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EEOC Loses Again on Background Checks

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The Equal Employment Opportunity Commission's (EEOC) crusade to bring "disparate impact" claims against employers conducting criminal and credit background checks on prospective employees took another huge hit recently after the U.S. Court of Appeals for the Sixth Circuit rejected the EEOC's appeal of the dismissal of its claim in *EEOC v. Kaplan Higher Education Corporation*.[1]

The EEOC sued Kaplan, an organization that offers undergraduate and graduate degrees to students, under Title VII of the Civil Rights Act for using the *same credit-based background checks that the EEOC uses itself*. The kicker is that the "expert" testimony used by the EEOC that was excluded as "unreliable" in this case was from the same expert whose testimony for the EEOC has been thrown out by other courts.

Common-Sense Credit Checks. Kaplan implemented these common-sense credit checks after discovering that some of their employees had stolen financial aid payments belonging to students and that others had engaged in self-dealing by hiring relatives as vendors. The credit checks applied to applicants who, if hired, would have access to company financials or cash, as well as student financial aid information. This latter requirement was particularly important, because, as the Sixth Circuit pointed out, the U.S. Department of Education has regulations that impose "severe penalties" on institutions that misuse student financial aid information.[2]

The background checks conducted by Kaplan's vendors were racially blind in that each vendor "does not report the applicant's race with her other information." Yet the EEOC still brought a "disparate impact" claim against Kaplan, alleging that checking the credit background of applicants disproportionately affected "more African-American applicants than white applicants."

However, as the court pointed out, according to the EEOC's own personnel handbook, it runs the *same* type of credit checks on 84 of the agency's 97 positions because "[o]verdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations."[3] That is the exact reasoning presented by Kaplan for administering credit checks.

Expert Testimony "Laughable." On top of that blatant hypocrisy, the EEOC attempted to introduce "expert testimony" to try to demonstrate that Kaplan's credit check process caused it to reject more African American applicants than white applicants, thereby creating a disparate impact. However, the trial court refused to admit the testimony on the grounds that it lacked any credibility whatsoever.

The EEOC's proposed expert, Kevin Murphy, conducted a "race rating" study in which he employed five "race raters" (none of whom had any experience with methodologies to identify someone's race by visual means) to review less than a quarter of the files obtained from only one of Kaplan's vendors to try to determine the race of those applicants by simply

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"eyeballing" the photos. Ironically, the EEOC explicitly "discourages employers" from determining an applicant's race based solely on visual evidence during their own application processes.[4] There was no evidence that Murphy's test group was in any way representative of Kaplan's actual applicant pool—in fact, there was "a strong indication to the contrary."[5]

This is not the first time that the EEOC has employed Murphy to try to support a disparate impact claim based on background checks.[6] A Maryland federal court in 2013 in *EEOC v. Freeman* found Murphy's testimony unreliable and threw out the EEOC's lawsuit against another employer for conducting criminal and credit background checks.[7] The judge in *Freeman* declared Murphy's studies to be "laughable" and full of "such a plethora of errors and analytical fallacies" as to "render them completely unreliable, and insufficient to support a finding of disparate impact."[8]

Dubious Legal Theory. The EEOC's lawsuits are based on an untenable and dubious legal theory that puts the public and employers at risk from the criminal conduct of employees. The EEOC outlined its legal theory in a 2012 "Enforcement Guidance" for employers, which claims that criminal background checks by potential employers qualify as actions that have a "disparate impact" on non-white job applicants.[9] The EEOC claims that this violates federal antidiscrimination protections despite the fact that having a criminal record is not listed as a protected basis against discrimination under the law.

The guidance flies in the face of the fact that the federal government itself conducts background checks for many positions and has blanket exclusions that prevent some individuals with criminal convictions from holding certain jobs. It also may have the exact opposite effect, since there are studies that show that the absence of background checks may actually hurt minority hiring, since some employers may use race as a proxy for past criminal history if not permitted to conduct criminal background checks.[10]

EEOC's Lack of Credibility. The EEOC's repeated reliance on Murphy's "laughable" statistical analyses and its own flawed legal theory highlights the EEOC's lack of credibility and the frivolous nature of this type of litigation. The EEOC's entire approach to background checks conducted by employers who are trying to protect themselves and their customers parallels the conclusion of the Sixth Circuit in the *Kaplan* case regarding the EEOC's expert witness:

> 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 himself.[11]

Similarly, the EEOC is bringing cases on the basis of a homemade legal theory crafted by government bureaucrats with no particular expertise to craft it, administered by EEOC employees with no particular expertise to administer it, tested by no one, and accepted only by the EEOC.

Look in the Mirror. What makes this case particularly egregious, in addition to all of these other

1. *Equal Employment Opportunity Commission v. Kaplan Higher Education Corporation*, 2014 WL 1378197 (6th Cir. 2014).
2. Ibid., at 3.
3. Ibid., at 2.
4. Ibid., at 7.
5. Ibid.
6. See Hans A. von Spakovsky, "Striking a Blow for Common Sense on Criminal Background Checks," Heritage Foundation *Legal Memorandum* No. 101, September 9, 2013, http://www.heritage.org/research/reports/2013/09/striking-a-blow-for-common-sense-on-criminal-background-checks.
7. *EEOC v. Freeman*, 961 F.Supp.2d 783 (D. MD. 2013).
8. Ibid., at 796, 793.
9. See Hans A. von Spakovsky, "The Dangerous Impact of Barring Criminal Background Checks: Congress Needs to Overrule the EEOC's New Employment 'Guideline,'" Heritage Foundation *Legal Memorandum* No. 81, May 31, 2012, http://www.heritage.org/research/reports/2012/05/the-dangerous-impact-of-barring-criminal-background-checks.
10. Ibid., pp. 4–5.
11. *Kaplan*, at 7.

factors, is that the credit check process used by Kaplan is completely race-blind and justified by previous criminal conduct of Kaplan employees, as well as government regulations from the Department of Education that could result in the imposition of severe penalties on Kaplan for the potential actions of its employees.

The EEOC must understand this, since it runs the same type of criminal background checks and credit checks on almost all of its potential employees. Perhaps the EEOC should look in the mirror and sue itself for "disparate impact."

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