**DEMAND LETTER –**

**FIRING EXISTING WORKER/EVALUATING PERSON WITH CONVICTIONS**

**FCRA VIOLATION/LACK OF PRE-ADVERSE ACTION NOTICE**

DATE

APPROPRIATE EMPLOYER REPRESENTATIVE

EMPLOYER’S ADDRESS

Re: CLIENT

Dear EMPLOYER:

CLIENT has sought my assistance regarding his recent termination by EMPLOYER. Despite working with EMPLOYER for six months without problem and previously for two years without problem, Mr. CLIENT was told that he could not work with EMPLOYER because of his decade old criminal record. I am writing to request that you reinstate Mr. CLIENT to his position immediately.

Mr. CLIENT most recently worked for EMPLOYER as a maintenance technician from December 2011 through June 2012, at the WORKSITE. Previously, Mr. CLIENT worked with EMPLOYER in from 2003-2005 at PREVIOUS WORKSITE. During both of those time periods, Mr. CLIENT worked without any serious disciplinary problems. Indeed, that he was rehired in 2011 shows that EMPLOYER thought that he was a good employee during his first stint with EMPLOYER. His manager in 2012 recently complimented him by telling Mr. CLIENT that he was one of the best maintenance techs that he had ever seen.

When Mr. CLIENT was hired in December 2011, a pre-employment background screening was prepared by SCREENER on behalf of EMPLOYER. Mr. CLIENT was hired at that point and completed his 90 day probationary period without incident.

As a part of the onsite tech application process, EMPLOYER ran another background check on Mr. CLIENT. Shortly after this background check was conducted, Mr. CLIENT was called into a meeting with a regional manager and his manager. During this meeting, Mr. MANAGER told my client that he could no longer work at EMPLOYER because had a felony on his criminal record. Mr. MANAGER then gave Mr. CLIENT the SCREENER’s phone number and told him to call SCREENER if he wanted a copy of his background report. Mr. MANAGER did not give my client a copy of his background report nor did he tell my client that he could clear up any inaccuracies on the report. Mr. MANAGER did not give my client an opportunity to explain his criminal record in any way.

Mr. CLIENT called SCREENER and received a copy of his criminal background report a week later. His report included offenses that had been expunged from his record. The only conviction on Mr. CLIENT’ record and the only conviction that Mr. CLIENT has is an open lewdness violation from 2001, a 3rd degree misdemeanor.

Mr. CLIENT is no dangerous lifetime criminal—he good person who made a small mistake in 2001 and received a conviction for a minor crime. What more, Mr. CLIENT made this mistake prior to starting work with EMPLOYER in 2003. From 2003 through 2005, Mr. CLIENT worked without problem for EMPLOYER. When he filled out his application in 2011, he was honest about his criminal record. He was given work and was highly praised by his manager. EMPLOYER was rewarded with a hard worker who intended to stay with the company for many years. His excellent work experience and solid record with your company should belie any concerns that you may have about his prior conviction.

**TITLE VII VIOLATION**

In April 2012, the U.S. Equal Employment Opportunity Commission (EEOC) released a new guidance on employers’ consideration of arrest and conviction records under Title VII, the federal law prohibiting race discrimination. This guidance, which is applicable in this case, is available at: <http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm> .

The EEOC guidance summarizes the law to require an employer “to link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.” Guidance at 14. It suggests that for employers to properly evaluate convictions, they should look at the following factors:

1. The nature of the crime;
2. The time elapsed; and
3. The nature of the job.

If the employer is inclined to reject an applicant after assessing those factors, it should then provide an individualized assessment of the person’s circumstances. Guidance at 14.

One of the examples given by the Guidance of a Title VII violation is where an employer taking over a business fires an existing long-term employee with no performance issues when it learns of his criminal record when conducting background checks of the workforce. The Guidance indicates that “[t]he employer’s conclusion that [the worker’s] guilty plea demonstrates that he poses an elevated risk of dishonesty is not factually based given [the worker’s] history of trustworthiness in the same job.” Guidance at 20 (Example 8). EEOC’s example is comparable to the scenario in this case.

In looking at the three factors, we believe they weigh in favor of Mr. CLIENT being retained despite his conviction. Most notably, Mr. CLIENT’s record contains only one conviction—an open lewdness violation from 2001, over 12 years ago.[[1]](#footnote-1) This was an isolated incident and a very minor crime. It does not reflect on Mr. CLIENT hard work since that time. Mr. CLIENT also has a long and very positive work history with your company since that time, including the time period from December through June 2012. This shows that it is not a risk of any kind to hire him. In fact, a worker with so much experience and knowledge of your company is exactly who you want to hire.

**FCRA VIOLATION**

In addition to violating Title VII, EMPLOYER has also violated the Fair Credit Reporting Act, 5 U.S.C. § 1681 et seq (“FCRA”). Under section 615(a) of the FCRA, an employer that takes adverse action against an employee based on the information contained within a background report is required to provide the employee with a meaningful opportunity to review the criminal background report and correct any errors. This requires that the employer provide the employee with the report *before* any adverse action is take and give the employee time to make any corrections *before* any adverse action is taken.

In the case of Mr. CLIENT, EMPLOYER terminated Mr. CLIENT without any opportunity to review his report and correct the errors on it. Mr. CLIENT in fact tried to correct the record by submitting a copy of his criminal record to human resources, but his updated record was ignored. Even if it had been taken into consideration, it was taken into consideration *after* he was already terminated.

In light of the aforementioned violations of Title VII and the FCRA, we ask that you immediately reinstate Mr. CLIENT to a job with EMPLOYER and provide him with full back pay for the time that he was not working with your company. If you fail to reinstate Mr. CLIENT by DEADLINE, I will discuss with him the possibility of filing a charge of discrimination and a FCRA complaint against you organization.

If you would like to discuss this matter further, please contact me at PHONE or EMAIL.

Very truly yours,

ATTORNEY

cc: CLIENT

1. In footnote 118, the Guidance references several social science studies indicating that the risk of recidivism decreases over time and that, after around 7 years, the risk of a new offense approximates that of a person who has never been arrested. [↑](#footnote-ref-1)