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February 4, 2013

EEOC Suit Against Employer Screening Applicants Based on Credit History Information Dismissed

By Rod Fliegel, Jennifer Mora, and William Simmons

In April 2012, the Equal Employment Opportunity Commission (EEOC) issued its updated enforcement guidance concerning how, in its view, Title VII of the Civil Rights Act of 1964 (Title VII) restricts an employer's discretion to consider criminal records relative to employment decisions.[1] The EEOC was scheduled to release at the same time its updated guidance concerning the use of credit history information, but at the last minute decided (without explanation) not to do so. Even before April 2012, however, the EEOC filed lawsuits against a handful of employers, including Kaplan Higher Education Corporation (Kaplan), for allegedly violating Title VII by relying on criminal and credit records. On January 28, 2013, the district court judge in *EEOC v. Kaplan Higher Education Corp.*[2] granted Kaplan's motion to dismiss the case without a trial, holding the EEOC failed to meet its threshold burden as the plaintiff to prove that Kaplan's screening practices disproportionately excluded protected class members (*i.e.*, had the requisite "disparate impact"). The opinion is significant for employers because: (1) the subject of background checks remains high on the EEOC's agenda (in fact there is an ongoing case in Maryland[3]); and (2) at least for employers who are not government contractors, the EEOC may face more hurdles than it expected in proving disparate impact. Because the court decided the matter based solely on the threshold question of disparate impact, it unfortunately did not reach other important issues, such as whether the EEOC can challenge an employer's use of credit history information when the Commission itself relies on such information in the hiring process. This uncertainty reinforces the benefit to employers of reviewing their background check and related programs.

Background of the Kaplan Litigation

In December 2010, the EEOC sued Kaplan in federal district court in Ohio, alleging that Kaplan's use of pre-employment credit checks had an unlawful disparate impact on protected class members in violation of Title VII.[4]

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1 *See* Rod Fliegel, Barry Hartstein, and Jennifer Mora, *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 30, 2012).

2 No. 1:10-cv-02882, ECF 110 (Jan. 28, 2013).

3 *See EEOC v. Freeman*, No. 8:09-cv-02573 (D. Md.).

4 As Littler previously reported, earlier in the case discovery had actually revealed that the EEOC itself used credit history in screening applicants for employment, which the district court had held was relevant to Kaplan's asserted defense of the business necessity of its practices. *See* Rod Fliegel and Alex Frondorf, *Do As I Say, Not As I Do: EEOC Required to Provide Discovery of Its Employment Practices*, Littler ASAP (Apr. 30, 2012).

On November 30, 2012, Kaplan and the EEOC filed separate motions for judgment before trial (known as summary judgment). On the same date, Kaplan also moved to exclude the testimony of the EEOC's expert witness. Kaplan's motions argued that: (a) the EEOC failed to identify a particular employment practice that allegedly had caused the purported disparate impact; (b) the EEOC's proffered expert opinion was inadmissible because it failed to satisfy the federal standards for reliable expert testimony (the *Daubert* standard), and in any event failed to consider other factors impacting the disparate impact analysis, such as non-common non-discriminatory explanations; and (c) Kaplan's use of credit history information was job-related and consistent with business necessity. The EEOC argued in its motion that the court should reject, as a matter of law, Kaplan's proposed affirmative defense that its use of credit history information was job-related and consistent with business necessity.

On January 28, 2013, the district court granted Kaplan's motion to strike the EEOC's expert opinion and motion for summary judgment, and dismissed the EEOC's lawsuit. The district court also denied the EEOC's motion. In doing so, the court determined that the EEOC had failed to provide reliable statistical evidence of discrimination, and, therefore, failed to satisfy its threshold burden of proving that Kaplan's use of credit history information resulted in a disparate impact on protected class members.

Kaplan did not collect information regarding the race of each applicant. Therefore, to determine the basic fact of the race of the applicants at issue, the EEOC's expert had obtained data from the Department of Motor Vehicles in 38 different states and Washington D.C. While 14 of those states had provided specific data on the applicants' races, 24 states provided only copies of the applicants' drivers' licenses. The district court noted that the EEOC's expert attempted to manufacture data related to those applicants' races by assembling a team of five individuals (so-called "race-raters") that reviewed the pictures on the drivers' licenses and purported to determine the individual's race. Where four of the five "race raters" agreed on the person's apparent race, the EEOC's expert assumed the "race-raters" had it right.

The district court held that the expert's practice of using "race raters" was not reliable under the standards set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), pursuant to which courts are required to act as "gate keepers" in determining whether purported expert evidence is sufficiently reliable and relevant to be heard by a jury, by examining a non-exhaustive list of factors. Those factors include whether the expert's technique or theory can be or has been tested or subject to peer review and publication, known potential error rates, and whether the theory or technique used by the expert has been generally accepted in the scientific community. The district court held that the EEOC failed to proffer any proof that the use of "race raters" was scientifically accepted, had been the subject of peer-reviewed publication, or had a scientifically acceptable rate of error. Moreover, the district court noted that the EEOC itself on its website in other contexts had discouraged employers from using this same method (visual identification) to ascertain individuals' races.

Furthermore, the district court and Kaplan both noted that the EEOC apparently chose not to simply contact the individuals directly to ascertain their race, which presumably would have been more reliable than the process the expert used. In addition, the district court observed that the EEOC's expert did not use a representative sample in his analysis. First, the EEOC's expert did not use a random sample. Second, Kaplan's expert witness opined (without contradiction by the EEOC) that the final sample pool used by the EEOC's expert consisted of a much higher percentage of individuals who had failed Kaplan's credit checks than the percentage of the entire applicant pool that had actually failed Kaplan's credit checks.

Because the district court held that the EEOC's expert evidence was inadmissible, it concluded that the EEOC could not present a *prima facie* case of disparate impact discrimination as it could not show that Kaplan's use of credit checks had caused the applicants' exclusion ***because of*** their membership in a protected group. The district court explicitly refused to consider the many other issues the parties raised, such as whether the EEOC had adequately identified a particular practice allegedly causing the disparate impact, whether the EEOC was estopped from challenging Kaplan's practices, and whether Kaplan's use of credit checks was job-related and consistent with business necessity.

Implications for Employers

The EEOC indisputably is pursuing an aggressive agenda of targeting what it views as discriminatory practices through "practice and pattern" cases, including investigations and lawsuits focusing on hiring and employment policies related to credit checks and criminal records. A very concrete and fairly recent example of this is the EEOC's January 2012 $3.13 million settlement in a dispute concerning criminal records.[5] It

5 *See* Press Release, Equal Employment Opportunity Commission (Jan. 1, 2012), *available at* www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm.

remains to be seen how the EEOC will respond to the dismissal of its suit against Kaplan without a trial. Because the district court's decision is not technically binding on any other court and focused only on whether the EEOC had presented reliable expert testimony, however, it is likely that the EEOC will continue to pursue litigation against employers while it further hones its methods of proof and expert techniques. In addition, the EEOC's objectionable use of "race raters" in the *Kaplan* case resulted from, first, the fact that Kaplan did not maintain race data on applicants and, second, that the EEOC chose not to contact the affected individuals directly to ascertain their races. Either or both of those factors may not be present in future cases or for all employers, such as federal contractors who, unlike Kaplan, are required to maintain data on applicants' races.

In the meantime, employers should consider reviewing their credit and criminal record-based screening policies and procedures to assess whether they are consistent with Title VII as interpreted by the EEOC. Of course, employers that consider credit history information and/or criminal records for employment purposes must be mindful not only of the EEOC's interpretation of Title VII, but related federal and state laws, including the fair credit reporting laws such as the Fair Credit Reporting Act,[6] and state fair employment laws restricting inquiries into, and the use of, credit history and criminal records (*e.g.*, the new laws in Vermont and Newark, New Jersey[7]).

Rod Fliegel, Co-Chair of Littler Mendelson's Hiring and Background Checks Practice Group, is a Shareholder in the San Francisco office; Jennifer Mora is an Associate in the Los Angeles (Century City) office, and William Simmons is an Associate in the Philadelphia office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Fliegel at rfliegel@littler.com, Ms. Mora at jmora@littler.com, or Mr. Simmons at wsimmons@littler.com.

6 *See* Rod Fliegel and Jennifer Mora, *The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011).

7 *See* Rod Fliegel and Jennifer Mora, *Vermont Becomes the Eighth State to Restrict the Use of Credit Reports for Employment Purposes*, Littler ASAP (June 18, 2012) (discussing Vermont's new restrictions on using credit history information); *see also* Rod Fliegel, Jedd Mendelson, and Jennifer Mora, *Employers in Newark, New Jersey Must Comply with a New Ordinance Broadly Restricting Their Discretion to Rely on Criminal Records for Employment Purposes*, Littler ASAP (Oct. 22, 2012) (discussing Newark, New Jersey's new restrictions on using criminal history information).