later, the
15 EEOC Guidance is not guidance at all. It provides no
16 meaningful rules about how to proceed. It is really
17 just a threat that the EEOC may proceed against
18 employers if in hindsight it decides it wants to.

19 Small businesses are often caught
20 between competing government priorities and
21 perspectives among different federal agencies, the
22 courts, and state and federal governments. The
23 recent EEOC Guidance, for example, explicitly stated
24 that the fact that a small business was complying
25 with a state legal requirement to conduct a criminal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 background check or to bar a felon from a particular
2 position would not prevent an EEOC enforcement
3 action.

4 With respect, it is ridiculous that
5 small business is forced to choose between two
6 conflicting government requirements. If the EEOC has
7 a problem with a state statute it should challenge
8 the statute, not launch an enforcement action against
9 a small business who is complying
10 with state law.

11 Unlike the federal government, small
12 businesses have limited resources and defending such
13 a lawsuit will damage the financial health of the
14 business. Similarly, state and federal courts will
15 allow potentially devastating tort lawsuits against
16 small businesses that hire felons who commit crimes
17 at the workplace or in the customers' homes. Yet the
18 EEOC has threatened to launch lawsuits if they do not
19 hire those same felons.

20 Small businesses really want to know
21 what the rules are so they can comply with those
22 rules and get on with running their businesses. They
23 want the state and federal governments including the
24 courts, the legislative and executive branches to set
25 forth consistent and comprehensible rules. This does

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 not seem like it is asking for too much. The rules
2 applying to small businesses should not be that they
3 are at substantial legal risk no matter what they do.

4
5 Workplace violence, protecting customers and
6 preventing property crime is continuing as a serious
7 problem. Moreover, in the absence of criminal
8 background screening, our members are subject to
9 substantial risk of being successfully sued for the
10 tort of negligent hiring.

11 Workplace theft and embezzlement are, as
12 I mentioned before, very large problems. Both can be
13 reduced through a proper background screening.
14 According to the Bureau of Justice Statistics,
15 approximately 500 to 72,000 non-fatal violent crimes
16 occurred to individuals aged 15 or older or while
17 they were at work in 2009.

18 Workplace violence accounted for 15 percent of
19 non-fatal, violent crimes against persons age 16 or
20 older. In short, workplace violence remains a very
21 serious problem even though it has declined over the
22 last 15 years.

23 A Westlaw search of the law reviews
24 regarding negligent hiring indicate that the trial
25 bar is quite busy filing negligent hiring lawsuits.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Businesses have to take that risk into account when
2 making hiring decisions.

3 The vast majority of small businesses
4 want to comply with the law and with EEOC Guidance,
5 but in the current situation they are unable to do
6 so. I can assure you that virtually no small
7 business owner is going to be able read, absorb and
8 apply the 55-page, 167 footnote enforcement Guidance
9 on the consideration of arrest and conviction records
10 in employment decisions under Title VII of the Civil
11 Rights Act 1964 issued by the EEOC on April 25th,
12 2012.

13 More importantly, we have had many
14 discussions with sophisticated attorneys who grapple
15 with these issues for a living, including those that
16 work for large law firms advising large corporations.
17 They do not know how to advise their clients either.
18 If they are at a loss, then small firms and their
19 generalist attorneys will fare no better.

20 In the real world, small firms and their
21 advisors are not going to be able to understand what
22 the EEOC regards as permissible with respect to the
23 use of criminal background checks.

24 The rules that small business owners
25 have to grapple with now are so opaque and complex

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that they will in practice have to be ignored. The
2 clear and quite understandable concerns about tort
3 liability and worker, customer and family safety will
4 take precedence over amorphous and ill-defined EEOC
5 Guidance. In short, EEOC Guidance will not achieve
6 its objective.

7 In conclusion, we urge the Commission to
8 not prioritize enforcement against firms with
9 educational attainment requirements or criminal
10 background checks unless there is a substantial,
11 factual basis to believe that they have an unlawful
12 purpose.

13 We also strongly urge the Commission to
14 clarify its guidance with respect to criminal
15 background checks so that the Commission's
16 expectations are made clear and so businesses can
17 effectively meet those expectations.

18 CHAIRMAN CASTRO: Thank you. Mr. Segal,
19 please proceed.

20 MR. SEGAL: Good afternoon, Chairman
21 Castro and other distinguished members of the
22 Commission. It is an honor to be here before you
23 today. My name is Jonathan Segal. I am a partner
24 with the Duane Morris law firm specializing in
25 employment law in general and equal employment

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 opportunity in particular.

2 I also am the Pennsylvania state
3 legislative director for the Society For Human
4 Resource Management also known as SHRM, and, it is
5 in that capacity, that I appear before you today.

6 SHRM is the world's largest association
7 devoted to human resource management, HR, with more
8 than 260,000 members in over 140 countries. SHRM has
9 participated in ongoing discussions at both the
10 national and the state levels regarding appropriate
11 use of background information in the employment
12 process.

13 These discussions are heightened by the
14 competitive employment environment created by today's
15 economy. SHRM and its members are supportive of and
16 are involved with various public policy initiatives
17 focusing on finding jobs for the unemployed. SHRM,
18 for example, is currently working with the U.S.
19 Departments of Labor and Defense to help increase
20 employment opportunities among returning military
21 veterans as well as disabled individuals.

22 At organizations, whether large or
23 small, HR professionals are charged with ensuring
24 that each individual hired possesses the talents,
25 skills and work ethic needed for the organization's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 success. The consequences of making a poor hiring
2 choice can be great, possibly leading to financial
3 losses, an unsafe work environment, and, if the
4 employee engages in severe misconduct, legal
5 liability to customers, shareholders or others in the
6 form of negligent hiring lawsuits or other legal
7 claims.

8 As a result, HR professionals strive to
9 make the most informed choices possible under the law
10 when selecting candidates for their organizations.
11 In today's market it is not uncommon for employers to
12 receive hundreds of applications in response to just
13 one advertisement for a vacant position.

14 To cull through these job candidates,
15 employers must use many factors to narrow the
16 applicant pool. Factors may include work experience,
17 education, certifications and so on. Once a group of
18 candidates or a finalist has been selected, most
19 often after an initial round of interviews, the HR
20 department typically conducts a background check on
21 the candidates or candidate.

22 It is important to remember that certain
23 federal and state laws, as we've heard before,
24 statutorily require employers to conduct specific
25 background checks for certain positions. Many state

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 laws require the use of criminal background checks
2 for certain industries to maintain their licenses.

3 Health care and child care are but two
4 examples. Some convictions under such state laws are
5 automatic disqualifiers for employment.

6 Independent of any state law, failure to
7 conduct a criminal background check can result in
8 unreasonable risk. You've heard many examples this
9 morning. I'd like to provide but one more example of
10 the difficult decision faced by employers.

11 In response to the Gulf oil spill just a
12 few years ago, BP worked with state unemployment
13 offices in three states to fill thousands of
14 positions to clean up affected beaches. In this
15 case, no criminal background checks were performed.
16 A BP contractor ended up hiring a supervisor who had
17 a criminal history and who, during his employment on
18 the cleanup, allegedly raped one of the workers whom
19 he supervised.

20 As you can imagine, the media stories
21 about the cleanup efforts quickly changed from kudos
22 for job opportunities provided to thousands of
23 unemployed individuals to stories about the obviously
24 tragic alleged rape and to condemning the company for
25 failing to provide for the safety of others and the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 public by not performing criminal background checks.

2 When the EEOC published updated Guidance
3 on the use of criminal history information in April
4 of this year, SHRM members were pleased to see that
5 the Guidance did not impose any new bright-line rules
6 explicitly designed to prohibit employer access to
7 and use of certain information. Instead, the
8 Commission in this Guidance continues to embrace the
9 use of long-standing three factor test identified in
10 the Green case when evaluating criminal history, and
11 we discussed those factors earlier today.

12 These factors are familiar to HR
13 professionals. Indeed, SHRM has not received
14 significant negative feedback from its members about
15 the Guidance as a whole. Two specific aspects of the
16 Guidance, however, have been mentioned as areas of
17 concern by SHRM and its members.

18 First, our members have expressed
19 concern about the statement in the Guidance that
20 compliance with state and local laws will not shield
21 them as employers from liability under Title VII. We
22 appreciate preemption. However, this places
23 employers between the proverbial rock and a hard
24 place, between losing their state license or opening
25 themselves up to liability if they don't comply with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the state law mandating criminal background checks,
2 and risking a class action if they go forward with
3 the criminal background checks and base hiring
4 decisions on the results.

5 We believe the state law requirements
6 can fit within the EEOC's concept of targeted
7 exclusion based on the Green factors and specifically
8 allowed for by the Guidance. We are hopeful that the
9 EEOC will clarify the validity of state law
10 requirements as lawful targeted exclusions or at
11 least consider these concerns in exercising their
12 prosecutorial discretion. We appreciate Commissioner
13 Lipnic's recent written statement on this issue,
14 which I understand has been submitted for the record.

15 Second, SHRM is concerned about the
16 Guidance interpretation of disparate impact. The
17 Guidance states, and I quote, "National data supports
18 a finding that criminal record exclusions have a
19 disparate impact on race and national origin. The
20 national data provides the Commission a basis to
21 investigate Title VII disparate impact charges
22 challenging criminal record exclusions," end quote.

23 It is not clear how imputing disparate
24 impact based on national data can be reconciled with
25 the recommended individualized assessment. Further,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 as written, it appears that employers may be
2 vulnerable to EEOC investigation any time they take
3 an adverse employment action against an individual of
4 certain races or national origins based on criminal
5 records checks, regardless of whether the employer
6 has conducted a valid individualized assessment,
7 seemingly making convictions a new protected status.
8 SHRM believes this section should be clarified to
9 help employers comply.

10 In conclusion, we believe the EEOC's Guidance
11 serves a very important societal interest, but that
12 clarification in the areas mentioned would greatly
13 benefit employers, employees and third parties who do
14 business with employers. If the legal risks of
15 conducting background checks are too great, then some
16 employers may be reluctant to use them.

17 We believe hiring decisions are enhanced
18 when employers are able to combine the information
19 obtained by the candidate's resume and interview with
20 additional verifiable information available through
21 background checks.

22 Thank you for the opportunity to
23 participate in today's discussion.

24 MR. MELLOR: Thank you, Mr. Chairman,
25 and good afternoon, Commissioners. On behalf of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 National Retail Federation I want to thank the
2 Commission on Civil Rights for holding this briefing
3 on the recent EEOC enforcement guidelines concerning
4 the use of background checks in employment decisions.
5 This is a very important topic for all of us. NRF
6 appreciates being able to share our thoughts on this
7 matter with the Commission.

8 As the world's largest retail trade
9 association and the voice of retail worldwide, NRF
10 membership includes retailers of all sizes, formats
11 and distribution channels as well as chain
12 restaurants in the United States. We represent more
13 than 3.6 million business establishments, 42 million
14 workers, 1 in 4 U.S. jobs, and \$2.5 Trillion annually
15 to the GDP.

16 My name is Rich Mellor and I serve as
17 vice president of loss prevention for the NRF. My
18 responsibilities at the NRF include communication of
19 pertinent information for retail loss prevention,
20 surveying members on important issues and to include
21 background checks as one of them, facilitating
22 educational conferences -- recently we've held two
23 conferences to discuss these topics on the background
24 checks and inform our members -- engaging law
25 enforcement to help prevent retail crime, advocating

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for appropriate legislation to protect retailers
2 better.

3 Prior to my position at the NRF I served
4 as a senior loss prevention executive for more than
5 25 years in retailing, most recently at a national
6 jewelry chain. As part of my responsibilities I
7 directed the company's employment screening process
8 to include applicant processing, testing and
9 background investigations.

10 Conducting this business in a
11 professional and law-abiding manner is paramount in
12 protecting the company brand and reputation. Over
13 the past decade the use of background checks has
14 increased steadily as retailers shoulder the enormous
15 responsibility of securing the private data of
16 customers, their safety and that of the employees,
17 and protecting the company assets.

18 More important than ever before is the
19 prevention of litigation and legal expense.
20 Unnecessary expenses that stem from carelessness in
21 employment related matters can have a huge impact on
22 the company's financial stability. Employers are
23 extremely careful to manage their employment process
24 preventing even the slightest appearances of
25 discrimination.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Social consciousness is a part of every
2 retailer's business strategy. Employment practices
3 and policies play an important role in creating a
4 brand identity that encourages customers to want to
5 shop and work for the company. Retailers, therefore,
6 place a high priority on openly demonstrating
7 fairness, credibility and serving the communities in
8 which they do business.

9 As a result, hiring within the community
10 is an important facet in perpetuating a healthy
11 business environment. There is a fine line that
12 retailers must walk between social responsibility and
13 the obligation to protect customers, especially
14 children, and to ensure the safety of employees.

15 A retailer who makes a decision to hire
16 a former criminal who compromises customer private
17 information has no protection under the EEOC
18 guidelines to fall back upon. They will suffer the
19 consequences, not the criminal that they hired.

20 The retailer who hires a delivery driver
21 or a home repairman who has a criminal record for
22 violence and theft and that person harms a customer
23 or even an employee will again suffer the
24 consequences and the liability for the crime. If a
25 child is abused or hurt by a known sex offender in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the company, the damage to the child and the retailer
2 can be so severe that it can put the company out of
3 business.

4 Statistics show that these type of
5 criminal behaviors are often repeated and it's a high
6 risk to employ such individuals. We are obligated to
7 know these things about our employees. When these
8 crimes do occur, the investigators, the prosecutors
9 and judges always ask these questions. How did the
10 person get access to that information, the restricted
11 area, the merchandise or even access to the child?

12
13 Sometimes this happens when the original
14 job changes or a specific task is assigned without
15 knowing the criminal history of the individual. A
16 matter of discussing criminal history cannot be left
17 to a chance opportunity hopefully addressed at a
18 later date after an offer of employment and by
19 someone not specialized in handling these
20 conversations.

21 For those seeking to turn over a new
22 leaf these conversations are better addressed by an
23 HR professional before the offer of employment is
24 conducted and when honesty and sincerity can be
25 assessed appropriately. Often times in retailing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that is a concerted effort to involve other parties
2 in that decision making. That would not be the case
3 if it's offered on the end of the employment process.

4 With a workforce of more than 42 million
5 employees, retailers handle millions of applications
6 each year and have worked diligently to provide
7 opportunities and second chances for individuals
8 committed to rehabilitation. Survey results show
9 that approximately 95 percent of retailers conduct
10 criminal background checks.

11 The question is, why do retailers spend
12 an extraordinary amount of money, sometimes hundreds
13 of thousands of dollars per year, in a tough economy,
14 when it would be easy to say, save the expense? The
15 answer, they've all learned by costly mistakes made
16 in their own company and those in other companies as
17 well. They seek to protect themselves against
18 negligent hiring and the checks do provide a good
19 opportunity for minority applicants.

20 We have heard stories of mistakes in
21 identity but we can fix those things if we stay
22 committed to improving the background check process.
23 What we can't fix is the harm that is done by
24 criminals and therefore we must, above all, protect
25 those who put their trust in us. Background checks

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 are an essential part of taking our responsibilities
2 seriously. Retailers cannot fulfill their
3 responsibility to us without doing the very best they
4 can to vet potential employees who have access to our
5 data, our homes and our children.

6 NRF believes the criminal background
7 check question needs to remain on the employment
8 application. This vital information is every bit as
9 relevant as an applicant's education, previous
10 employment, experience and formal training. That
11 said, retailers have embraced individual assessment,
12 I can say that.

13 In closing, I want to sincerely thank
14 the Commissioners for allowing us all, employers,
15 employees, consumers and family members to express
16 our views on this very important matter.

17 MR. DOMBI: Good afternoon. Thank you,
18 Chairman Castro and Commissioners at large for the
19 opportunity to testify today. My name is Bill Dombi.
20 I'm vice president for law at the National
21 Association for Home Care and Hospice.

22 NAC, as we call it, is a trade
23 association representing tens of thousands of home
24 care providers and hospices across the country. The
25 issues involved in screening prospective employees'

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 criminal record backgrounds have been longstanding in
2 health care presenting a myriad of challenges in
3 complying with state and federal laws regulating the
4 home health care community as a health service
5 provider in addition to addressing their needs
6 regarding best practices in employment and service to
7 their customers along with fully respecting the civil
8 rights of applicants for employment as well as the
9 existing employees who may be on staff.

10 At the outset, let me state with total
11 seriousness that my constituency and the Association
12 fully supports efforts to ensure the civil rights
13 guaranteed to employees and applicants for
14 employment, but likewise, we support all the
15 appropriate efforts to protect the highly vulnerable
16 patient population served in home care along with the
17 integrity of the numerous federal and state programs
18 that finance this essential care.

19 In that regard, NAC has a longstanding
20 support for the use of criminal background checks as
21 an employment screen for individuals who have direct
22 patient care contact, access to health information on
23 patients, responsibilities that relate to health
24 care financing including payments to federal and
25 state health care programs. Comprehensive criminal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 background checks are an essential tool for the home
2 care provider in meeting their responsibilities to
3 protect patients, payors, as well as their own
4 organization.

5 It is fairly well known today what home
6 care is. Some years ago people just couldn't
7 distinguish us between Home Depot and health care in
8 the home, but my assumption is that pretty much
9 everyone in this room has been touched by home care
10 in the last two decades, whether it's personal care
11 services for their loved ones who are in their last
12 years of life, hospice services for true end-of-life
13 care, or as my own personal experiences, my father,
14 my mother, my sister and my son, and most recently my
15 mother-in-law as home care patients.

16 It is also very clear that that is an
17 extremely vulnerable population of individuals. Home
18 care is just what it says, care to individuals in
19 their home. The vulnerable nature of that population
20 is such that very often many of these individuals are
21 just individuals in the home who open the door or
22 have somebody give them a key to let them in the
23 door, because these people are confined to a hospital
24 bed or otherwise, to provide intimate and very
25 important health care services.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 It is a combination of high tech and
2 high touch. Some of the most remarkable technology
3 advances in health care have found their way into
4 home care, but they haven't replaced the high touch
5 aspect of personal care services to people who need
6 assistance with activities of daily living. At the
7 same time it's a very vulnerable payor population as
8 well.

9 When we look at the issues of Medicare
10 and Medicaid, today in particular, fraud, waste and
11 abuse is way more than anyone would find acceptable.
12 Even if you start with just one dollar as being
13 acceptable we are dealing with billions and billions
14 of dollars. So individuals who are entrusted not
15 only with the care of elderly, disabled, pediatric,
16 as well as populations of all ages need special
17 selection when sent into individuals' homes.

18 Beyond that, home care is a small
19 business. Yes, we do have some companies that are
20 billion-dollar operations, but we have many, many,
21 many more who are small operations, meeting the SBA's
22 definition of a small business but meeting everyone's
23 common sense definition of that as well. And with
24 due respect to the testimonies that I've heard prior
25 to this, counsel that I see sitting at this table,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 counsel who preceded the people at this table, the
2 social scientist as well, are not readily accessible
3 to these small businesses to help in making these
4 individualized determinations.

5 Asking the question, is this long enough
6 after the conviction for the individual to then be
7 employed to send to the home for your mother, is a
8 very serious kind of matter but the resources are not
9 there for these small businesses to do this. So
10 instead, what happens is the businesses in home care
11 look first to state and federal regulation.

12 We've talked a lot about preemption of
13 state regulations today. In home care there is
14 federal law requiring criminal background checks.
15 All hospices must have a criminal background check of
16 all employees who have contact with patients or
17 sensitive health information as well as anyone they
18 have as a subcontractor.

19 The Medicare conditions of participation
20 require every home health agency to comply with all
21 state and local laws, which then takes a state law
22 requirement on criminal background checks and makes
23 it a federal law requirement. In addition, over the
24 last few years, the Congress has shown great
25 attention to the issue of protecting the elderly in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 their homes who are receiving home care services,
2 most recently through the Affordable Care Act,
3 extending the Elder Justice Act to require an
4 expansion of a program that focuses in on criminal
5 background checks.

6 Now I am in a slightly different world
7 than I normally live, frankly, being here today. I'm
8 a health care practitioner. My civil rights work
9 ended with a school desegregation lawsuit back in the
10 early '80s when the Supreme Court in Milliken v.
11 Bradley stopped the opportunities to desegregate
12 schools on an interdistrict basis. Disparate impact
13 was never a viable standard in school segregation
14 cases as well, but I'm back, you know, here talking a
15 bit on civil rights.

16 And I had the opportunity to review the
17 Guidance which, I think, is an extraordinarily well
18 written document for lawyers. I would publish it any
19 law review in any part of this country. But for my
20 constituency, no chance of understanding it, frankly.
21 I think they would misunderstand it before they do
22 understand it.

23 It was described as common sense
24 guidance, but I don't see how it takes 50 pages to
25 describe something in common sense when, instead, my

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 constituency reads such things as this month's
2 Consumer Report, which I didn't read until this
3 morning. Happened to take a few minutes before I
4 came out here, and it's an article, it's all about
5 protecting Mom and Dad's money, just the money part
6 of it. And it talks about how health care, home care
7 in particular, is a high-risk area.

8 And so Consumer Reports, which is relied
9 upon for common sense by people all across the
10 country, writes as follows: "Make sure any care giver
11 you're considering undergoes a background check.
12 Don't assume that the placement agency will do a
13 thorough one. Insist on a national rather than a
14 state criminal check. To monitor home help, consider
15 installing a surveillance camera if the state law
16 permits it." That's a common sense instruction.

17 And in line with that I'm concerned, as
18 another member, of the chilling effect. I submitted
19 testimony, which I offer as a series of
20 recommendations, which suggest a collaborative effort
21 between the health care regulators and the EEOC. I
22 think there is a ground that can be found common
23 among all them. So thank you for the opportunity
24 today.

25 CHAIRMAN CASTRO: Thank you. I have a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 couple of questions then I'll open it up for the
2 Commissioners.

3 Mr. McCracken, you were talking about, I
4 think everyone mentioned it but I think you were the
5 first to go into depth about the alleged conflict
6 between the Guidance and adherence to state
7 requirements that there be background checks. Now
8 again, as I asked earlier, I don't think anyone here
9 is saying, the EEOC is not saying that you can't do
10 background checks. It's saying, this is how you do
11 them and not violate Title VII.

12 So I don't know if you were here earlier
13 for Ms. Miaskoff's presentation, and I believe when
14 she presented orally she stated this, but in her
15 written presentation to us she said that Title VII
16 prohibits disparate impact discrimination. And it
17 also includes language that preempts state or local
18 laws when those laws, quote, "Purport to require or
19 permit the doing of any act which would be an
20 unlawful employment practice under the statute.
21 Therefore, if an employer's exclusionary policy or
22 practice has a disparate impact and is not job
23 related and consistent with business necessity, the
24 fact that it was adopted to comply with state or
25 local law does not shield the employer from Title VII

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 liability."

2 Presumably these state laws that require
3 background checks in certain instances are doing it
4 because they feel in those instances there is a
5 business necessity, is that not right? And that it
6 is consistent with the job so it's job related,
7 right? So that would seem to me that in those
8 instances the issue of Title VII liability would not
9 be there because they're allowing you to do the
10 background check. They're not saying you can't at
11 the federal level. As long as it's consistent with
12 business necessity and job related, it's not
13 violating Title VII.

14 So I don't understand where that
15 conflict resides, because presumably if you do the
16 background check you're going to do it for those
17 reasons. You're not going to do a background check
18 that's not going to be job related, right, and that
19 has nothing to do with business necessity, right?

20 MR. MCCracken: And I may be alone, and
21 I'm not sure. I'm not an attorney so I'm not going
22 to give you a legal opinion about that. But I do
23 know a lot about small businesses, and I will tell
24 you that you can walk them through something like
25 that and get them to a correct conclusion. But when

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 they're making a decision in the field they have to
2 feel confident, for instance, if they feel that
3 there's a conflict between both laws.

4 The EEOC rules, as I understand them,
5 require a level of judgment. You have to make some
6 decisions about whether or not the background checks
7 are directly related to the job, and a whole series
8 of judgment calls that you have to feel confident
9 about as a business owner, and to understand the law.

10 And that's our most significant issue is
11 confusion. Small businesses need clarity and
12 simplicity in terms of how they need to comply with
13 these requirements, and then make sure they
14 understand where the conflicts are or are not between
15 state laws.

16 CHAIRMAN CASTRO: Mr. Segal, you mention
17 in your presentation an example of a BP contractor
18 for whom a background check was not done and then
19 they committed a rape. Are you suggesting that that
20 background check was not done as a result of some
21 confusion about the EEOC's Guidance?

22 MR. SEGAL: No, I'm not suggesting that,
23 sir. I am suggesting that, because of some confusion
24 with regard to the Guidance, it's possible that a
25 contractor would not perform a background check that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 they otherwise would and that clarification with
2 regard to the issues that we have raised would be
3 helpful.

4 CHAIRMAN CASTRO: Hypothetical on your
5 part. You're conjecturing that that might happen in
6 another case.

7 MR. SEGAL: No. I would suggest,
8 respectfully, it's not hypothetical but that there is
9 the potential for employers to refrain from
10 conducting appropriate background checks if there is
11 confusion over the Guidance, and what we're hoping
12 for is that the EEOC will provide clarification so
13 that the respective rights of employers and
14 applicants can be balanced.

15 CHAIRMAN CASTRO: There wasn't the case
16 in this example for BP. That was not the case in the
17 BP example.

18 MR. SEGAL: I'm not familiar with all of
19 the background of the BP hiring process.

20 CHAIRMAN CASTRO: I saw Commissioner
21 Kirsanow's hand go up in my peripheral vision, then
22 Commissioner Kladney, and then Commissioner Gaziano.

23 COMMISSIONER KIRSANOW: Thank you, Mr.
24 Chairman, and again thank you for the panelists,
25 another splendid panel. Were any of you witnesses at

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the EEOC hearing?

2 (No response.)

3 COMMISSIONER KIRSANOW: Nobody? Were
4 any of you invited to testify at the EEOC hearing?
5 Were any of you asked to submit written comment at
6 the EEOC hearing? No.

7 MR. SEGAL: Yes.

8 COMMISSIONER KIRSANOW: Okay, SHRM was
9 invited to submit comments but none of the rest of
10 you were. Written comments, okay, and you supplied
11 written comments. I've got a number of questions but
12 I'll defer to others. Really, I've got a number and
13 I hope I have the chance to follow up but --

14 CHAIRMAN CASTRO: You will.

15 COMMISSIONER KIRSANOW: Mr. Segal, you
16 talked a little bit about the tension between
17 disparate impact and individualized assessment.

18 MR. SEGAL: Yes, sir.

19 COMMISSIONER KIRSANOW: I'd like you to
20 kind of elaborate upon that because the way I look at
21 it, if you look at the case, I don't know if you're
22 familiar with Ricci versus DiStefano where you had an
23 employer that engaged in disparate treatment in order
24 to avoid potential liability on disparate impact
25 because its numbers weren't right.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Can you tell me a little bit about the
2 potential for that kind of problem where this might,
3 if not encourage disparate treatment, shade toward
4 that in order to avoid a disparate impact liability
5 lawsuit?

6 MR. SEGAL: Perhaps it would be helpful
7 to start with the Guidance. The language from the
8 Guidance provides that national data such as that
9 cited above supports a finding that a criminal record
10 exclusion to have a disparate impact based on race
11 and national origin. The national data provides a
12 basis for the Commission to further investigate such
13 Title VII disparate impact charges. During the
14 investigation the employer would have the opportunity
15 to show that its employment policy or practice does
16 not cause disparate impact on the protected group.

17 So as I understand the language, there
18 would be the possibility for one adverse action to
19 result in an investigation based on a disparate
20 impact analysis. We have concerns about this
21 language as previously noted. We believe the
22 reasonableness of the Guidance ultimately will turn
23 on the reasonableness of the prosecutorial discretion
24 in enforcing it.

25 COMMISSIONER KIRSANOW: Mr. Fishman, you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 said something that really interested me. You said
2 that when you issue reports to your clients of
3 criminal background check, protected class
4 information is not contained therein, and suggests to
5 me that what's happening is clients are sometimes
6 blind to the actual applicants.

7 They simply do an initial screen to
8 determine whether or not someone has a criminal
9 background, correct? If that's the case, if clients
10 don't know the protected class information how could
11 there be a disparate impact issue?

12 MR. FISHMAN: I can't answer that
13 question. It would seem that there wouldn't be.

14 COMMISSIONER KIRSANOW: I'll defer the
15 rest of my questions for --

16 CHAIRMAN CASTRO: We'll come back.

17 COMMISSIONER KIRSANOW: Thank you.

18 CHAIRMAN CASTRO: Commissioner Kladney?

19 COMMISSIONER KLADNEY: As Commissioner
20 Kirsanow, my cup runneth over with questions, and I
21 don't know if I'll have enough time to ask, but I
22 appreciate this panel and its input. And I would
23 like everyone to know I support criminal background
24 checks. I think they're good and I think they're
25 worthy, worthwhile.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I wonder though, Mr. McCracken, you said
2 that your group, and I assume it's a big Association,
3 didn't quite grasp the analysis of the Guidance, is
4 that correct, of how you go through the analysis of a
5 criminal background check?

6 MR. MCCRACKEN: I was saying it's not
7 clear for small businesses.

8 COMMISSIONER KLADNEY: And as an
9 association do you find it to be incumbent upon you
10 to communicate that information?

11 MR. MCCRACKEN: Well, sure. We try to
12 communicate all kinds of information to our members.
13 But the reality is, every kind of business in
14 different states are all on different situations, and
15 so ultimately it's up to a business owner to make a
16 whole series of judgment calls on these issues and
17 there's only so much that a group sitting in
18 Washington can help them with.

19 COMMISSIONER KLADNEY: Have you done any
20 of that work?

21 MR. MCCRACKEN: That's why we
22 consistently advocate that federal agencies at all
23 levels be clear and consistent and as simple as
24 possible on communicating what businesses have to do.
25 Because you have to remember, this isn't the only

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 thing that they're having to worry about and it's
2 typically the business owner, him or herself, that is
3 having to think through these issues and make these
4 decisions.

5 COMMISSIONER KLADNEY: My question
6 really is based upon Mr. Segal's analysis saying that
7 the Green factors are not that difficult to apply.
8 Is that correct, Mr. Segal? That's what you said, I
9 think, in your statement.

10 MR. SEGAL: Based on the testimony we
11 have heard today, we can see that there are competing
12 considerations that employers must consider in making
13 these difficult decisions. We believe employers can
14 apply the Green factors but there will be times that,
15 based on them, targeted exclusions will be
16 appropriate. But the Green 3-factor analysis in and
17 of itself is not new.

18 COMMISSIONER KLADNEY: It's been for 20,
19 30 years.

20 CHAIRMAN CASTRO: Here's the microphone,
21 Mr. Segal, please. Thank you.

22 MR. SEGAL: Overall the Guidance is
23 largely a restatement of existing law and SHRM has
24 not received substantial concerns raised by its
25 members. In our experience, the result has been that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 most members are taking a closer look at the Green
2 factors in making individualized assessments and in
3 determining where targeted exclusions may be
4 appropriate.

5 COMMISSIONER KLADNEY: Thank you. And
6 then the background checkers, I'm wondering, you
7 know, obviously you're professional background
8 checkers and you do a very professional job. My
9 concern is, what are your thoughts regarding
10 regulating internet scrubbers where businesses get on
11 and do their criminal background check with these
12 organizations, well, dot coms on the internet?
13 What's been your experience with that?

14 MR. FISHMAN: I don't have a lot of
15 experience with that. They operate under an entirely
16 separate set of circumstances than we do as
17 employment background screeners, and it's an entirely
18 different animal altogether.

19 COMMISSIONER KLADNEY: Is it reliable?

20 MR. FISHMAN: I don't know the answer to
21 that question because I'm not familiar with all of
22 them. I would say it's less reliable than that which
23 we engage in as employment background screeners.

24 COMMISSIONER KLADNEY: Ms. Miller?

25 MS. MILLER: When you say internet

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 scrubbers I think the devil's in the details,
2 probably, as to what exactly you mean, because I'm
3 not quite familiar with that.

4 COMMISSIONER KLADNEY: Well, I prefer
5 not to use any company names. But people on the
6 internet, like you're looking for somebody. If I put
7 Montserrat Miller in, up pops the very first thing
8 is, come here and find out about Montserrat Miller.

9 MS. MILLER: You would fall outside of
10 the Fair Credit Reporting Act. So I, if you were to
11 find information out about me, would not be
12 protected. I wouldn't have all the rights that fall
13 under the Fair Credit Reporting Act.

14 COMMISSIONER KLADNEY: So do you believe
15 that small business should be made aware of that and
16 business should understand not to use these internet
17 scrubbers in terms of providing criminal background
18 checks? Would that be your recommendation?

19 MS. MILLER: That's a good
20 recommendation. As an association we do quite a bit
21 of outreach and education. We've done outreach and
22 education on the EEOC Guidance and we do it on other
23 issues as well such as doing the perils of doing your
24 own Google searches, because of the fact that the
25 individuals upon who you are doing them may not know.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And not only is there an issue that you fall outside
2 of the Fair Credit Reporting Act, but there are EEO
3 considerations as well when you look at that type of
4 information. So we do certainly try to educate as to
5 the perils of doing searches outside of a
6 professional background screening company.

7 COMMISSIONER KLADNEY: One more question
8 to Mr. Fishman.

9 CHAIRMAN CASTRO: And then we'll go to
10 Commissioner Gaziano. We'll come back to you,
11 Commissioner Kladney, I promise.

12 COMMISSIONER KLADNEY: When you said an
13 EEOC lawyer gave some guidance for people not to do
14 criminal background checks, do you know what context
15 that was given in?

16 MR. FISHMAN: It was reported in the
17 Chicago Tribune, and then has been reported in
18 several other areas. I don't know the context. I
19 just know that the direction was that employers
20 better think twice before conducting a background
21 check.

22 COMMISSIONER KLADNEY: Was it a
23 direction or was it, if you don't know the context
24 how do you know it was a direction?

25 MR. FISHMAN: I guess I can't answer

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 that question.

2 COMMISSIONER KLADNEY: I mean are you
3 just picking something out of the newspaper and
4 putting it in your presentation?

5 MR. FISHMAN: Out of a number of
6 articles that were written about that particular
7 comment.

8 COMMISSIONER KLADNEY: It could have
9 been said in a facetious point of view. It could
10 have been said a lot of different ways.

11 MR. FISHMAN: From what I read it didn't
12 appear to be that way, but I guess I couldn't --

13 COMMISSIONER KLADNEY: I read it. It
14 was a three-paragraph deal. Thank you.

15 CHAIRMAN CASTRO: Commissioner Gaziano?

16 COMMISSIONER GAZIANO: Thank you. And
17 thank you all for your wonderful testimony.

18 And before she walks away, I also want
19 to publicly thank our Lenore Ostrowsky for her work
20 on this panel and putting together such outstanding
21 panels that, I think, represented the various views
22 much more than seems to have been before the EEOC.
23 And I think the record also reflects that the
24 Commission reached out to Commissioners of the EEOC.
25 Some of them have submitted written testimony. I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 would have appreciated hearing from them as well.

2 But I want to focus on one of the, I
3 think the last panel was unanimous that the purpose
4 of the EEOC rule was to act on their hunch, since
5 they didn't have the relevant data, to increase the
6 costs on businesses that wanted to use criminal
7 background checks.

8 And by there, there's many costs. One
9 of them is it's been remarked on the individualized
10 attention of course is the cost of screening, but
11 what I'm really worried about was the cost of acting
12 on screening. Of course everyone said, well, they
13 can still do it, they can still do it.

14 But the problem with the Guidance is, in
15 an attempt to increase litigation risks, increase
16 legal, to try to through guidance create a standard
17 that a court might apply, so that if someone actually
18 acted on the criminal background check there's
19 increased liability.

20 And one of the factors I want to
21 concentrate on this panel is the sort of reversal of
22 the precautionary principle that we normally have in
23 government regulation. the various types of
24 precautionary principle. But let's take some EPA
25 regulation. Congress generally writes it. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 agency then takes it to an extreme.

2 But there are some conditions where if
3 there's a risk of cancer no matter how infinitesimal,
4 so-called "Delaney Clauses," EPA requires the
5 companies to eliminate any risk. In Clean Air Act,
6 there are some other extreme precautionary principles
7 where the government says if there's even a very
8 small risk that public health will be affected that
9 the company must expend enormous amounts of money.

10 But it seems to me that this EEOC
11 Guidance has the strangely opposite effect. It tells
12 companies who may have a precautionary principle of
13 their own, and I'm particularly directing this to
14 you, Mr. Mellor, because it seemed to dovetail in
15 some of your testimony, that you better abandon your
16 precautionary.

17 And one little factor in the Guidance
18 that it seems to suggest that the offense that you've
19 got to consider disqualifying has to be really kind
20 of close. One of the reasons that worries me is
21 because I think most of us know a lot of convictions
22 are also pled down.

23 Speaking with one of the witnesses in
24 the prior panel, they're facing a multi-million
25 dollar lawsuit because they hired someone with a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 misdemeanor who was taking pictures of a underage
2 woman as a security guard, he was acting as the
3 security guard for a gated community, and he was
4 taking pictures of this underage woman undressing.
5 Well, it turns out that that misdemeanor was pled
6 down from a Peeping Tom charge.

7 So how does, if you don't mind, any of
8 you, but especially Mr. Mellor, could you comment on
9 how the guidelines skew the normal risk precautionary
10 principle decision making of a firm and whether you
11 think that's a good idea or a bad idea?

12 MR. MELLOR: Commissioner, I'm not sure
13 I understand the question, how it's -- sorry -- how
14 it skews. Could you just be a bit more clear on
15 that? I'd be very happy to answer that. It's
16 opaque.

17 COMMISSIONER GAZIANO: Yes, I'm sure it
18 is. I'm sorry about that. If a company would have,
19 before the guidelines, applied a certain, you know,
20 framework of relatedness to the type of crimes or
21 would make a decision, do the guidelines, how would
22 the guidelines tend to skew a company's decision when
23 they have to factor in the possible liability for
24 disparate impact litigation?

25 MR. MELLOR: I'm assuming that you're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 speaking about prior to the guidelines where
2 companies, and there's been lots of conversation
3 about this, have put out blanket sort of matrix that
4 we do not employ people with this type of criminal
5 history, and apply that across the landscape,
6 perhaps, of the whole company.

7 And I can comfortably say this after
8 doing it for good number of years myself and involved
9 with other people in retailing that actually conduct
10 the background checks, comfortably say that even
11 before the guidelines came out, and I happen to feel
12 that the logic involved with the guidelines is well
13 founded and that maybe it's a little bit behind the
14 curve from the standpoint that retailers in
15 particular have evolved out of those blanket policies
16 and how they apply them across the landscape and do
17 spend considerable time now analyzing what the Green
18 factors are before even being asked or guided to do
19 that.

20 My comments with regard to how that gets
21 done and when it gets done, I focused on the fact
22 that this is better done by corporate type people who
23 have their head on straight, can analyze this
24 information properly and interact, often me, on the
25 telephone with the applicant, because some of these

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 interviews take place far and away from them.

2 But there are other people that become
3 involved in that decision making and collaborating on
4 whether this is a sensible risk and could we take it
5 and would this job be a disqualifier for this
6 particular individual.

7 I don't know that I've answered your
8 question but I --

9 COMMISSIONER GAZIANO: Let me rephrase
10 it and open it up to anyone.

11 MR. MELLOR: Okay.

12 COMMISSIONER GAZIANO: Does anyone want
13 to comment on whether they think these guidelines
14 tend to require companies, as an economic matter, to
15 increase their risk in hiring to decrease their risk
16 of a disparate impact lawsuit?

17 MR. SEGAL: In my experience, as an
18 attorney who advises clients, and in SHRM's
19 experience, this has not resulted generally in
20 employers discontinuing use of the background checks.
21 What we have seen as employers looking to the
22 Guidance as just that and in reviewing more carefully
23 the Green factors.

24 But, ultimately, I believe that the
25 reasonableness of the Guidance will turn on the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 reasonableness of the prosecutorial discretion in
2 terms of enforcement, and that may have an impact on
3 whether employers continue to use background checks.
4 I'd rather see employers use professional background
5 checks than simply search the internet and come up
6 with what may be invalid information.

7 CHAIRMAN CASTRO: Commissioner
8 Achtenberg?

9 COMMISSIONER ACHTENBERG: Thank you, Mr.
10 Chairman. Before asking Mr. Dombi a follow-up
11 question to his testimony I just want to say that we
12 don't have any information in our record or otherwise
13 that would suggest that the EEOC in its various
14 capacities, including whatever fact-finding it
15 undertook before promulgating the various guidelines
16 that it was certainly entitled to promulgate, failed
17 to, merely because it didn't invite everyone on this
18 terrific panel -- and by the way thank you all very
19 much for all the observations that you have proffered
20 before our little committee here -- merely because it
21 didn't ask everyone on this panel to participate
22 specifically in its fact-finding does not support the
23 assertion that somehow its fact-finding was skewed.
24 And I just wanted to make that observation for the
25 record.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Mr. Dombi, having recently lost many
2 family members in my own family and had to supervise
3 home health care that needed to be provided during
4 their last illness, I'm very knowledgeable about and
5 sympathetic to the plight of the lawyer who advises
6 home health care providers and hospice providers, and
7 I understand what a difficult situation that might
8 put you in.

9 Could you talk a little bit about how a
10 collaboration between a group like your industry
11 group and the EEOC might be furthered so that home
12 health care providers might do just the right kind of
13 background screenings so as to enhance safety while
14 not inadvertently or otherwise doing harm to ex-
15 offenders who have a right to have their criminal
16 backgrounds assessed properly by a prospective
17 employer?

18 MR. DOMBI: The state regulation as
19 brought into federal play varies from state to state.
20 Some states have automatic exclusion, and I think we
21 would support a safe harbor where a state's made that
22 kind of a judgment there, and I think it would be an
23 easy call for everybody on that. But beyond that, a
24 number of states take certain criminal offenses and
25 then allow them to be taken into consideration.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I learned more here today about what you
2 should be considering than I knew coming in by far,
3 and I think the collaboration that I would suspect
4 would be very helpful would be, you know, the parties
5 to get together to try to outline in more detail,
6 with better clarity, how you take into consideration
7 whether an offense has a connection to the risk that
8 you have in an individual going into a home setting,
9 the issue of the time frame, you know, and obviously
10 you should let the individuals, perhaps, receiving
11 the services make the ultimate judgment, but it
12 appears there is some science that says that after a
13 certain period of time someone with a record is no
14 longer a greater risk than someone without a record.
15 And so that, you know, would be certainly one way to
16 go about it.

17 But beyond the collaboration in terms of
18 what is told to individual companies is the health
19 care system itself has a huge communications network.
20 Medicare, for example, routinely puts out something
21 they call the MedLearn articles, which are guidance
22 instructions and they have contractors there who
23 engage in training and the like.

24 And so the EEOC combined with HHS in
25 doing some training around this, I think, would go a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 long way to alleviate what I know would happen, that
2 chilling effect. If my constituency read this they
3 would be wondering, what's changed and what have I
4 done wrong and I better do something different, so
5 teach me what I'm supposed to do, because that's all
6 they're really looking to accomplish is to meet the
7 standard.

8 One of the things they'd have to work
9 out between themselves is one that I don't have an
10 answer to and that is that yes, criminal background
11 checks are used in home care. They are mandated by
12 and large. Decisions are made when it's
13 discretionary to select from one offense or another,
14 but the majority of the workforce, ultimately, that's
15 in home care are actually in protected race
16 categories. They are African American. They are
17 Hispanic.

18 This is job not a lot of people want,
19 and home care companies are searching high and low to
20 get people to do the job. You know, for \$10 an hour
21 to clean up after an incontinent dementia patient,
22 you're either a saint or you're desperate.
23 Fortunately we have a lot of saints providing home
24 care.

25 So trying to figure out how is that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 disparate treatment in that situation would be, yes,
2 deny a criminal record background candidate
3 employment and accept another one who happens to be
4 actually of the same race or may actually be of a
5 protected class of the one that you've denied. My
6 constituency doesn't understand disparate impact,
7 doesn't understand that tough decision, and maybe
8 together the EEOC and the Department of Health and
9 Human Services can help guide them because they do
10 want to comply.

11 CHAIRMAN CASTRO: I have a question, and
12 then Commissioner Kirsanow, and I'm sure Commissioner
13 Kladney's going to want to come back as well.

14 I'll direct this to Mr. Mellor, but
15 anyone else feel free to chime in as well. In the
16 materials that we've received and in some of the
17 testimony we've heard earlier, although we haven't
18 spent a lot of time on this, there has been issues
19 raised about the inaccuracies of some criminal
20 records and arrest records or the lack of clarity of
21 some of those and, you know, wrong people being
22 considered as the criminal compared to the actual
23 person who's applying for the job.

24 And I believe, Mr. Mellor, in your
25 remarks you said well, you know, we can fix those

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 inaccuracies. It seems to me that the reason for the
2 individualized assessment is to kind of address that
3 to fix these inaccuracies, which exist probably in
4 various layers of government data and criminal
5 records, has got to be an overwhelming task, maybe
6 even more overwhelming than an individualized
7 assessment.

8 How would you propose that we fix these
9 inaccuracies? I believe if they could have been
10 fixed easily that would have happened. Do you have
11 some ideas and recommendations on how to do that?

12 MR. MELLOR: Well, I certainly agree
13 with you, Mr. Chairman. It's not an easy task to do
14 it and I wasn't trying to imply that it was an easy
15 task. I was giving some relativity to, if we put our
16 minds to it, we work together, the professional
17 organization for background screeners is certainly
18 tasked and working on that to collaborate with the
19 retailers and the other organizations represented
20 here, I think that that's a task that we can tackle,
21 work on, collaborate with this Commission as well as
22 the EEOC to kind of push forward and see if we can't
23 do something about this.

24 My personal experience with doing the
25 background checks over a pretty long period of time,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 the folks that work for me doing that were tasked to
2 go to every degree they possibly could to validate
3 the information to include personal visits to
4 courthouses and so forth. But it always, always
5 included conversation with the individual that was
6 applying for the job and whatever information they
7 had placed on the application. In some cases it was
8 understated on the application, in other cases it was
9 very clear.

10 But to the point of trying to be precise
11 in the identification of who the individual was, in
12 my experience and in my management of that process,
13 absolutely wouldn't go forward with a decision if we
14 couldn't validate it 100 percent. Now I'm not
15 suggesting that that doesn't happen out there. I
16 think it does. I'm pretty comfortable saying that.

17 But as I made reference to in my
18 remarks, there isn't a company that's willing to take
19 a risk at doing something that's going to result in a
20 litigation such as being confronted from the EEOC or
21 other attorneys to take on as your information was
22 inaccurate and this is what resulted.

23 So I don't suggest that this is easy to
24 do, but I think the collective minds could put their
25 heads to this. And it took a long time for the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 guidelines to be reissued and I think it'll take time
2 for us to get where we need to be on validating this
3 kind of information in background checks.

4 CHAIRMAN CASTRO: I'd like to hear from
5 you. Yes, please.

6 MS. MILLER: If I could, thank you.
7 Accuracy of the reports is paramount. It's what is
8 required by the Fair Credit Reporting Act, so maximum
9 possible accuracy.

10 Contrary to popular belief, and as
11 reported in the media, our member companies report to
12 me 99 percent accuracy rates. So that means that
13 when a consumer disputes a consumer report, and that
14 might include criminal history information, that only
15 one percent of consumer reports are disputed, and of
16 that one percent an even smaller percentage actually
17 require a correction. So as far as the
18 individualized assessment, that doesn't replace the
19 Fair Credit Reporting Act procedures.

20 And under the Fair Credit Reporting Act
21 an individual has not one but two opportunities to
22 correct the information in the report if there is an
23 inaccuracy or incomplete information, which again
24 inaccuracy is not, it's rare that the reports are
25 inaccurate. Not one but two.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 So the first bite of the apple is, if a
2 report is done, and mind you, under the Fair Credit
3 Reporting Act that requires your consent in order to
4 do a background check and that, like I said, might
5 include a criminal history check, you provide your
6 consent.

7 There are multiple steps that then begin
8 to kick in and those steps are requirements of
9 background screening companies, consumer reporting
10 agencies, which are actually defined under the Fair
11 Credit Reporting Act, and it also places
12 responsibilities on the employers. And those
13 responsibilities of the employers would be that they
14 provide individuals with a pre-adverse action notice
15 if during the process any information, in whole or in
16 part, is going to be used from that report that might
17 adversely impact the individual and that might
18 include criminal history information.

19 So the first opportunity is what's
20 called the pre-adverse action notice. They're
21 provided a copy of their report, a copy of the
22 summary of their rights under the Fair Credit
23 Reporting Act, and they can contest the information
24 if it is inaccurate or incomplete. And then the next
25 step would be again they could go through the same

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 process through the adverse action process if they
2 will be denied employment based on the report.

3 What is providing some confusion with
4 the Guidance is that the Guidance has the
5 individualized assessment. So what is very new, at
6 least in my opinion, is that there is this concept
7 under the EEOC's Guidance that in order to avoid
8 Title VII liability you could do either a validation
9 study, which the Guidance itself says, but there's
10 not enough social science in order to do a validation
11 study, or you can do a matrix and an individualized
12 assessment. This is a new concept provided by the
13 Guidance.

14 That causes confusion with employers
15 because then they say well, wait a minute, what
16 happens to the Fair Credit Reporting Act? So I don't
17 think that was intended, but the unintended
18 consequence is employers now are faced with, well, do
19 I follow the Fair Credit Reporting Act or do I follow
20 this Guidance, I'm not quite sure. And what I hope
21 doesn't happen is that consumers aren't afforded the
22 rights because of confusion with the Guidance.

23 But there are two separate processes,
24 and the Fair Credit Reporting Act, which has been
25 around since the '70s, has provided many protections

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 for consumers when background checks are done and it
2 already has what you could say would be similar to an
3 individualized assessment, although under the Fair
4 Credit Reporting Act what you're looking at are
5 inaccuracies or incomplete information in the
6 consumer report which the consumer can then challenge
7 and background screeners have a duty to reinvestigate
8 that information and provide correct information.
9 But again the inaccuracy rates are very low.

10 Nick, I don't know if you want to --

11 MR. FISHMAN: I would just echo those
12 same sentiments. They do have an opportunity, if
13 there is an error in the report, to be able to
14 dispute that information.

15 In addition to that as far as the
16 misidentity, if you will, I can only speak for a
17 company like my own where until we're able to confirm
18 identifiers, meaning name and date of birth, name and
19 Social Security or any combination thereof, we're not
20 going to report a record.

21 So that's how you eliminate that kind of
22 thing is that you pay attention to those identifiers
23 and ensure that they actually belong to the applicant
24 before it's been reported.

25 CHAIRMAN CASTRO: Commissioner Kirsanow,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 then Commissioner Kladney.

2 COMMISSIONER KIRSANOW: Thank you. So
3 far on all the panels I haven't heard anybody say
4 that, you know, there shouldn't be background checks
5 done, and I haven't heard anybody say that they
6 oppose reintegration of criminals into society. And
7 the real question is, is this Guidance --

8 (Simultaneous speaking.)

9 COMMISSIONER KIRSANOW: The real
10 question is -- let me repeat myself. I haven't heard
11 anybody say that they don't feel criminal backgrounds
12 should be done nor that we don't support
13 reintegration of those with criminal records into
14 society. And the question, I think, is whether or
15 not the EEOC Guidance is a smart way or the best way
16 or even a decent way of doing this.

17 I want to pick up on something that I
18 think Commissioner Kladney had asked of Mr. Fishman.
19 I think it was interesting. It had to with, Mr.
20 Fishman talked about the EEOC lawyer who was quoted
21 in the paper, Chicago Tribune, as saying, "If you're
22 thinking about doing a criminal background check you
23 better think again."

24 We've heard about certain instances
25 related to concerns about ambiguity of the Guidance.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 I think it was Mr. Dombi said, a 55-page Guidance was
2 beautifully written for lawyers. I would like to ask
3 Mr. McCracken, Mr. Mellor and Mr. Dombi, with respect
4 to small businesses, when a small businessman -- I
5 appreciate he doesn't know the context in which an
6 EEOC lawyer may say something.

7 When a small businessman hears or reads
8 that an EEOC lawyer, as the character in Lincoln
9 says, "Clothed in immense power," says, "You better
10 think twice about using a criminal background check,"
11 how does that person construe that statement and what
12 actions does he take as a result?

13 CHAIRMAN CASTRO: And if I could add, it
14 could also apply to a businesswoman.

15 COMMISSIONER KLADNEY: Could I also give
16 the correct quote? Would that be okay, Commissioner?

17 COMMISSIONER KIRSANOW: Sure, absolutely.
18 I'd like to know it.

19 COMMISSIONER KLADNEY: This is the quote
20 out of context, and we don't know what context it was
21 given in. "I would suggest to," open parens,
22 "businesses," close parens, "that they think long and
23 hard about why they think they need to do a criminal
24 background check."

25 If you look at the Guidance I guess that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 would tell you why.

2 COMMISSIONER KIRSANOW: Yes, long and
3 hard. If an EEOC lawyer says they better think long
4 and hard, long and hard before they think about doing
5 a criminal background check, Mom and Pop's there,
6 doesn't have an HR department, doesn't have access to
7 big-time lawyer, how does he construe it normally?

8 MR. MCCRACKEN: I would say -- and I
9 missed what your comment was.

10 CHAIRMAN CASTRO: He said businessman.
11 I said businesswoman as well.

12 MR. MCCRACKEN: You have to realize
13 these are your very small business people, no one
14 would be surprised to hear, you know, do operate
15 largely on conventional wisdom, what they hear, what
16 people tell them, because as you say they don't have
17 the time and the resources to, so they will, I do
18 think it has the potential at least to have a
19 chilling effect on some companies that should and
20 might be able to conduct criminal background checks
21 legitimately that they will choose not to.

22 And that will have, you know, potential
23 consequences for whether it's staffed in the
24 workplace or other things down the road. And those
25 will be hard to quantify because it's hard to know

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 what didn't happen.

2 But I do think that's a real thing
3 because there, very much in the small business
4 sector, there is sort of an accepted wisdom that
5 comes from somewhere, like newspaper articles like
6 this, that really does shape how people behave.

7 COMMISSIONER KIRSANOW: Anybody else
8 have a comment on that, Mr. Dombi or Mr. Mellor?

9 MR. DOMBI: I think my constituency is
10 very unique compared to some of the others that were
11 referenced here. The enlightened ones would call me
12 and say, what did that mean? And then I might be
13 able to explain it to them. Others would say, what
14 is that EEOC person talking about? It's pretty clear
15 why we have criminal background checks in health
16 care. And then the vast majority probably would be
17 unfazed and they would recognize in a common sense
18 way to do a criminal background check and to make the
19 right judgment to keep their patients safe.

20 It's a priority for them. Patients
21 first, payors second, business third, and prospective
22 employee would probably be denied employment still
23 even after seeing that.

24 CHAIRMAN CASTRO: Commissioner Kladney?
25 Oh, I'm sorry, did you want to answer?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. MELLOR: Quickly, I will. With
2 regard to small businesses the NRF represents a lot
3 of one-store business owners, and with regard to that
4 I would say that as we suspect they would opt out and
5 not do the background check. That's our fear,
6 because they're fearful of not being able to do this
7 process appropriately and rely on their instincts for
8 their employment decisions.

9 COMMISSIONER KIRSANOW: Do many of your
10 constituents have employment practices, liability
11 insurance or anything similar in case your friendly
12 neighborhood EEOC investigator comes knocking on the
13 door?

14 MR. MELLOR: I'm not able to say that
15 for sure, but I would think not.

16 MR. DOMBI: In health care, it's in the
17 marketplace, I mean and a lot of the brokers, longer
18 standing home care providers would likely have
19 purchased it along with directors' and officers'
20 liability, general liability, and it's in a package
21 that many of them acquire today.

22 CHAIRMAN CASTRO: Mr. Kladney?

23 COMMISSIONER KLADNEY: I personally
24 think the quotation means to go ahead and do one
25 because you're supposed to do one. Think long and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 hard why you should do one, and you need to do one.
2 But I guess beauty is in the eye of the beholder,
3 Commissioner.

4 CHAIRMAN CASTRO: See, now that's how it
5 should be.

6 COMMISSIONER KLADNEY: Mr. Fishman?

7 MR. FISHMAN: Sir.

8 COMMISSIONER KLADNEY: How are you?

9 MR. FISHMAN: Well, thank you.

10 COMMISSIONER KLADNEY: And anybody else
11 can answer this question who would like to. In your
12 presented document, statement, you said there's no
13 relief or consideration for employers that have state
14 law conflicts. Since 1987, when the initial Guidance
15 came out, do you have any cases to back that up?

16 MR. FISHMAN: Well, that was referring
17 to the new Guidance.

18 COMMISSIONER KLADNEY: Okay, the new
19 Guidance. Any cases?

20 MR. FISHMAN: Not that I'm aware of. I
21 think that one of the earlier panelists mentioned the
22 fact though that she was caught between a rock and a
23 hard place. I believe it was Pennsylvania law and
24 the EEOC Guidance.

25 COMMISSIONER KLADNEY: That actually had

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

1 to do with the Pennsylvania law that merely provided
2 a background check but not exclusions. The
3 background check, background check. Anybody else?
4 Thank you.

5 CHAIRMAN CASTRO: Any other questions?
6 If not, I don't even know, is the Vice Chair on the
7 phone? I presume you've not asked to -- no, she's
8 not. Okay, I want to make sure that I don't close
9 this unless I've given her a chance to speak.

10 Well, that concludes this panel. I want
11 to, on behalf of the Commission, thank each and every
12 one of you who presented not only on the third panel
13 but also on each of our other panels. I also want to
14 again thank the staff that put this together. I
15 thank Pam Dunston and her staff for doing all the
16 logistics of this.

17 I also want to remind folks that the
18 record for this briefing report is going to remain
19 open for the next 30 days. If panelists or members
20 of the public would like to submit materials they can
21 either mail them to the U.S. Commission on Civil
22 Rights, Office of Civil Rights Evaluation, 1331
23 Pennsylvania Avenue, N.W., Suite 1150, Washington,
24 D.C. 20425, or they can send them via email to
25 publiccomments@usccr.gov. That's P-U-B-L-I-C-C-O-M-

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 M-E-N-T-S @ U-S-C-C-R.gov.

2 It is now 2:07 and this meeting of the
3 Commission is hereby adjourned.

4 (Whereupon, the foregoing matter went
5 off the record at 2:07 p.m.)

6

7

8

9

10

11

12

13

14

15

16

17

18 4813-0931-5602, v. 1

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com