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Choose Your Expert Wisely: Fourth Circuit Rejects EEOC's Choice On Background Checks

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Fans of the Indiana Jones series will remember the scene near the end of the *Last Crusade* where our hero is looking over a multitude of chalices to select the one true grail, and the ancient knight beside him warns: "*Choose wisely*." When the bad guy pushes his way forward to pick out a pretty – but ultimately incorrect – cup, we find out the grisly consequences of *choosing poorly*. The knight's admonition to "choose wisely" not only is good advice for selecting grails, but also applies to selecting experts. Unfortunately, the EEOC apparently ignored this advice when it selected an expert in the recent Fourth Circuit Court of Appeals case of *EEOC v. Freeman*, Fourth Circuit Case No. 13-2365. The case involved a company that provides services for expositions and conventions nationwide. As do many employers, the company conducted background checks on job applicants' criminal histories, as well as credit checks for prospective employees who would be responsible for handling money. After an employee complained he had been denied a position because of one of the background checks, the EEOC filed suit, alleging that the company's background checks had an unlawful disparate impact on minorities. To support its position, the EEOC hired an "industrial/organizational psychologist" to analyze the company's background check logs. The company dutifully produced documents for thousands of potential applicants for analysis by the EEOC's expert. The expert, however, conveniently omitted hundreds of these individuals from the database he analyzed. As an example, the company conducted more than 1,500 criminal investigations and more than 300 credit investigations in a three-year span. But, the expert failed to consider any of this information. He also omitted data from half of the company's branch offices. When the company brought the deficiencies in the expert's findings to the district court's attention, the court excluded the expert, finding that his opinion was "rife with analytical errors," and "completely unreliable." For good measure, the court added that the defects were "mind-boggling." On appeal, the Fourth Circuit agreed, finding the expert's work to be defective and that the district court properly excluded the expert. Federal courts act as gatekeepers for scientific evidence. In other words, admitting an expert's opinion is normally a function of whether the opinion rests on reliable information, is relevant, and would help the jury. A fancy degree and "expert" title" aren't enough. Employers facing an "expert" on the other side of a lawsuit – be it the EEOC, a class action or even a single plaintiff case – need a healthy dose of skepticisim. With your lawyers' assistance, every aspect of that expert's work should be scrutinized. Never assume that expert's work is sound; have your own expert review it. Additionally, hire someone qualified. It's hard to understand why someone analyzing the disproportionate effects of background checks wouldn't, in fact, be qualified as a *number-cruncher* (*i.e.,* an accountant). In this case, the

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“industrial/organizational psychologist” seems an ill fit (I imagine counseling a factory would require an enormous couch . . ., but it certainly doesn’t sound like someone who primarily deals with math.) Employers need not be intimidated by experts, regardless of who hires them – including the EEOC. Skepticism, hard work and good lawyering can expose a *poor choice* – as exemplified by this case where the employer successfully excluded the EEOC’s expert.