

# INVESTIGATING A GED AS A CONDITION OF PROBATION: PIMA COUNTY SUPERIOR COURT

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*Pima County Superior Court judges have broad discretion to assign probation-eligible people special conditions of probation. This Note examines one of those special conditions: attaining a GED. Furthermore, this Note discusses the biases of employers against employee-applicants with criminal records and the consequences that result from those biases. Additionally, this Note discusses some of the factors that Pima County Superior Court judges consider to determine whether they will issue a GED-attainment condition to a probation-eligible person. Finally, this Note advocates for the local employer community to provide employment opportunities to people issued a GED-attainment condition not only to make this GED-condition practice worthwhile but also to dispel any biases that employers may have against people with criminal records.*

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## INTRODUCTION

A GED-attainment condition is not a traditional or familiar condition of probation, but it could easily be assigned to anyone serving a probation sentence in Arizona.<sup>1</sup> Judges assign this condition under the “Special Requirements” section of the standard probation form that every superior court in Arizona uses.<sup>2</sup> Specifically, under this section, there is a blank space where judges can write in any special conditions of probation, such as a GED-attainment condition, that they deem appropriate for probationers.<sup>3</sup> Only judges (and not probation officers) possess the authority to assign attaining a GED as a condition of probation; however, probation officers may *encourage* probationers to attain a GED or submit a petition asking a judge to consider ordering this as a condition of probation.<sup>4</sup> The authority to assign GED attainment as a condition of probation is completely discretionary, but a judge may never delegate that authority to a probation officer.<sup>5</sup> No guidelines exist to assist judges in determining who are the appropriate candidates for the GED-attainment condition. Thus, the decision to do so depends entirely on the factors that each judge deems important to consider.<sup>6</sup> Under such circumstances, “it really depends on the personality of each bench.”<sup>7</sup>

No court in Arizona has issued any limits on the authority of judges to assign this condition. Courts in Florida, in particular, have been the most vocal in establishing restrictions and guidelines for their judges.<sup>8</sup> For example, Florida judges may only require probationers to make a good-faith effort to pursue a GED; that is, they may not require probationers to actually obtain one.<sup>9</sup> Moreover, in Florida, failing to successfully pass the GED exam because of an intellectual inability will never be enough to constitute willful and substantial noncompliance with the GED condition.<sup>10</sup> In addition, a third court in Florida (on two separate occasions) held that a GED condition will be invalidated if it is not reasonably related to a probationer’s crime and rehabilitation or if compliance would be impossible or highly unlikely.<sup>11</sup>

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1. Interview with David F. Sanders, Chief Probation Officer, Adult Probation Dep’t, in Tucson, Ariz. (Sept. 18, 2017).

2. AZ. CODE OF JUD. ADMIN. § 6-207 app. A.

3. *Id.*

4. Interview with David F. Sanders, *supra* note 1.

5. *Id.*

6. Interview with Judge PCSC1, Superior Court Judge, Pima County Superior Court, in Tucson, Ariz. (Sept. 26, 2017).

7. *Id.*

8. See *Taylor v. State*, 185 So. 3d 1281, 1281–82 (Fla. Dist. Ct. App. 2016); *Rodriguez v. State*, 768 So. 2d 1234, 1235–36 (Fla. Dist. Ct. App. 2000).

9. *Taylor*, 185 So. 3d at 1281–82.

10. *Rodriguez*, 768 So. 2d at 1235–36.

11. *Colburn v. State*, 510 So. 2d 652, 653 (Fla. Dist. Ct. App. 1987); *Priest v. State*, 626 So. 2d 1005, 1006 (Fla. Dist. Ct. App. 1993).

With nothing to guide them through their decision to order a GED-attainment condition, Pima County Superior Court judges have relied on their own individual-eligibility assessments based entirely on the information available in each person's presentence report, which is prepared by the Pima County Adult Probation Department.<sup>12</sup> The three most common factors considered by the judges are criminal history, drug abuse, and current employment and economic status.<sup>13</sup> Other minor factors the judges consider are age and intellectual ability.<sup>14</sup> In general, younger, probation-eligible people are the targeted candidates for the GED condition.<sup>15</sup> People with intellectual disabilities or mental-health issues are not automatically disqualified, but the GED-attainment condition depends on their specific diagnosis and how feasible it is for them to accomplish the requirements to attain a GED.<sup>16</sup> To motivate people to satisfy the GED condition, judges provide incentives, such as waiving discretionary jail time, waiving fees (if possible), redesignating a felony to a misdemeanor, and early termination of probation.<sup>17</sup>

Part I of this Note examines employment discrimination against people with criminal records to address whether there is any value in mandating probationers to attain a GED. Part II examines two of the three common factors that Pima County Superior Court judges consider before issuing a GED-attainment condition: past criminal conduct and employment status. Additionally, Part II discusses the judges' specific reasoning for considering these factors. Part III concludes with a solution to help prevent employers from forming any biases against people with criminal histories.

## I. ADDRESSING EMPLOYMENT DISCRIMINATION BASED ON CRIMINAL HISTORY

Despite the anticipated benefits, Pima County Superior Court judges collectively agree that, even with a GED in hand, many people are inevitably going to encounter obstacles as a consequence of their criminal records while job hunting.<sup>18</sup> For that reason, there are two hurdles that people have to overcome to

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12. Interview with Judge PCSC1, *supra* note 6. A presentence report is an extensive document with information about people, especially those eligible for probation. *Id.* Information included in a presentence report includes, for example, a description of the offenses committed by the individual, mental-health history, substance-abuse history, living situation, employment status, education level, risk-assessment results, and criminal history. *Id.*

13. Interview with Judge PCSC1, *supra* note 6; Interview with Judge PCSC2, Superior Court Judge, Pima County Superior Court, in Tucson, Ariz. (Oct. 9, 2017); Interview with Judge PCSC3, Superior Court Judge, Pima County Superior Court, in Tucson, Ariz. (Oct. 19, 2017); Interview with Judge PCSC4, Superior Court Judge, Pima County Superior Court, in Tucson, Ariz. (Nov. 15, 2017); Interview with Judge PCSC5, Superior Court Judge, Pima County Superior Court, in Tucson, Ariz. (Dec. 29, 2017); Interview with PCSC6, Superior Court Judge, Pima County Superior Court, in Tucson, Ariz. (Jan. 8, 2018).

14. See interviews cited *supra* note 13.

15. See interviews cited *supra* note 13.

16. See interviews cited *supra* note 13.

17. See interviews cited *supra* note 13.

18. See interviews cited *supra* note 13.

acquire the benefits that the GED-attainment order is meant to provide: the first is pursuing and attaining a GED; and the second, which is perhaps more challenging, is finding an employer who will hire them despite their criminal record. The latter is examined in this Note.

Because he believes that education is power, Judge PCSC4 said he will likely soon join the other judges in implementing the practice of issuing a GED-attainment condition of probation in his courtroom.<sup>19</sup> Judge PCSC1 actively participated in the practice because he believes that having a GED would grant people opportunities that would not otherwise be available to them.<sup>20</sup> Similarly, Judge PCSC5 participated in the practice because he believes that earning a GED will allow people to pursue job opportunities that are available only to GED or high-school-diploma recipients.<sup>21</sup> Judge PCSC2 and Judge PCSC6 both order the GED condition because they believe it is a positive mechanism to motivate people—especially those who have families to support—to improve their employment status and earning potential.<sup>22</sup> Judge PCSC3 was a longtime participant predominantly because he does not see how a GED could ever harm anybody who earns one.<sup>23</sup>

#### A. *Studies on Employment Discrimination Against People with a Criminal Record*

Within the past decade, the U.S. Equal Employment Opportunity Commission (EEOC) has met three times to examine employment discrimination against those with criminal records.<sup>24</sup> In two of those meetings, members of the EEOC (and invited panelists) made remarks about employer biases, believing these biases negatively contribute to the unlikelihood that people with criminal records will get hired.<sup>25</sup> One study, in fact, found that there was “a widespread aversion to applicants with criminal histories.”<sup>26</sup> This came from a sample of more than 3,000

19. Interview with Judge PCSC4, *supra* note 13.

20. Interview with Judge PCSC1, *supra* note 6.

21. Interview with Judge PCSC5, *supra* note 13.

22. Interview with Judge PCSC2, *supra* note 13; Interview with Judge PCSC6, *supra* note 13.

23. Interview with Judge PCSC3, *supra* note 13.

24. See *Meetings of the Commission*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/meetings/index.cfm> (last visited Feb. 27, 2019).

25. *Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Nov. 20, 2008), <https://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm> (Former Commissioner Stuart J. Ishimaru stated that the “[f]ear, myths[,] . . . stereotypes[,] and biases against those with criminal records continue to be part of the . . . decision making for many employers.”); *Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 26, 2011), <https://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm> (“There’s a perception/assumption that all ex-cons are dangerous, rule breakers, will steal[,] . . . [and] will fight at work or provoke violence . . . . We need to get over our fears, our biases and our hiring challenges.”).

26. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Will Employers Hire Ex-Offenders? Employer Checks, Background Checks, and Their Determinants* 8 (Berkeley Program on Hous. & Urban Policy, Working Paper No. W01-005, 2001), <https://escholarship.org/uc/item/3c6468h2>.

employers in four metropolitan areas.<sup>27</sup> When asked to disclose the extent to which they were willing to hire people with criminal records, over 60% of that sample indicated “that they would ‘probably not’ or ‘definitely not’ be willing to” do so.<sup>28</sup> However, 38% of the employers indicated “that they would definitely or probably consider” hiring someone with a criminal record, although only 12.5% of this minority group of employers specifically used the phrase “definitely consider.”<sup>29</sup> Notably, these percentages were substantially higher than the percentages of employers who would choose to “definitely not” or “probably not” hire people that the researchers believed had a different stigmatizing characteristic.<sup>30</sup> For example, only 8% of employers said they would “definitely not” or “probably not” hire a welfare recipient, 16% said the same about people who have been unemployed for more than a year, and 3% likewise said “definitely not” or “probably not” to hiring people who have their GED rather than their high-school diploma.<sup>31</sup>

Employer biases against people with criminal records were made notably more apparent by a field experiment conducted in New York City that investigated the effects of criminal records, as well as race, on employment.<sup>32</sup> After sending out young white and black people—half with criminal records and the other half with clean records, but all with fictitious résumés—to apply to 250 low-wage, entry-level jobs throughout New York City, it was again demonstrated that a stigma against people with criminal records inescapably exists, even in the entry-level job market.<sup>33</sup> One crucial finding was that the likelihood of a callback or job offer decreased by nearly 50% for people with a criminal record.<sup>34</sup> A second crucial finding was that the negative effect was substantially higher (roughly twice as high) for black job seekers than for white job seekers.<sup>35</sup> The third crucial finding, however, presents a means to counteract both of these aforementioned effects: personal contact.<sup>36</sup> What the researchers reported, specifically, was that personal contact with employers granted applicants with a criminal record the opportunity to contextualize their convictions—and assuage the concerns, if any, of employers—and to rebut any misconceptions that employers may have initially formulated about them after discovering that they had a criminal record.<sup>37</sup> Personal contact also gave these applicants the opportunity to demonstrate evidence of their successful rehabilitation and present personalizing information about their work ethic.<sup>38</sup> As a result, the

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27. *Id.* at 6.

28. *Id.* at 8. Specifically, 42% of employers said, “probably not,” and nearly 20% said, “definitely not.” *Id.* at 33, fig.1.

29. *Id.* at 8.

30. *Id.*

31. *Id.* at 34, fig.2.

32. Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 198–99 (2009).

33. *Id.* at 199.

34. *Id.*

35. *Id.*

36. *Id.* at 200.

37. *Id.* at 201, 204.

38. *Id.* at 201, 206.

criminal-record applicants who engaged in personal contact were “between four and six times more likely to receive a callback or job offer than those who” did not interact with employers at all.<sup>39</sup>

Conceivably, if personal contact indeed shapes an employer’s perception of someone’s criminal record in ways that immensely improve that person’s employment prospects, it should similarly influence employers to reevaluate their fear of negligent hiring, which is another concern that adds to an employer’s reluctance to hire people with a criminal record.<sup>40</sup> Under the theory of negligent hiring, if an employer knew, or should have known, that an employee “might render harm to another,” and the foreseeable harm results, the employer may be held liable to any victims.<sup>41</sup> Notably, in Arizona, proving that an employer had the requisite knowledge *can* be established by the mere knowledge that the employee who caused the harm had a criminal record, or even by furnishing evidence of past bad behavior committed by the employee, regardless of whether that behavior resulted in any convictions.<sup>42</sup> In addition to the fear of losing a negligent-hiring suit under this standard, the financial consequences of a liability finding likewise conceivably dissuades employers from hiring people with criminal records.<sup>43</sup> For these reasons, negligent-hiring liability is a concern that “may substantially deter employers from hiring applicants with criminal history records.”<sup>44</sup> Unfortunately, a concern like this, which could substantially limit the willingness of employers to hire these applicants, would mean that there is a probable risk that what the majority of the Pima County Superior Court judges anticipate their GED-condition recipients will achieve—gainful employment—will not be the result for a lot of those who end up satisfying the condition.

### ***B. Title VII’s Hidden Protection for “Ex-Offender” Status***

Because probationers are people who were convicted of crimes, and because the GED-attainment condition is being ordered upon them for the purpose of helping them obtain employment, the necessary question to ask is whether

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39. *Id.* at 200. Personal contact “reduce[d] the effect of a criminal record by roughly 15 percent . . .” *Id.*

40. *SHRM Survey Findings: Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, SOC’Y FOR HUMAN RES. MGMT. (July 19, 2012), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx> (results of a survey of 544 employers from various industries revealed that 55% conducted background checks “[t]o reduce legal liability of negligent hiring”).

41. Stacy Ann Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1002 (2011).

42. *Id.* at 1015; *Pruitt v. Pavelin*, 685 P.2d 1347, 1354–55 (Ariz. Ct. App. 1984) (finding that an employer that knew its employee had convictions for passing insufficient-funds checks, had forged a signature on a document, and had lied to the employer about obtaining a real-estate license was enough to foresee that the employee would defraud a customer).

43. For example, employers in 2001 “lost 72 percent of negligent hiring cases with an average settlement of more than \$1.6 million.” Holzer, *supra* note 26, at 4.

44. *Id.*

employers are in some way legally prohibited from discriminating against people with criminal records. Unfortunately, “[h]aving a criminal record is not listed as a protected basis” under Title VII of the Civil Rights Act of 1964.<sup>45</sup> That is, it is not a protected status under federal law.<sup>46</sup> However, two somewhat-indirect protections appear to be available if people with a criminal record can demonstrate either of the following: first, that they have been treated differently because of their race, color, religion, sex, or national origin; or second, that an employer’s practice of excluding people with a criminal record has the effect of disproportionately impacting certain people on the basis of any of the aforementioned protected statuses under Title VII.<sup>47</sup> Concern about both racial and national-origin discrimination seems to be the chief driver creating the indirect protection for people with criminal records.<sup>48</sup> Race indeed has been shown to have a clear negative effect on the employment prospects of certain people with criminal records.<sup>49</sup> Similarly, certain policies or practices that employers have implemented to screen out people with criminal records have also proven to produce that same effect.<sup>50</sup> For these reasons, employers who treat criminal histories differently for different applicants based on their race or national origin will be held liable for disparate treatment, whereas employers who implement policies or practices that disproportionately impact applicants of a specific race or national origin will be held liable for disparate-impact discrimination, both of which are Title VII violations.<sup>51</sup>

### ***C. EEOC Recommendations for Employers to Avoid Title VII Liability***

To help carry out the purpose of assigning GED attainment as a condition of probation (employability), employers need guidance on how to appropriately consider someone’s criminal history when evaluating his or her candidacy for a job position. Thus, to avoid the aforementioned liabilities—and perhaps even negligent-hiring liability—the EEOC adopted three factors to evaluate when screening people with a criminal record: (1) the nature of the offense; (2) the time that has elapsed

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45. *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Apr. 25, 2012), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) [hereinafter *Consideration of Arrest and Conviction Records*].

46. *Id.*

47. *Id.*

48. *See id.*

49. Pager, Western & Sugie, *supra* note 32, at 199.

50. Michael Pinard, *Criminal Records, Race, and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 974, 983 (2013) (noting that “hiring policies that bar or largely exclude individuals with criminal records [] are particularly acute;” however, “[t]his holds particularly true for individuals of color;” also noting that the EEOC “recognize[d] that employers have used criminal records to exclude individuals [who possess that trait] from employment, and that the exclusions have disproportionately impacted African Americans and Latinos because of their overrepresentation in the criminal justice system”); *see also* Lucas Loafman & Andrew Little, *Race, Employment, and Crime: The Shifting Landscape of Disparate Impact Discrimination Based on Criminal Convictions*, 51 AM. BUS. L.J. 251 (2014) (discussing disparate-impact discrimination in-depth, highlighting private-party cases and EEOC actions concerning the issue).

51. *Consideration of Arrest and Conviction Records*, *supra* note 45.

since the conviction or sentence; and (3) the nature of the sought-after job.<sup>52</sup> These three factors were taken from *Green v. Missouri Pacific Railroad Co.*, where the Eighth Circuit Court of Appeals directed the United States District Court for the District of Missouri to enjoin an employer from using someone's criminal record as an absolute bar to employment.<sup>53</sup> The District Court issued the order but allowed the employer to consider a criminal record as a factor in making individual hiring decisions—so long as it took the three factors into consideration.<sup>54</sup> The Eighth Circuit upheld this order on appeal.<sup>55</sup> However, despite allowing employers to consider a criminal record as a factor, the decision is still a sympathetic stance on making people with a criminal record more employable. The EEOC, likewise, is not asking employers to refrain from considering criminal records as a factor in making hiring decisions, but it is asking employers to consider people with criminal records on a case-by-case basis.<sup>56</sup> Furthermore, the EEOC is not asking employers to employ people whose past criminal conduct “may be relevant to concerns about risks in a particular position.”<sup>57</sup> However, it is asking them to carefully analyze whether someone's prior criminal conduct could make that person unfit for the job in question.<sup>58</sup> To successfully do so, the EEOC recommends that employers consider, for example, the legal elements of each crime committed by the person, the particular harm caused by each crime, and other “particular facts and circumstances” in that person's case that could help determine his or her risk of engaging in criminal conduct while on the job.<sup>59</sup> These recommendations create the opportunity for personal contact (because directly inquiring about past criminal conduct would provide an employer with specific details), which as previously revealed, permits people to demonstrate to employers that they are nothing like “the stereotype of the ex-con.”<sup>60</sup>

Conveniently, employers who carry out these recommendations satisfy the aforementioned *Green* factors and, as a result, achieve a higher likelihood of avoiding unlawful discrimination while conducting their employment screens.<sup>61</sup> For employers who wish to go the extra mile to avoid any liability for their employment screens, the EEOC recommends that they provide opportunities for individualized assessments (in addition to the *Green* factors).<sup>62</sup> Compared to the *Green* factors, these individualized assessments are more expansive, and they allow people to explain why they should be hired despite their past criminal conduct.<sup>63</sup> The opportunity for more personal contact is unavoidably an essential component of

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52. *Id.*  
53. 523 F.2d 1290 (8th Cir. 1975).  
54. *Green v. Missouri Pac. R.R. Co.*, 549 F.2d 1158 (8th Cir. 1977).  
55. *Id.*  
56. *Consideration of Arrest and Conviction Records*, *supra* note 45.  
57. *Id.*  
58. *Id.*  
59. *Id.*  
60. Payer, Western & Sugie, *supra* note 32, at 209.  
61. *Consideration of Arrest and Conviction Records*, *supra* note 45.  
62. *Id.*  
63. Loafman & Little, *supra* note 50, at 281.



these individualized assessments and would allow people to contextualize their convictions; demonstrate evidence of their rehabilitation; and provide information about their character, fitness for the position in question, and work ethic, which also addresses any concerns employers may have after discovering applicants' criminal records.<sup>64</sup> With the above information at hand, the hope is that employers will make a more informed decision when encountering applications from people with criminal records and avoid rejecting those who would not create any liability for them.

#### *D. Ban-the-Box Efforts in Arizona*

In addition to Title VII's indirect protection for people with criminal records, there are legislative achievements in numerous states that have removed the conviction-history question (the conviction check-mark box, that is) from job applications.<sup>65</sup> Specifically, these achievements stem from the Ban the Box Campaign, aimed at ending discrimination against people with conviction histories.<sup>66</sup> The campaign started in 2004 to challenge "the stereotypes of [people] with conviction histories by asking employers to choose their best candidates based on job skills and qualifications, *not* past convictions."<sup>67</sup> Conveniently, states that have adopted ban-the-box laws have transformed that request into a legal requirement by forbidding many employers (both public and private) from probing about someone's criminal record until later in the hiring process.<sup>68</sup> This is also a growing trend in numerous cities and counties in states that have not yet adopted statewide ban-the-box laws.<sup>69</sup> For example, a fair amount of the existing ban-the-box laws delay conducting background checks—as well as any employer inquiries about someone's conviction history—until after a conditional offer of employment is extended.<sup>70</sup> Another fair amount of existing ban-the-box laws bar employers from inquiring about someone's conviction history until after the candidate has been interviewed, or even until he or she has been found otherwise qualified for the job position.<sup>71</sup> Notably, a large majority of these ban-the-box laws have adopted the EEOC's individualized-assessment recommendation; thus, after employers discover someone's conviction record, they are required to consider, in addition to the *Green* factors, the person's explanation of the circumstances surrounding the offenses and any rehabilitation measures the person has taken since then.<sup>72</sup> This procedure is required before the employer makes a final decision, and many ban-the-box laws

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64. *Consideration of Arrest and Conviction Records*, *supra* note 45.

65. Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Feb. 8, 2018), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

66. *About: The Ban the Box Campaign*, BAN THE BOX CAMPAIGN, <http://bantheboxcampaign.org/about/#.WrwNXmaZMdU> (last visited Feb. 29, 2019).

67. *Id.*

68. See C.W. Von Bergen & Martin S. Bressler, "Ban the Box" Gives Ex-Offenders a Fresh Start in Securing Employment, 67 LAB. L. J. 383, 385 (2016).

69. *Id.*

70. Avery & Hernandez, *supra* note 65, at 6–18, 24–96.

71. *Id.*

72. *Id.*

require employers to provide the person with an opportunity to appeal any resulting adverse employment decision.<sup>73</sup>

The hope of delaying employer inquiries into criminal records is that it will weaken, or even eliminate, concerns about employing ex-offenders if the employer first evaluates their qualifications before discovering that they have a criminal record.<sup>74</sup> In other words, proponents of ban-the-box laws hope that “rejection is harder once a personal relationship has been formed.”<sup>75</sup>

Personal contact is evidently a recurring theme in all of the aforementioned efforts to change the way employers view people with criminal records. Fortunately, Arizona recently joined 29 states and over 150 cities and counties in the Ban the Box Campaign when Governor Doug Ducey, on November 6, 2017, issued an executive order “prohibiting certain state agencies from inquiring into an applicant’s conviction or arrest history until after . . . an initial interview” has been conducted.<sup>76</sup> After signing this executive order, Governor Ducey expressed that “[a]ll Arizonans—no matter their background or past mistakes—deserve the chance to make a living and a better life for themselves and their families.”<sup>77</sup> The City of Tucson adopted that same view much earlier when it “committed to removing the question about conviction history from [its Tucson] city job application” in 2014.<sup>78</sup> Less than seven months later, the Mayor and City Council adopted a resolution instructing the City to identify positions that require background checks and to conduct such checks only after a contingent offer has been made.<sup>79</sup> Then, on November 10, 2015, Pima County’s Board of Supervisors voted (4–1) to join the City of Tucson in banning the criminal-conviction checkbox from County applications and in delaying necessary background checks until later in the hiring process.<sup>80</sup>

People who are ordered to attain their GEDs while on probation may find it wasteful because of the belief that a criminal record will outshine a GED. But, given the aforementioned policies, it would not be a waste of time for them to pursue and attain a GED because they may likely receive a better opportunity to introduce themselves to prospective state, city, or county employers and perhaps prove to them that they are not what their criminal histories say they are.

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73. *Id.*

74. *Consideration of Arrest and Conviction Records, supra* note 45.

75. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L.J.* 753, 774 (2011).

76. Avery & Hernandez, *supra* note 65, at 1, 7.

77. *Id.* at 7.

78. *Id.* at 64.

79. *Id.*

80. Press Release, Pima Cty. Admin., Ban the Box, Stepping Up Initiatives Passed by BOS (Nov. 15, 2015), <https://www.nelp.org/wp-content/uploads/Pima-County-Press-Release.pdf>.

## II. GED-CONDITION ELIGIBILITY ASSESSMENT FACTORS

Additionally, people ordered to attain their GEDs should not find it wasteful because judges deem that they have the means to do so, and they are each diligent in considering multiple factors before issuing a GED-attainment condition. Specifically, judges at the Pima County Superior Court consider the following factors:

### A. Past Criminal Conduct

Past criminal conduct is a disqualifier for some—but not all—judges in ordering GED attainment as a condition of probation.<sup>81</sup> Judge PCSC1 would never issue a GED condition to a repeat-felony offender—especially if the prior felony was serious.<sup>82</sup> By “serious,” he means an offense higher than a class 4 felony.<sup>83</sup> Thus, before electing to order a probation-eligible person to attain a GED, Judge PCSC1 looks at the number of times that person has had contact with the criminal-justice system—specifically, the adult system.<sup>84</sup> Indeed, if a prospective probationer is new to the adult system, then there is a high probability that Judge PCSC1 would view this person as a candidate for a GED condition—that is, only if the person does not trigger one or more of Judge PCSC1’s other disqualifiers.<sup>85</sup>

However, someone’s first encounter with the adult system does not automatically make Judge PCSC4 perceive that person as a potential candidate for a GED condition.<sup>86</sup> Instead, he would be more inclined to issue a GED condition to someone whose criminal history is “not so pronounced.”<sup>87</sup> For instance, repetitive drug offenses suggesting a drug-abuse problem, persistent property-crime offenses indicating that someone is stealing to finance drug abuse, and other ongoing criminal behavior stemming from someone’s mental-health problems all—independently—fall under a “pronounced criminal history.”<sup>88</sup> Judge PCSC4 notes that, unfortunately, pronounced criminal histories are more common among people with substance-abuse and mental-health problems—his main group of concern for the GED condition.<sup>89</sup> Their exclusion from the GED condition stems from his concern that they would not be able to comply with that condition if the aforementioned issues

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81. Interview with Judge PCSC1, *supra* note 6; Interview with Judge PCSC4, *supra* note 13; Interview with Judge PCSC5, *supra* note 13; Interview with Judge PCSC2, *supra* note 13; Interview with PCSC6, *supra* note 13; Interview with Judge PCSC3, *supra* note 13.

82. Interview with Judge PCSC1, *supra* note 6.

83. *Id.*

84. *Id.*

85. *Id.*

86. Interview with Judge PCSC4, *supra* note 13.

87. *Id.* An individual with a pronounced criminal history is someone who is going to repeat that criminal history. *Id.*

88. *Id.*

89. *Id.*

make it difficult for them to comply with the law.<sup>90</sup> In its place, Judge PCSC4 would rather issue a drug- or mental-health-treatment order.<sup>91</sup>

While serious or repetitive criminal histories and difficult-to-eradicate recidivism are Judge PCSC1's and Judge PCSC4's respective mandatory disqualifiers for the GED condition,<sup>92</sup> past criminal conduct does not factor into the other judges' eligibility assessment.<sup>93</sup> No significant number of felonies on someone's record would dissuade Judge PCSC5, specifically, from considering that person for the GED condition—even if serious convictions were present on his or her record.<sup>94</sup> Thus, if someone with a prior but serious conviction returns to Superior Court for committing a new crime, and that person's new crime carries a mandatory probation sentence, Judge PCSC5 would not see a problem in assigning that person the GED condition.<sup>95</sup> This would indeed be the case if no other disqualifiers were present and if the presentence report shows that this person was very close to completing high school, but now needs a push—that is, a court order—to pursue and attain that almost-completed education through a GED program.<sup>96</sup> Furthermore, because these people were already punished once for their prior convictions, punishing them a second time by depriving them of an opportunity to obtain an education is not a decision Judge PCSC5 would opt for.<sup>97</sup> This disposition derives from his belief in the power of giving people a second chance,<sup>98</sup> which not too long ago (here in Arizona) was given to a convicted first-degree murderer, James Hamm.<sup>99</sup>

In fact, Hamm was given two second chances: first, he was admitted to Northern Arizona University (through a prison study program) to pursue his bachelor's degree; and second, he was admitted to Arizona State University (while released on parole) to pursue his law degree.<sup>100</sup> He succeeded in acquiring both degrees, and he even passed the bar exam.<sup>101</sup> Had he still been a high-school dropout after being released from prison, Judge PCSC2 would surely have provided him with the opportunity to complete his education by ordering him to attain his GED; that is, assuming he had found himself in her courtroom for committing a new crime that requires or allows the court to impose a probation sentence.<sup>102</sup> Like with Judge

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90. *Id.*

91. *Id.*

92. Interview with Judge PCSC1, *supra* note 6; Interview with Judge PCSC4, *supra* note 13.

93. Interview with Judge PCSC5, *supra* note 13; Interview with Judge PCSC2, *supra* note 13; Interview with Judge PCSC6, *supra* note 13; Interview with Judge PCSC3, *supra* note 13.

94. Interview with Judge PCSC5, *supra* note 13.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *In re Hamm*, 123 P.3d 652 (Ariz. 2005).

100. *Id.*

101. *Id.*

102. Interview with Judge PCSC2, *supra* note 13.

PCSC5, a serious criminal history is insignificant and therefore excluded from her eligibility assessment.<sup>103</sup> However, for Judge PCSC2, omitting this factor has less to do with giving someone a second chance and more to do with helping someone with a serious criminal record obtain a particular benefit—employment.<sup>104</sup> For example, not too long ago, a person who committed a mandatory-probation offense and who recently had been released from prison after serving a 20-year term for a homicide conviction received a GED condition from Judge PCSC2.<sup>105</sup> This person needed a job, and because his skill set was very limited due to his incarceration, she ordered him to attain a GED to increase his chances of getting a job.<sup>106</sup>

### ***B. Employment Status***

Employment status is another factor that Pima County Superior Court judges consider, and in fact, it is the most heavily weighted factor in their GED-order decision.<sup>107</sup> Notably, the judges rate employment statuses very differently.<sup>108</sup> For instance, a particular employment status may persuade one judge to order GED attainment, persuade a second judge to merely *recommend* it, and dissuade a third judge from even introducing the idea of a GED at all.<sup>109</sup> Thus, each judge has an independent view on which employment statuses are satisfactory, and each view will dictate whether GED attainment is going to be ordered or encouraged in a particular case.<sup>110</sup> However, there is one specific view shared by all six judges interviewed for this Note: they want a GED to improve someone's employment status, not damage it.<sup>111</sup> That is, they do not want to set people up for failure by burdening them with complying with the GED condition if it is going to cause them to lose hours at work and thus lose earnings, or if it is going to cause them to lose a good job.<sup>112</sup> The judges' aim is to accurately (as best as they can with the employment and education information they have from someone's presentence report) determine which people can improve their employment status by attaining a GED, as well as which people are not well-suited for the GED condition.<sup>113</sup>

Judge PCSC2, in particular, views paycheck-to-paycheck living as unsatisfactory, mainly because this sort of financial situation shows, more often than not, that someone is working a job that is well below his or her skill level and cognitive ability.<sup>114</sup> However, it would be an unacceptable situation if children also

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Interview with Judge PCSC1, *supra* note 6; Interview with Judge PCSC4, *supra* note 13; Interview with Judge PCSC5, *supra* note 13; Interview with Judge PCSC2, *supra* note 13; Interview with PCSC6, *supra* note 13; Interview with Judge PCSC3, *supra* note 13.

108. *See* interviews cited *supra* note 13.

109. *See* interviews cited *supra* note 13.

110. *See* interviews cited *supra* note 13.

111. *See* interviews cited *supra* note 13.

112. *See* interviews cited *supra* note 13.

113. *See* interviews cited *supra* note 13.

114. Interview with Judge PCSC2, *supra* note 13.

depended on that person's paycheck-to-paycheck income for financial support.<sup>115</sup> If either of these situations is discovered in someone's presentence report, Judge PCSC2 would order that person to attain a GED to potentially open up higher-paying and higher-skilled employment opportunities.<sup>116</sup> That, in turn, should gradually substitute someone's paycheck-to-paycheck living situation for a more financially secure situation that could better meet the needs of a household with young, dependent children, which is Judge PCSC2's primary concern.<sup>117</sup> On the other hand, someone who is working a full-time managerial position and earning sufficient income to provide for a family household and, at the same time, maintaining some savings system for future emergencies would present a rare case where Judge PCSC2 would merely encourage that person to attain a GED.<sup>118</sup> This is because such people are already achieving what she believes they should be achieving: support for both themselves and their families while pursuing a career, rather than just any job simply to pay the bills.<sup>119</sup>

For Judge PCSC4, however, a job that provides someone with a paycheck-to-paycheck living is a rarity among numerous people who fall into the adult criminal-justice system.<sup>120</sup> For that reason, he likely would not order people under that circumstance to attain their GED because a job providing a paycheck-to-paycheck living tells him that these people were able to succeed in obtaining employment without a high-school education.<sup>121</sup> This success is difficult to achieve in today's society where unemployment rates are higher for workers with less than a high-school education.<sup>122</sup> The Bureau of Labor Statistics reported that, in 2016, workers aged 25 and over with "less education than a high school diploma had the highest unemployment rate" at 7.4%, whereas those with a high-school diploma had a lower unemployment rate at 5.2%.<sup>123</sup> These statistics show that a rise in a worker's educational attainment decreases the risk of being unemployed. But Judge PCSC4 deems it far more important for all employed people to maintain their jobs rather than attain their GEDs because pursuing an education involves incurring an additional financial obligation and a time commitment that most likely replaces much-needed hours that employed people would instead prefer to work to generate more income.<sup>124</sup> This would especially be his position if they had important financial obligations to fulfill, such as paying court- or probation-related fees or paying off medical bills.<sup>125</sup> Moreover, for those who are unemployed, he prefers that they

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Interview with Judge PCSC4, *supra* note 13.

121. *Id.*

122. Allen Chen, *More Education: Lower Unemployment, Higher Earnings*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR (Apr. 2017), <https://www.bls.gov/careeroutlook/2017/data-on-display/more-education.htm>.

123. *Id.*

124. Interview with Judge PCSC4, *supra* note 13.

125. *Id.*

obtain a job and maintain it throughout, as well as beyond, their probationary period, especially if they have a family to support, just as Judge PCSC2 said.<sup>126</sup> Therefore, although he believes that a higher education would grant people an opportunity to work a better job and earn a higher pay, Judge PCSC4 suggests that pursuing a GED should be a secondary priority when one or more of the aforementioned circumstances applies.<sup>127</sup>

Thus, for probationers who are employed, Judge PCSC4 foresees that he will, more often than not, *encourage* people to pursue and attain their GEDs rather than mandate them to do so.<sup>128</sup> This is what ordinarily happens in Judge PCSC5's and Judge PCSC3's courtrooms.<sup>129</sup> For Judge PCSC5, specifically, GED attainment as a condition of probation is appropriate mainly in cases where someone has expressed regret in not completing a high-school education and an interest in attaining the equivalent (a GED) because of a desire for a promotion or a particular position that requires that level of education.<sup>130</sup> In contrast, it is inappropriate in cases where people are working jobs that do not require a high-school diploma or GED, especially when they are perfectly content with those jobs.<sup>131</sup> What largely concerns Judge PCSC5 in issuing a GED condition to those already employed is the possible risk that doing so will only provide more stress to an already stressful situation of serving a probation sentence.<sup>132</sup> In other words, he believes that having to comply with the 15 conditions of probation mandated by statute—including whatever additional conditions he deems are more important for the protection of the community and betterment of the person—is sufficient responsibility and stress for someone to manage simultaneously with nonprobation-related responsibilities, such as maintaining employment status.<sup>133</sup> Therefore, Judge PCSC5 finds that a GED is a credential that not everyone needs, but he will encourage it in cases where he sees that someone has the potential to attain one.<sup>134</sup> If someone wishes not to follow his encouragement, there will be no consequences for that person; Judge PCSC5 will leave it up to the probationer to decide on pursuing an education.<sup>135</sup> For Judge PCSC3, a GED condition is appropriate in cases where people are both young—between 18 and 25 years of age—and unemployed.<sup>136</sup> Focusing on young, unemployed people is Judge PCSC3's main priority because he believes that they should take advantage of their youth—when they have fewer responsibilities—by achieving everything they can right now to make their future better.<sup>137</sup> However, in

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126. Interview with Judge PCSC4, *supra* note 13; Interview with Judge PCSC2, *supra* note 13.

127. Interview with Judge PCSC4, *supra* note 13.

128. *Id.*

129. Interview with Judge PCSC5, *supra* note 13; Interview with Judge PCSC3, *supra* note 13.

130. Interview with Judge PCSC5, *supra* note 13.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Interview with Judge PCSC3, *supra* note 13.

137. *Id.*

cases where young people are already employed and making a suitable living, he probably would not issue a GED condition because of his concern that doing so might interfere with their work obligations.<sup>138</sup> Judge PCSC6 would also not order GED attainment in those cases, especially if she learns that they have been “consistently employed for a long period of time.”<sup>139</sup>

### CONCLUSION: HELPING GED RECIPIENTS BECOME EMPLOYABLE DESPITE THEIR CRIMINAL RECORDS

In essence, a blanket policy denying employment to anyone with a criminal record can, by itself, constitute a Title VII violation.<sup>140</sup> Due to markedly higher arrest and conviction rates among African Americans and Hispanics, a blanket policy like that can have the effect of disproportionately screening out these people.<sup>141</sup> Employers can stay clear of such a violation by simply following the EEOC’s recommendations when considering a job applicant’s criminal record.<sup>142</sup> Moreover, in following these recommendations, employers achieve two other results: one, they make an informed decision about whether an applicant with a criminal record may be unfit for the job; and two, they verify that they do not miss out on hiring a qualified candidate who can perform as well as someone with no criminal record. Furthermore, following these recommendations could allow employers to get to know an applicant with a criminal record and see firsthand what kind of a person the applicant truly is, without allowing a stereotype to define the applicant for them. The EEOC’s recommendations thus open the door to personal contact between these two groups, and the opportunity to have personal contact with employers could be especially valued by probationers who are ordered to attain their GEDs here in Pima County. Probationers with a GED could have more to talk about with employers when they attain their GEDs, such as discussing their journey in obtaining this credential.

However, having a GED will not completely eliminate the stigma of having a criminal record.<sup>143</sup> Unfortunately, the stigma is a part of human nature; some employers will inherently have a negative reaction after learning about a prospective employee’s criminal history.<sup>144</sup> This type of employment discrimination is a societal issue beyond the control of judges. However, Judge PCSC4 has suggested that judges who issue GED-attainment conditions get involved by collectively leading a seminar for employers in the Tucson community to discuss education’s positive effect of reducing criminal behavior, to have them meet GED recipients who attained a GED as a result of this probation condition, and more importantly, to highlight that people who attain a GED while simultaneously juggling 15 conditions

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138. *Id.*

139. Interview with Judge PCSC6, *supra* note 13.

140. *See supra* Section I.B; Von Bergen & Bressler, *supra* note 68, at 387.

141. *See supra* note 50 and accompanying text; Von Bergen & Bressler, *supra* note 68, at 387.

142. *See supra* Section I.C.

143. *See interviews cited supra* note 107.

144. *See interviews cited supra* note 107.



of probation should be deemed “the exception *and* the exceptional.”<sup>145</sup> If this is done, perhaps it will open the door to more personal contact between employers and prospective employees with criminal records, which as research shows, may help weaken the stereotypes that employers have about them.<sup>146</sup> The hope is that increasing the possibility of more personal contact will serve as a motivating factor for probationers in Pima County to attain their GED if they are issued the GED-attainment condition.

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145. Interview with Judge PCSC4, *supra* note 13.

146. *See supra* Section I.A.