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Sixth Circuit Upholds Dismissal of EEOC Suit Against Employer Screening Applicants Based on Credit History Information

By Rod Fliegel and Jennifer Mora

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 in *EEOC v. Kaplan Higher Education Corp.* 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").

On April 9, 2014, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision, explaining in the first paragraph of its opinion:

> "In this case the EEOC sued the defendants for using the same type of background check that the EEOC itself uses. The EEOC's personnel handbook recites that '[o]verdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations.' Because of that concern, the EEOC runs credit checks on applicants for 84 of the agency's 97 positions. The defendants . . . have the same concern; and thus Kaplan runs credit checks on applicants for positions that provide access to students' financial-loan information, among other positions. For that practice, the EEOC sued Kaplan."

In affirming dismissal of the EEOC's suit against Kaplan, the Sixth Circuit agreed with the district court's conclusion that the EEOC had failed to prove disparate impact in the first instance and its expert's testimony was unreliable.

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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).

The opinion is significant for employers because: (1) the subject of background checks remains high on the EEOC's agenda; 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 Sixth Circuit 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, or whether an employer is obligated by Title VII and its regulations to collect information regarding the race of its applicants. Of course, the Sixth Circuit's opening paragraph indicates how it views the EEOC's challenges to screening practices similar to its own. Regardless, 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.[2]

On November 30, 2012, Kaplan and the EEOC filed cross-motions for 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 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 district 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 its motion for summary judgment, and dismissed the EEOC's lawsuit. In doing so, the court determined that the EEOC 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.

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 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.

On appeal to the Sixth Circuit, the EEOC argued that the district court erred when it excluded its expert's testimony and dismissed the lawsuit. On April 9, 2014, the Sixth Circuit Court of Appeals affirmed the district court's dismissal of the lawsuit, concluding that:

> "The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness itself. The district court did not abuse its discretion in excluding [the expert's] testimony."

Specifically, Kaplan did not collect information regarding the race of each applicant. Therefore, to determine the race of the applicants at issue, the EEOC's expert obtained data from the Department of Motor Vehicles in different states and Washington D.C. While 11 of those states provided specific data on the applicants' races, 36 states and the District of Columbia provided only copies of the applicants' drivers' licenses. The Sixth Circuit 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") who 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.

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2 As Littler previously reported, earlier in the case, discovery revealed that the EEOC itself used credit history in screening applicants for employment, which the district court 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).

The Sixth Circuit agreed with the district court's conclusion 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 Sixth Circuit agreed 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 discouraged employers from using this same method (visual identification) to ascertain an individual's race.

Furthermore, the Sixth Circuit 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 applicants who failed Kaplan's credit checks than characterized the entire applicant pool that was subject to credit checks..

Implications for Employers

The EEOC is pursuing an aggressive agenda of targeting what it views as discriminatory practices through disparate impact cases, including investigations and lawsuits focusing on hiring and employment policies related to credit checks and criminal records. Because the Sixth Circuit's decision focused only on whether the EEOC 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. In future cases, the EEOC may be expected to revise its procedures or pursue federal contractors who, unlike Kaplan, are required to maintain data on an applicant's race.

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 who 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,[3] and state fair employment laws restricting inquiries into, and the use of, credit history and criminal records (e.g., the new laws in California[4]).

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3 *See* Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler ASAP (Jan. 6, 2014).

4 *See* Rod Fliegel and Jennifer Mora, *"Ban-the-Box" and Beyond: Employers That Do Business In or Contract with the City of San Francisco Should Review Sweeping Restrictions Regarding Inquiries Into, and the Use of, Criminal Records*, Littler ASAP (Feb. 14, 2014); Rod Fliegel, Jennifer Mora and Amanda Fu, *New California Laws Restrict the Discretion Employers Have to Inquire Into and Use Criminal Record Information*, Littler ASAP (Oct. 24, 2013).