



# ACLU

AMERICAN CIVIL LIBERTIES UNION  
of MICHIGAN

American Civil  
Liberties Union

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Fund of Michigan

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December 22, 2009

Joe Wood, District Market Manager  
5859 28<sup>th</sup> Street  
Grand Rapids, MI 49546

Karen Boyer, Manager  
7000 East Michigan Ave  
Saline, MI 48176

Re: Concerns about Possible Illegal Hiring Practices at Wal-Mart

Dear Mr. Wood and Ms. Boyer:

The American Civil Liberties Union of Michigan has received information that applicants at Wal-Mart's new store in Pittsfield Township with felony convictions are automatically excluded from obtaining a job -- no matter how old the conviction or whether the conviction is for a minor crime with no connection to the job that the applicant seeks. If this information is correct, it raises significant questions of illegality under Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000e et seq. As a result, we are writing to you for clarification of Wal-Mart's hiring practices. We hope that you can either correct any misunderstanding on our part regarding the contents of Wal-Mart's hiring policy or, in the alternative, work with us to amend the policy to ensure that it does not violate Title VII.

**Federal Law Prohibits Employment Practices that Either on Their Face or in  
Practice Discriminate Against Minorities**

It is unlawful for an employer to refuse to hire an employee based on her race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2 (1991). This includes practices that are facially neutral with respect to race, but have a "disparate impact" on minority applicants. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Even if a hiring policy never mentions race, it may still be illegal under federal law if it excludes a disproportionate percentage of minority applicants and cannot be justified by business necessity.

## **The Automatic Exclusion of all Applicants with a Felony Conviction Unlawfully Discriminates Against Minorities**

Although the automatic exclusion of all applicants with a felony conviction record is facially neutral with respect to race, federal administrative agencies and courts have made clear that this practice unlawfully discriminates against minorities in violation of Title VII. Relying on the numerous studies that reveal African American and Hispanic individuals (1) are convicted at rates disproportionately greater than their representation in the population and (2) are much more likely to be convicted than white applicants, the United States Equal Employment Opportunity Commission (EEOC)<sup>1</sup> has repeatedly held that “an employer’s policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Black and Hispanics.” EEOC Compliance Manual § 604 App (June 2006); *see, e.g.*, MARC MAUER, RACE TO INCARCERATE 124-26 (1999). Significantly, the EEOC has also emphasized that there is no business necessity that can justify the disparate impact that stems from such an absolute bar to employment. EEOC Compliance Manual § 604 App (June 2006). The courts have also reached a similar conclusion. As explained by the Eighth Circuit United States Court of Appeals,

[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense[] in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.

*Green v. Missouri Pac. R.R. Co.y*, 523 F.2d 1290 (8<sup>th</sup> Cir. 1975); *see also Carter v. Gallagher*, 337 F.Supp. 626 (D. Minn. 1971) *aff’d in relevant part*, 452 F.2d 315 (8<sup>th</sup> Cir. 1971) *cert den* 406 U.S. 950 (1972).

### **If Wal-Mart’s Hiring Policy Automatically Prohibits all Applicants with a Felony Conviction from Obtaining a Job, then it Violates Federal Anti-Discrimination Law**

According to the information that we have received thus far, it appears that the Wal-Mart in Pittsfield Township is using a hiring practice that is functionally identical to those which have routinely been held to be unlawful under Title VII. It is clear that a policy which excludes all applicants convicted of a criminal offense would have a racially disparate impact on African Americans living in Pittsfield Township: 60% of prisoners who return to Washtenaw County are African American, as compared to 37% who are white. Michigan Prison ReEntry Initiative, *Public Education Presentation*, <http://www.michpri.com/index.php?page=test>. Moreover, an absolute ban cannot be justified by any business necessity. In and of itself, a single prior felony

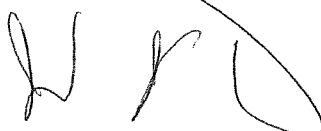
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<sup>1</sup> The EEOC is the federal agency responsible for enforcing federal anti-discrimination laws, including Title VII.

conviction simply does not render an individual unfit for employment irrespective of the nature of the offense, the time that has passed since the conviction and the nature of the job sought. EEOC Compliance Manual § 604 App (June 2006); *cf. Kindem v. City of Alameda*, 502 F.Supp. 1108 (D. Cal.1980). Indeed, the United States Supreme Court has explicitly recognized that the sole fact that a person was convicted does not destroy that person's reputation or good character. *Schwartz v. Board of New Mexico*, 353 U.S. 232, 243 (1957).

As we stated at the outset, we have been unable to independently verify Wal-Mart's hiring practices. If the reports we have received inaccurately describe your policy, we would appreciate any clarification that you could provide. Alternatively, if Wal-Mart is automatically excluding all applicants with a felony conviction, we would like to work with you to amend your policy so that it comports with federal anti-discrimination laws. Please contact staff attorney Jessie Rossman after you have had the opportunity to review this letter. We look forward to hearing from you.

Very truly yours,



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