Employment Barriers Facing Women of Color Upon Re-Entry from Incarceration

Shellie Sewell

> We had one young lady, Ellen, she obtained a job at Sears as a sales person, she did not check anything on her application, she was working, doing fine, in the process of being promoted. One of the persons she spent time in prison with came in, "when did you get out of prison?" supervisor overheard the conversation brought her into the office and said, "you didn't tell me you were a convicted felon, she said, "you didn't ask" she said, "well we have it on our application" she pulled the application it was not checked, she did not lie, and they told her, "I am sorry we don't hire convicted felons.[1]

I. Introduction

Women comprise over 6.7% of the incarcerated population.[2] One can expect about 9% of those women to be released within 60 months of their sentence.[3] Upon release, society expects them to find employment. Of the women who face this challenge, most of them are women of color[4] who will face a greater challenge finding employment upon reentry than white women.[5] Whether they are expected to work as a condition of a public assistance program or simply as a means of survival, to successfully reenter, women have to create a foundation for themselves and a job provides the bedrock of this foundation. Unfortunately, the criminal record that follows them out of incarceration serves as a terrific impediment to fulfilling both society's and their own expectation that they find employment upon release. Stories like Ellen's play themselves out everyday. Employers often shy away from hiring applicants with felony convictions in fear that hiring such an applicant invites potential liability should the employee harm a customer, even

[1] Interview with Rosana Anderson, Director, Virginia Cares Program, in Roanoke, Va. (April 5, 2003).
[2] Paige M. Harrison & Jennifer C. Karberg, Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2002 5 (2003) available at http://www.ojp.usdoj.gov/bjs/abstract/pjim02.htm.
[3] Laurence A. Greenfield & Tracy L. Snell, Bureau of Justice Statistics, Women Offenders 10, Dec. 1999 (stating that over two thirds of incarcerated women are women of color) available at http://www.ojp.usdoj.gov/bjs/abstract/wo.htm.
[4] *See Id.* at 7.
[5] Patricia Allard, The Sentencing Project, *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses* 19 (2002).

when such an employee has already demonstrated her competence as an employee.[6] Many advocates suggest that Title VII and other litigation strategies can ameliorate the rejection rate that women of color reentering experience but this approach fails to deal with the problem effectively,[7] legislation provides a more enduring and reliable solution.

This paper will explore the plight of low-income women of color reentering society from incarceration and the barriers that they face. By looking at the Personal Responsibility and Work Opportunity and Reconciliation Act ("PRWORA"), Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and state legislation, I challenge popular litigation strategies advocated by reentry activists and propose changes in welfare requirements and statutory treatment of discrimination against ex-felons that consider both the women's struggle toward stability, and the employers fear of liability from hiring ex-felons.

II. Barriers to Reentry for Women

A. *Expectation of Work*

Work plays a central role in society's vision of what constitutes the rehabilitated ex-felon. Programs for released prisoners including the Federal Supervised Work Release program confirm this vision on a policy level. All people released from prison, as a condition of that release must find and retain employment. On the one hand, this policy provides a rehabilitative outlet for people trying to reestablish their lives, on the other; it functions as a further punishment when these individuals cannot find jobs. Federal and state social programs like

[6] Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders,* 34 Conn. L. Rev. 1281, 1302 (2002).
[7] *See generally* Sharon Dietrich et al, *Work Reform: The Other Side of Welfare Reform*, 9 Stan. L. & Pol'y Rev. 53 (1998); Sharon M. Dietrich, Center for Law and Social Policy, *Criminal Record and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families* 20-21 (2002);

PRWORA also emphasize work as a condition to receive benefits;[8] however, imposing this expectation of work for women is far from realistic.

Most employers, avoid hiring ex-felons by inquiring into an applicant's job history and rejecting them upon the disclosure of a criminal record. Women of color reentering society must struggle within a system that determines their worth through their ability to secure a job, yet, this societal expectation exists on top of a population of employers that use criminal convictions as a means to weed out applicants.

Public benefits should provide women with a safety net to assist them as they find a job because a significant number of women exit prison without financial resources. However, because most programs condition the receipt of benefits on work, public assistance can present an additional hurdle.

B. *Constrictions in Welfare*

Thirty percent of women entering prison relied on welfare one month prior to her arrest, and many more women will qualify for benefits upon their release.[9] Public assistance provides economic support that enables recently released women to secure a job, a home and retain their children.[10] In light of this promising safety net, women re-entering can anticipate problems securing public assistance because of their criminal records.

With the enactment of PRWORA in 1996, Congress overhauled the welfare system and initiated a new program, Temporary Assistance for Needy Families (TANF). This block grant requires recipients to work as a condition of receiving benefits to support their families. A little known provision in PRWORA imposes a lifetime ban on public assistance for convicted drug

[8] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 (1996).
[9] *Id.*
[10] *Id.*

felons.[11] Several states have opted out of this ban[12] and by doing so sacrificed spending TANF funds on convicted drug felons and their families; rather those states must spend their own money when servicing this population.[13]

Drug convicts face a larger challenge in reestablishing their lives without the option of public benefits. These women not only have a big strike against them in their job pursuit because of their criminal record, but also have to further struggle to attain a foundation of basic sustenance, because welfare excluded them from eligibility.

When public benefits do not provide a safety net, finding employment becomes critical. Seeking job without an reliable address, minimal clothing, and no food, poses a formidable task. This denial of benefits while meant to serve as a deterrent for low-income people not to engage in the drug economy,[14] actually functions as a means to drive people back into the underground economy to survive.[15]

C. *Criminal Records Constrict Work*

The challenge confronting women reentering and seeking jobs, is that it remains perfectly lawful for an employer to discriminate against an applicant based on her criminal record or for states to prohibit ex-felons from engaging in specific professions by denying them licenses to practice.[16] In many states, ex-felons may not hold jobs in childcare, health, beauty, or schools. Some states have specialized treatment by listing occupations that require state licensure and an applicant's criminal conviction has to receive review in connection with the application.[17]

---

[11] Stuart H. McCluer, PRWORA § 115: The Devastating Impact of a Little-Known Provision (Apr. 2001) (on file with author)
[12] Allard, supra note 5 at 3 (listing CT, DC, MI, NH, NY, OH, OK, OR, VT as the state opting out of the ban)
[13] *Id.* at 2-3.
[14] *Id.* at
[15] *Id.* at 6.
[16] Hirsch, supra note at 14
[17] Id. at 15.

Restrictions on licenses will vary from state to state but generally, most states address this issue statutorily.[18]

When an applicant applies for a job that does not require a license, she will encounter a similar problem when she approaches the private employer. Individual employers can easily discover the applicant's criminal history with simple research and reject them by relying on a reason other than the record to avoid discrimination liability.[19] Although legally, the employer may discriminate against applicants that have a criminal record, litigation strategies can arguably give the applicant more power to challenge the basis on which the employer based his decision. Although championed by some activists, litigation strategies fail to provide predictable, substantive change that is needed in this area of law to truly bring justice to these women.

III. Litigation Strategies that Challenge the Use of Criminal Records in the Job Application Process

A. *Title VII*

Title VII remains a primary litigation tool used by reentry advocates as a means to challenge the use of criminal records in employment decisions for people of color. Policy advocates like Sharon Dietrich, admit that the approach has suffered some set backs though the 1990's, but points to judicial interpretation as the reason for these set back. By applying the appropriate statute to the Title VII disparate impact analysis, such cases would enjoy more success. Yet she does think that the tools for filing successful claims presently exist, they just need to be applied correctly. Non profit organizations like the Legal Action center[20] also point to

[18] Id. at 16.
[19] Id. at 14.
[20] The legal Action Center is the only non-profit law and policy organization in the U.S. whose sole mission is to fight discrimination against people with histories of alcohol and drug dependencies, HIV/AIDS, or criminal records, and to advocate for sound public policy in those areas.

Title VII as a primary litigation approach to those seeking redress from discrimination based on the criminal record for people of color.[21]

Although some advocates can identify problems with this approach, they continue to insist that, filing such a claim may bring some justice to a wronged client. Unfortunately, this "glimmer of hope" no longer deserves propagation. Treatment of criminals in record disparate impact cases has changed dramatically from the successful claims of the 1970s.

1. Why Do We Have Title VII?

Congress enacted Title VII of the Civil Rights Act of 1964 to ameliorate employment discrimination based on, race, color, sex, and religion by reducing unnecessary barriers to employment.[22] In enacting Title VII as a matter of public policy, Congress concluded that job qualification, not race, or color should serve as the basis of an employer's employment decisions.[23] The statute not only against protects overt discrimination, but it also protects employees from unintentional discrimination under a "disparate impact" theory. Under the disparate impact theory, an employment practice may not seem discriminatory at first glance, but the problem lies in the employer applying the practice in a manner that ultimately has an exclusionary effect on applicants belonging to a protected class of people. If the employer cannot show that the practice relates to business necessity, then the practice violates Title VII.[24]

A business necessity constitutes an employment practice that remains essential to the safe and efficient operation of the business regardless of how it ultimately affects certain groups of people. A policy of not hiring convicted child molesters as teachers, would serve as an example

[21] Legal Action Center, Employment Discrimination and What to do About it: A Guide for Virginia Counselors of Individuals with Criminal Records or in Recovery from Alcohol and Drug Dependence (2002).
[22] Sharon M. Dietrich, Center for Law and Social Policy, *Criminal Record and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families* 21 (2002).
[23] *Id*.
[24] Griggs 431

of a business justified practice, because the possible harm to the children would supercede any claims of discrimination the plaintiff could raise.

Historically, plaintiffs successfully used Title VII to combat hiring practices that exclude applicants based on their criminal records. This approach relied on the fact that African-Americans and Latinos constitute the majority of individuals arrested and convicted in this country. Because of the high rate at which minorities enter into the criminal justice system, any policy that precludes hiring a person with a criminal record would affect people of color more than their white counterparts. Once the plaintiff established the discriminatory effect the policy has on African-American applicants, then the employer had burden to show "business necessity."

Continuing to rely on Title VII as a litigation boon that lies in wait for us, can no longer serve as an option. By looking at the development of Title VII as it pertains to criminal records, one can see how it no longer deserves the focus of our attention, because of the uncertainty that it promises plaintiffs.

2. Can Plaintiff Successfully Evoke Title VII Today to Protect them From Discrimination Based on Criminal Record

a. Pre-Ward's Cove*: Strong Foundation Against Discrimination*

In the 1970s, Title VII disparate impact claims enjoyed a great deal of success in combating discriminatory employment policies based on criminal records. The success in this area began with prohibiting the use of arrest records in employment decisions, and grew to include forbidding the use of conviction records.

Gregory v. Litton Systems, Inc.[25] provided a sound foundation for the protection applicants with criminal arrest records. In *Gregory*, the plaintiff successfully demonstrated that the defendant did not have a business justified employment practice. The plaintiff applied for

[25] Gregory v. Litton Systems, 316 F. Supp. 401 (1970).

and accepted a position as a sheet metal mechanic at Litton. The defendant was not aware of the plaintiff's arrest record. When the employer found out about the plaintiff's record, it withdrew its offer for employment. The court implied that the employer's justification for excluding applicants with arrest records is that they work less efficiently and are less honest than applicants without records. The plaintiff demonstrated that the policy of excluding applicants with arrests without convictions violated Title VII because it is foreseeable that blacks would be disproportionately affected by this prohibition despite the facial neutrality of the policy.[26]

In 1975, the 8th Circuit expanded the precedent set in *Gregory* by striking down an across-the board disqualification policy based on criminal convictions.[27] In *Green v. Missouri Pacific Railroad Company*[28], the plaintiff challenges Missouri Pacific Railroad Company's ("MoPac") absolute policy of refusing to consider an applicant for employment who has a conviction record as a violation of Title VII.[29] The plaintiff applied for employment. He disclosed that he had a conviction on his application and served a brief time in prison. The personnel officer disqualified him after reviewing his application based on the conviction. The court determined that the policy disqualified blacks at a substantially higher rate than whites within the general population from which the employees were drawn. Secondly, the court determined that the employer's policy failed to measure aptitude or ability; conversely, the policy was not job related and operated to exclude more Blacks than Whites under the business necessity standards. MoPac offered several business necessity reasons for the policy including, fear of cargo theft, handling of company funds, possible liability for people with known violent

[26] Because Blacks are arrests at higher rates than whites.
[27] Dietrich et al, Work Reform *supra* note 7 at 56
[28] Green v. Missouri Railroad Company, 523 F.2d 1290 (1975).
[29] *Id.* at 1298.

tendencies and, lack of moral character of applicants with criminal convictions.[30] The court determined that the employer's justifications were too broad and that it could find a reasonable alternative that did not result in a differential impact on Blacks. The court finally concluded that an employer's blanket policy of excluding applicants with conviction records has a disparate impact on blacks and therefore violates Title VII. When compared with *Gregory*, that case only forbade employment policies based on arrests records, *Green* took it many steps forward by forbidding any policy that allows an employer to discriminate based on a conviction. Convictions on a criminal record pose more potential employment problems than an arrest where no guilt was determined; therefore, by protecting this class of people, *Green* created a strong foundation for people reentering from prison.

After creating a solid, circuit wide foundation for Title VII disparate impact cases based on criminal convictions, a decade later, the Supreme Court shattered the foundation forged by the court throughout the 1970s in *Ward's Cove Packing Company v. Antonio* .[31] Since the Supreme Court determined that case, ex-felons have enjoyed very little success in bringing successful discrimination claims.

In *Ward's Cove Packing Company v. Antonio,* the plaintiffs were salmon cannery workers of Filipino and Alaska-native origin who brought a class action suit against the defendant cannery companies for disparate impact based on race. The employees performed the canning duties on a seasonal schedule. Workers received little pay for arduous work. Those workers who did not work in the canning department held what the company considered "skilled" jobs. The skilled jobs came with better pay and working conditions, and were occupied primarily by White people. The court determined that to present a viable cause of action (a

[30] Green, 523 F.2d at 1298.
[31] Ward's Cove Packing Co. Inc. v. Antonio, 490 U.S. 642 (1989).

prima facie case), the plaintiff had to show through statistics that the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market reflected one another. [32]

In *Ward's Cove,* the fact that few qualified nonwhites applied for the skilled jobs was an occurrence for which the court could not hold the employer responsible. Showing that racial disparity existed at the bottom line did not constitute enough evidence for the plaintiffs to successfully bring a Title VII disparate impact claim.

Following *Ward's Cove*, the same year, District Courts began dismantling the foundation of protection against employer discrimination for applicants with criminal convictions. Four months after the Supreme Court decided *Ward's Cove*, a Florida court rejected *Green* using a *Ward's Cove* analysis.[33] In the Florida case of *EEOC v. Carolina Freight Carriers Corp.,* the EEOC brought a case on behalf of a plaintiff for failure to promote based on the applicant's criminal record. The applicant possessed the right qualifications and the company recognized him as competent and reliable. The employer declined to hire him based on its policy against hiring ex-criminals. the plaintiff failed to establish its *prima facie* case because it neglected to use the appropriate statistical analysis introduced in *Ward's Cove*. The court went ahead and accepted the employer's justification that because drivers had to carry expensive cargo in expensive trucks and handle cash without supervision, the policy deserved deference by the court because it minimized potential losses to the company.[34]

b. Post Ward's Cove*: The Foundation Crumbles*

[32] *Ward's Cove*, 490 U.S. at 650.
[33] See Equal Empl. Opportunity Comm'n v. Carolina Freight Carriers Corp., 723 F. Supp. 734 (1989).
[34] Carolina Freight, 723 F. Supp. at 742.

Carolina Freight, served as the first of many cases employing *Ward's Cove* statistical standard to disparate impact challenges based on criminal records.[35] Within the past decade, many Title VII claims against employers who reject applicants based on criminal have not enjoyed success, despite Congress' attempt to undo the analysis established in *Ward's Cove*.

The Civil Rights Act of 1991 provided a legislative remedy to disparate impact law created by *Ward's Cove*.[36] It returned the disparate impact analysis back to its pre-Ward's Cove state by shifting the burden back to the employer to prove business necessity. However, the 1991 Act retained the statistical proof required to establish a plaintiff's prima face case. A plaintiff still needs to look at the racial composition of the qualified labor market versus the composition of the at-issue job. The few cases that have used disparate impact analysis to challenge employer policies, after the 1991 act, continue to face the same difficulty that confronted plaintiff's subjected to the *Ward's Cove* analysis.

The 1991 act does provide for an exception to using statistical proof to establish the plaintiff's prima face case. If one could argue that an employer's use of criminal record, functioned as one element of an generalized assessment of "moral fitness" for example, then a plaintiff could evoke the "bottom line" exception to establish her *prima facie* case and forgo presenting statistical analysis. To establish her prima facie case under the exception, the plaintiff could simply show that a evaluation policy evoking a combination of indivisible factors that constitute "moral fitness" results in less African-American employees. However, in most cases where employer rejects a woman of color based on her criminal conviction, the employer policy stands alone; therefore the exception would not apply in the cases currently at issue.

---

[35] *See* Williams v. Scott 1992 WL 229849 (N.D. Ill 1992), Lewis v. Alabama Dep't of Pub. Safety, 831 F. Supp. 824 (M.D. Ala. 1993).; Matthews v. Runyon, 860 F. Supp. 1347 (E.D. Wisc. 1994).; McCraven v. City of Chicago, 109 F. Supp. 935 (N.D. Ill. 2000).

[36] Civil Rights Act of 1991, 42 U.S.C. § 20002-2(k) (1991).

Although to some, the 1991 Act if applied correctly could make Title VII a more effective strategy, the EEOC guidelines hold the same latent promise. The Title VII guidelines established by the EEOC provide another means to strengthen the potential power of Title VII, however they too have done little to influence judicial interpretation of Title VII case law.

EEOC Guidelines: Helping to Strengthen Disparate Impact Cases?

As the administrative agency responsible for interpreting Title VII, the Equal Employment Opportunity Commission (EEOC) generated guidelines to assist "employers, labor organizations, employment agencies, and licensing and certification boards" to comply with requirements of Title VII.[37] According to the guidelines, blanket policies excluding job applicants from job considerations violate Title VII.[38] The EEOC bases its interpretation on the fact that minorities face convictions far more frequently than Whites do.[39] Under the EEOC guidelines, if an employer discriminates against a person with a criminal record, the crime must relate to the nature of the job in question to justify rejecting an applicant based on her record.[40] Despite the EEOC's strong guidelines, courts and employers rarely follow them due to the precedent set by the higher courts. The impact of this on women reentering is a lack of support by the court to follow guidelines that promote their interests. For a potential plaintiff one to rely on the guidelines as the authority for a Title VII claim, would be fruitless.

The Supreme Court bears a significant amount of responsibility for the impotence of the EEOC guidelines. The following cases illustrate the court's tendency to acknowledge the guidelines and then arrive at a conclusion that opposes them. This behavior sets the trend for the

[37] 29 CFR 1607.1
[38] EEOC Compliance Manual § 604 App. (2002).
[39] *See Id.* (stating that the Commission relies on statistics that show that Blacks or Hispanics are convicted at higher rates then whites).
[40] *Id.*

lower courts. If the highest court in the land does not hold the guidelines in high esteem, the likelihood that lower courts will rely on them remains low.

Dewey v. Reynolds Metals Co. provides an example of the court choosing not to use the guidelines when presented with a choice.[41] The plaintiff filed a Title VII claim against his employer, alleging discrimination based on religious practices.[42] His religious practices prevented the plaintiff from working on Sundays and he refused to find a replacement as required by the collective bargaining agreement between the employer and the employee union. The EEOC guidelines governing at the time of the plaintiff's discharge said: 1) that the employer is free to establish a work week that applies equally to all employees regardless of their religious observances and 2) an employee that believes that the work week may conflict with her religious practices may not make any alterations in the schedule to accommodate her religious practices (unless the employer establishes a work week that *intentionally* conflicts with the plaintiff's religious beliefs).[43] The EEOC then redrafted the guidelines and omitted these two provisions. Although the employer dismissed the plaintiff prior to the implementation of the new guidelines, the court applied them retroactively; therefore, denying the plaintiff a viable claim. The court reasoned that the new guidelines were unreasonable because they failed to contain the element of "discriminatory intent" by the employer, therefore the plaintiff should not succeed under such unreasonable guidelines.[44]

A second example of the court's dismissal of EEOC's guidelines lies in the case of *General Electric Co. v. Gilbert*.[45] The plaintiffs, pregnant women, initiated a sex-based Title VII suit against their employer for its failure to cover pregnancy as a temporary disability under their

[41] Dewey v. Reynolds Metals Co., 429 F.2d 324 (E.D. Wisc. 1971).
[42] Dewey, 429 F.2d at 330.
[43] *Id.* at 337.
[44] *Id.* at 330.
[45] General Electric Co. v. Gilbert, 129 U.S. 125 (1976).

disability policy. The plaintiffs pointed to the EEOC guidelines as authority that the legislature intended pregnancy to fall under Title VII's protection. The Court acknowledged that the guidelines should receive deference in interpreting the scope of Title VII; however, Congress did not give the guidelines the force of law as it had done for other administrative guidelines. Because the guidelines lacked force, the Court did not feel compelled to follow them because they failed to conform to the Court's determination of the legislature's intent behind the statute.[46] Once again, the court looked at the guidelines, determined they did not conform to the result it deemed appropriate and subordinated them to other reasoning.

These cases occurred early in the history of Title VII law. Both *Gilbert* and *Reynolds* set a standard that crippled the standing of EEOC guidelines in the court's interpretation of Title VII. The cases explicitly rejected the guidelines in favor of what the court considered more credible reasoning. With such a subordinated status, one would have difficultly making a persuasive argument that the court should simply follow the guidelines when confronted with a Title VII issue. Reversing 30 years of precedent that subordinated the guidelines through litigation seems highly unlikely.

3. Negligent Hire: The Other Side of Title VII

Should employers hire people with criminal records, they face the possibility of a customer filing a negligent hire claim against them if the employee engaged in some unlawful behavior against a customer. As the party with the most financial resources, businesses are often the target of these claims because such an employee has no resources to offer to a customer who seeks redress. Negligent hire claims can promise a strong case against the employer and has

[46] Gilbert, 129 U.S. at 129.

become a popular means of redress for customers wronged by employees, who upon discovery, have criminal records.[47]

To successfully assert a negligent hire case, the plaintiff must show 1) that the employer owed the "plaintiff a duty of reasonable care, 2) the employer breached that duty and 3) the breach served as the cause of harm that affected the plaintiff.[48] The standard by which a claim is ultimately determined is whether the employer could have reasonably foreseen the harm caused by the employee toward the plaintiff.[49] Businesses have employed various strategies to protect themselves from liability including, using criminal record searches and background checks However, creating a blanket policy of exclusion based on criminal records, remains the easiest way to avoid liability (even if it does contradict the EEOC guidelines!).

Background checks provide a reasonable means for employers to discover an employees criminal history. A court can determine whether the presence of certain criminal violations on an applicants record creates foreseeability of customer harm. An Ohio court provides an example of how foreseeability plays into negligent hire cases.

The court in *Stephens v. A-Able Rents Co*. imputed liability upon the employer for an attempted rape of one of its customers conducted by one of its employees.[50] Because of the employee's long history of drug use, the court determined that the employer should not have allowed the employee in customer's homes.[51] The employer's pre-employment investigation should have discovered the drug use, and because it failed to conduct such an investigation the court imputed liability upon the employer. [52]

---

[47] Leavitt *supra* note 6 at 1301.
[48] *Id.*
[49] *Id.*
[50] Stephens v. A-Able Rents Co., 654 NE.2d 1315 (Ohio App. 8 Dist. 1995).
[51] Stephens, 654 N.E.2d at 1319.
[52] *Id.*

Unfortunately the threat of negligent hire cases presents a dilemma for employers, if one decides to hire an applicant with a criminal record, it does so knowing that it must operate in a state of constant anxiety that the employee will invite a negligent hire suit. On the other hand, if the employer imposes a blanket policy against hiring these applicants it makes itself vulnerable to Title VII claims. In the end, making one's business vulnerable to a Title VII claim becomes more attractive than defending against a possible negligent hire case. Although negligent hire and Title VII remain entwined in a struggle, Litigation claims under the American with Disabilities Act ("ADA") do not present the same struggle with a direct opponent. However, this strategy provides little hope of serving as an alternate litigation strategy to Title VII because it is limited, application

B. Possible Relief for Drug Convicts Under the ADA

The ADA provides low-income women of color convicted of drug offenses with another possible means of redress for discrimination based on their criminal records. This act forbids an employer from rejecting an applicant or employee based on the employer regarding the individual as having an impairment, and a past drug addiction qualifies an impairment. In this case, when the applicant discloses on the application that she has a felony, more likely than not, the application will require her to explain.[53] In explaining her conviction, the applicant may disclose that she had a drug addiction in the past that contributed to her unlawful behavior. In such a situation, the employer must not rely on her conviction as the justification for not hiring her, rather, the applicant's drug addiction must provide the reason why the employer denies the applicant the employment opportunity.

The plaintiff must first establish the prima facie case by showing that she applied for a position for which she was qualified, but the employer rejected her; this provides the initial

[53] Interview with Denise, Participant of Virginia Cares Program, in Roanoke, Va. (Apr. 5, 2003).

inference of discrimination under the ADA. The employer must then present a legitimate, nondiscriminatory reason for not selecting the applicant. The plaintiff may then challenge this reason as a pretext (the drug addiction would serve as the basis of the pretext argument in the situation of a drug conviction.). Upon the presentation of these arguments, the trier of fact must then sort out this information and determine if the employer actually did rely on the drug addiction as the basis for not hiring the applicant, hence violating the ADA.

Hernandez v. Hughes Missiles Systems Co. provides an example of the potential usefulness of the ADA as a challenge to criminal record policies.[54] In *Hernandez*, the court held that an employer violates the ADA when it fails to hire an applicant that has a documented history of drug abuse from which it has recovered.[55]

The plaintiff, Hernandez applied for a job with the defendant, Hughes. Hernandez had previously worked for the defendant for 25 years, however he left the company upon its recommendation when he tested positive during a drug test. When Hernandez returned to apply for a job at Hughes two years later, the defendant reviewed his application, and referred Hernandez' past work records. Upon review of the records, the company chose not to hire him based on his past drug addiction. Because Hernandez suffered from drug addition when he left Hughes the first time, the drug test recorded the fact that he had an impairment. Although Hernandez no longer used drugs, the fact that Hughes viewed his record and determined from that, it would not hire him, constituted discrimination under the ADA.

[54] Hernandez v. Hughes Missiles Systems Co., 298 F.3d 1030 (9th Cir. 2002); *See also* Gillen v. Fallon Ambulance Serv, Inc., 283 F.3d 11 (2002). The plaintiff applied for a position as an Emergency Medical Technician ("EMT"). Because she only had one functioning arm, the employer hesitated to hire her because the job required a lot of lifting. She performed physical tests and passed the first doctor's exam but failed the second doctor's evaluation who made an assessment solely based on the first doctor's description of the plaintiff's impairment. The second doctor unlawfully relied on a unlawful stereotype in rejecting the plaintiff for a position under the ADA.

[55] Hernandez, 298 F.3d at 1036.

Whether one can show that a criminal record or admission of addiction contains enough information to function as an indicator of a past addiction or impairment remains the primary issue in this case. Certain drug felonies may reveal such an addiction, but others may not. Secondly, if we allow the presence of drug convictions to stand as the impetus for this claim, this may be abused by those arguing that their possession charge resulted from personal addiction when, an ambitious enterprise served as the real reason for the possession of drugs.

Many courts have shown a refusal to hold an employer liable under the ADA for not hiring an individual with a criminal record who points to an impairment as the cause of a crime on record, because the unlawfulness constitutes the reason for the rejection, not the impairment behind it. However, if a test case could reveal that the fear of former impairment served as the basis of rejection and not the criminal record, one may have a chance of succeeding in this type of case.

Admittedly, this approach provides very little hope as the basis for a widespread litigation strategy, but it should receive consideration. The plaintiff can establish the elements needed for a prima facie case and the issue of whether the criminal record or admission of addiction served as the basis for rejection remains one for the jury.

An ADA claim presents an uncertain path for women with drug offenses on their criminal records and those who disclose former addiction on their application. However, similar problems arise under the ADA as they do with Title VII when it comes to the employer offering a justification for the rejection; the plaintiff will have difficulty proving the true reason for the employer not hiring her. Presumably, most employers will rely on criminal records as the justification for the refusal to hire, but if a proper test case can clearly show pretext, then a claim under this theory could see a successful resolution.

IV. Legislation

Legislation serves as the strongest and most effective way to protect applicants from hiring discrimination. States have taken several approaches to confronting the policy objective of employing ex-convicts while respecting the public's demand for security. A few states have implemented legislation that prevents both public and private employers from discriminating against applicants based on their criminal record, period. Other states have statutes that specify what types of convictions an employer may ask about, and others restrict discrimination in the attainment of state jobs and state issued licenses.[56] Each statute reflects the climate of the state in which it presides, however, generally states have recognized the importance of employment in the successful reentry ex-convicts into society.

Currently, Wisconsin has the most aggressive discrimination statute in place that prevents employer discrimination against applicants with criminal conviction records.[57] In Wisconsin, the statute forbids public or private employers from discriminating against an applicant or employee based on a conviction.[58] To further protect such an applicant's opportunity for redress, the legislature took the further step of making such person a part of a legally protected class.[59] This designation places ex-felons on equal footing with people discriminated against based on their race or gender in the employment context. Although the legislature made a definitive step to quash such discrimination, the courts fashioned an exception judicially to the rule that allows an employer to discriminate against an applicant or employee if the crime on her record is "substantially related" to the nature of the job for which she is applying. For example, a

[56] *See* Leavitt, *supra* note 7 (discussing state responses to the need for rehabilitative employment opportunities)
[57] Thomas M. Hruz, "The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records" 85 Marq. L. Rev. 779, 783 (2002); Hawaii is the only other state to offer applicants such a strong level of protection similar to that of the Wisconsin statute.
[58] *Id.*
[59] *Id.* at 784.

Wisconsin court determined that a drug conviction did not preclude an employee from stocking shelves at Wal-Mart. The crime did not "substantially relate" to the job because although she worked near drugs, banning her from working in a store where she had the opportunity to "use and distribute drugs" would set undesirable precedent and exclude people with criminal records from whole categories of employment.

In *Moore v. Milwaukee Board of School Directors*, the plaintiff applied for a position as a boiler attendant in an elementary school. The plaintiff had a felony conviction that stemmed from a accidental scalding of a child. The court determined that the defendant employer could not reject him based on his record because the circumstances of his conviction did not "substantially relate" to the job as boiler attendant. The plaintiff's periodic contact with children did not raise the level of concern for further criminal conduct.

Most states place more conditions on their statutory prohibition against discrimination based on criminal records. Massachusetts prohibits an employer from requesting any information about, arrests that did not result in a conviction, a first conviction that falls under a list of misdemeanors, or any misdemeanor conviction that occurred five or more years prior to the employment application. Massachusetts draws a very clear line between felonies and misdemeanors and conviction and arrest records, whereas Wisconsin does not.. Although this statute seems promising, the state courts have rendered the statute impotent by allowing inquiries in the a person's criminal history by third parties (such as an investigation service). Such a service can bypass the restriction imposed on employers from directly requesting and reviewing the information themselves. This type of legislation does little to help women with felony convictions because it primarily deals with misdemeanors and offers little relief for those with felonies and even if it did deal with felonies, the court has stripped it of any power.

Many states do not attempt to regulate the employment relationship between individuals and private employers, opting to only regulate jobs over which they preside. States may implement specific steps its own employers may take in determining the weight the conviction bears on the job. Such a policy resembles the "substantially related" standard embraced by other states, only states limit its effect to its own practices. This strategy may serve as a positive step in the inclusion of ex-convicts in *state jobs* and send a positive message to the public that the state maintains a commitment to facilitating the rehabilitation of ex-felons, however it does very little in the overall scheme of employment for reentrants. Not all women coming out of prison will find state jobs, nor will they find state jobs in areas that will facilitate professional growth, the private sector may hold the most promise for such goals. Although different legislative strategies help women with felony convictions in varying degrees, legislation continues to hold the most promise for developing laws that support women's struggle to reestablish their lives. Legislation gives states the opportunity to meld policy interests of ex-felons, employers and the public, into a scheme that promote the needs of all the identified interests.

V. But What are Some Solutions?

A. Less Litigation

From looking at the evolution of Title VII discrimination claims based on criminal record cases, one can see that even a claim with strong precedent can become unraveled with the passage of one far reaching case. Title VII cases in this area have enjoyed very little success in the 1990s. Despite some support from the 1991 Act and the EEOC guidelines, Title VII remains an often suggested, rarely successful litigation strategy because the court has rendered these two tools impotent, which were originally created to bolster disparate impact claims.

Using the ADA as a strategy to challenge the use of criminal record for women with drug offenses remains largely unexplored, but looks unlikely to bring widespread success. Theoretically, ADA litigation provides a sound model however, only if activists can bring a specifically selected test case to establish sound precedent. Proof problems that initially challenge this litigation could see successful resolution through the right test cases;

One must remember the changing landscape of litigation. What can serve as good law today may no be so several years down the road. For this reason we must prioritize establishing long term goals that include welfare reform and specific legislation addressing criminal records and employment.

B. Encourage Employers and Reduce Liability

Since negligent hire suits pose the largest barrier for employers engaging in this debate. Capping potential awards for negligent hire claims may not completely dissolve employer's concerns but can ameliorate them. Capping awards creates a policy climate that recognizes the fears of employers while acknowledging the desires of the larger community to see this population succeed by sending a message that employers should not endure punishment for investing in members of our community who have made mistakes.

Although attorneys may resist the idea of placing a cap on damages, I remind them of our larger community and the vow they took to serve it. Participating in a system that punishes employers for hiring struggling women, besmirches the reputation of the profession and provides functions as an impediment to a the growth of the community.

In addition to capping damages, providing employers with incentives to hire women upon reentry by using tax incentives coupled with state insurance programs for employers employing ex-felons. Having insurance that protects the employer should he get sued over something

carried out by his ex-felon employee, gives the employer a sense of economic security and allows him to use his resources to assist members of the community with jobs without feeling like such an act may jeopardize the stability of his business.

C. Remove Ban From Welfare

Because women reentering will most likely need some financial support in their struggle to start a new, the federal government should understand and support their need. One cannot get a job if she has not food to eat or no home in which to live. The best way to acknowledge the need is to eliminate barriers in PRWORA that make reentry more difficult by either imposing work requirements that remain insensitive to the employment challenges that dog women with criminal records or harshly punishing ex-drug felons in such a manner as to ensure recidivism. Unfortunately, removing barriers in public assistance will not occur within the reign of the current administration. Therefore, the states have a responsibility to opt out of the ban granting TANF funds to re-entrants with drug convictions and provide these women with a foundation on which to stand, so they do not have to rely on the underground economies to survive. The ban attempted to serve as a deterrent, to keep people away from drug sales and use, but it backfired. The ban failed as a deterrent and now it may be partially responsible for why some people have to return to prison; because they have no money to survive and have to get it the best they know how, which may entail illegal activity.

Removing welfare barriers provides an indirect approach to tackling employment hurdles, but provides some hope that states will give their residents chance at rebuilding their lives. Litigation on the other hand, although looked upon as an effective approach, in reality offers very little hope for dismantling employment barriers.

D. Strengthen Legislation

For all women, regardless of the offense Legislation provides the strongest tool with which to deal with this employment barriers to reentry. States have developed various ways to confront the problem, but legislation that the court cannot easily weaken serves as the strongest tool. Clearly, states have to consider all of the policy implications of any legislation they enact, which includes the interest of the employer and the potential employees.

Although Wisconsin provides the most protection to applicants with criminal records, I do not agree that it employs the best overall method. The "substantially related" standard provides a strong model because it gives the employer some control in whether to hire an applicant and gives the applicant some options that would not exist if an across-the board ban existed. However, to give this standard any teeth it must become a statutory standard, immune from overt meddling from the court and apply to both arrests and convictions. States should not apply the substantial relations standard loosely; an employer denying an applicant a job on this basis would have to narrowly tailor to the crime that is named on her record to the job. For example, a convicted drug offender, may not be considered for a job as a Nurse initially, because of her handling of drugs, but perhaps she can be a nurse's aid, a position that may not absolutely require handling drugs but only being around them.

Additionally, such a standard should only apply for a fixed number of years as a probationary period, and if the individual proves herself reliable during that period, she would no longer be legally bound to inform her employer of her past conviction.

VI. Conclusion

> Yes, I made a mistake in life, not one maybe two, but I've made *mistakes* in my life. You can't hold that against me for the rest of my life. Now here I am, I done changed, *I* know I've changed, I mean. you don't know me so you can't know if I've changed, all you know is what's on a piece of paper. Give me a chance to work, you know? That's how it is because you have a lot of business people in the white house and different

> places doing way more than I've done. They're crazy you know? really… cause they haven't got caught.[60]

Despite the myriad of reasons why women enter prison, once they complete their sentence their success remains critical to all of us. As a part of a larger community, each of us have a responsibility to ensure the success of all of our members because their failure affects each and every one of us, whether its through increased crime, more people with sustained dependence on public assistance, or kids who as a result of unstable homes have problems. We all have an investment in the success of these women.

Beyond our recognition as members of a larger community with ties to one another, we must remember the moral ground on which many of us stand. Judgment of others must not rest in the hearts and minds of women and men. We must work forgivingly for those who wish to make right bad judgments they relied on in the past. Banning drug convicts from public assistance, denying ambitious ex-felons job opportunities serves to judge and further condemn people who, for the most part have suffered for their mistakes. We have a responsibility to reevaluate some of the policies in place that impede women's' success and provide non-punitive solutions while also looking at strategies that we can begin employing now that will aid us in building a stronger community in which we can all flourish. As Denise expressed in our interview, "If God can forgive me for what I've done, why can't man on earth forgive me?" Hard working women like Ellen and Denise deserve the opportunity for success.

[60] Interview with Denise, Participant in the Virginia Cares Program, in Roanoke, VA. (Apr. 3, 2003).