

A Check on the EEOC Attack on the Credit Check

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We have written a few times about the EEOC's closer inspection of background checks and the use of criminal records in employment decisions because of their potential adverse impact on classes of applicants. The EEOC has also been focusing on the use of credit checks in hiring decisions for the same reason, and has commenced litigation against employers who use credit checks. Unfortunately, for the EEOC, a federal appeals court, in [EEOC v. Kaplan Higher Education Corp.](#), recently disarmed the EEOC in its attempt at challenging this common practice.

Kaplan, Inc., the for-profit higher education and test preparation company runs credit checks on applications for certain senior-executive positions and for accounting and other positions with access to company financials or cash, or access to student financial-aid information. Kaplan implemented the credit check about ten years earlier following its discovery that employees had stolen payments that belonged to students. The credit checks were performed by various outside vendors, which reported whether an applicant had ever filed for bankruptcy, is delinquent on child support payments, had any garnishments on wages, or outstanding civil judgments in excess of \$2,000. If the applicant's history had any of the foregoing items, the vendor flagged the applicant for further review by Kaplan. The vendor did not know the race of the applicant.

The EEOC argued that Kaplan's use of credit checks caused it to "screen out" more African-Americans resulting in prohibited disparate impact treatment based on race under Title VII of the Civil Rights Act of 1964.

To prove this disparate impact, the EEOC engaged an expert who analyzed the credit check reports and Kaplan's hiring data. The expert determined that the percentage of black applicants who were flagged for further review was higher than the percentage for white. The district court, however, excluded the expert's report because it did not meet the standards required under the federal rules of evidence for admission of expert testimony. Specifically, the court refused to allow the expert's testimony because of the methodology the expert used for determining disparate impact. The district court granted Kaplan's motion for summary judgment and dismissed the case. The EEOC appealed the decision on the basis that the district court should not have excluded the expert testimony. The federal appeals court affirmed the lower court's decision.

The case is certainly a set-back for the EEOC in its efforts to prove disparate impact. However, the EEOC may view this decision as just that, a temporary set-back in its efforts to address what it perceives as a widespread problem that has not been redressed. In fact, a similar case by the EEOC is pending in another court, so stay tuned. There is no doubt the EEOC will attempt to overcome the expert witness deficiency in its next action.

Employers should be aware that the EEOC is taking a closer look at credit checks and similar background checks and should consider carefully when denying employment to applicants based merely on the results of the background checks to avoid any prohibited disparate impact.

Authors