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Federal District Court Holds Employer to its Promise in FCRA “Pre-Adverse Action” Notice

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The U.S. District Court for the Eastern District of Wisconsin recently held that an *employer* potentially violated the Fair Credit Reporting Act (FCRA) when it provided the employee with *three* days to dispute information contained in a background report and not the *five* it promised in the pre-adverse action notice.¹ The court’s opinion is a cautionary tale to employers to pay careful attention to their adverse action notice procedures, and in that regard, has takeaways for consumer reporting agencies (CRAs) that provide notices on *behalf* of employers.

The Decision

The plaintiff applied to work for the employer as a security guard. A CRA conducted a background report on the plaintiff as part of that hiring process. On October 27, 2014, the employer mailed the plaintiff a copy of his pre-adverse action notice required under the FCRA. In that notice, the employer told the plaintiff that he had *five* days to dispute the accuracy or completeness of the background report. Yet, *fewer* than five days later, on October 30, 2014, the employer sent the plaintiff the adverse action notice and told him that, based on the CRA’s background report, the employer had denied the plaintiff’s security clearance and he could not be hired as a result. (Notably, the employer subsequently provided correspondence to the court showing that the plaintiff may not have received the adverse action letter until after the five days had passed.) Nonetheless, according to the lawsuit allegations, there were numerous errors in the CRA’s background report, the result of which portrayed the plaintiff more negatively than if the errors did not exist.

After it notified the plaintiff of the adverse action decision, the employer provided the plaintiff with an appeals process to dispute the decision to deny him security clearance. The plaintiff used this appeals process, to no avail.

¹ *Tyus v. United States Postal Service*, Case No. 15-cv-1467 (E.D. Wis. June 20, 2017).

The plaintiff then filed a lawsuit, ultimately alleging that the employer violated the FCRA's pre-adverse action notice requirements when it failed to give him a "reasonable and real opportunity" to dispute the contents of the report. The employer moved to dismiss under Rules 12(b)(1) and 12(b)(6).

The employer argued that the plaintiff had not alleged a concrete harm and, thus, had no standing, because he did not allege that the employer would have made a different decision if it had waited the five days it promised in the pre-adverse action notice. The plaintiff countered that the inaccuracies in the background report made it more likely that his security clearance would be denied and that such an increased risk coupled with the actual denial adequately pled a concrete injury.

The employer also argued that the plaintiff could not "fairly trace" his injuries (emotional distress and financial loss) to the USPS' failure to adhere to the five-day promise. The employer argued that it made the employment decision based on a conviction that the plaintiff was not disputing. The plaintiff, however, noted that the "fairly traceable" standard was low at the Rule 12 stage.

At issue according to the court was whether the employer had provided the plaintiff with "a reasonable opportunity to address the information contained in his [background report] before it made a final decision." The court agreed with the plaintiff. It held that the employer's failure to adhere to its five-day *promise* "was not a mere procedural violation." Instead, the numerous inaccuracies in the background report gave a negative impression of the plaintiff and increased the risk that he would be denied the security clearance. The court "reasonably infer[red]" that, if the plaintiff had been given the full five days to dispute the background report, the employer *might* have reached a different decision. The court discounted the employer's position that the error did not matter because it was not implausible that the errors could have changed the employment decision made as to the plaintiff. According to the court, *Spokeo* allows an increased risk of real harm to constitute a *concrete* injury. The court further held that when the plaintiff may have received the adverse action letter was irrelevant - what mattered was when the final decision was made.

Although the employer claimed that it ultimately did provide the plaintiff with a meaningful opportunity to dispute the background report via its appeals process, the court found this unavailing for purposes of a Rule 12 Motion and focused on the plaintiff's sufficient pleading. The court noted that the employer had not provided case law to support its position, but it did leave the door open for the employer to raise this argument at summary judgment. The court denied the employer motion and allowed the case to proceed.

Next Steps for Employers

Now more than ever, it is advisable for employers that use background checks for employment purposes to take steps to ensure compliance with the applicable provisions of the FCRA. There is more FCRA litigation against employers for alleged willful violations of the FCRA than ever before, especially class action litigation against larger, national employers. In addition, because various other laws affect the use of background checks for employment purposes, such as Title VII of the Civil Rights Act of 1964 and state fair employment and fair credit reporting laws, employers should continue to be mindful of their obligations to comply with all of these laws.