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Sixth Circuit Affirms Summary Judgment Against EEOC in Credit Check Suit

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In *Equal Employment Opportunity Commission ("EEOC") v. Kaplan Higher Education Corp.*, No. 13-3408 (6th Cir. Apr. 9, 2014), the U.S. Court of Appeals for the Sixth Circuit affirmed the award of summary judgment against the EEOC in its suit alleging that Kaplan's use of credit checks disparately impacted African-American applicants in violation of Title VII of the Civil Rights Act of 1964. Following on the heels of a similar ruling in *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013), the *Kaplan* decision represents yet another failure by the EEOC to muster the expert testimony necessary to meet its evidentiary burden in a disparate impact case, and still another setback for an agency that has tried to make the issue of background checks a top priority in recent years.

By way of background, Kaplan runs credit checks on applicants for senior executive and financial positions. As part of the check, a third-party vendor flags for Kaplan's consideration such items as bankruptcy filings, delinquency on child support, garnishment on earnings, outstanding civil judgments, and Social Security numbers that do not match the number the credit bureau has on file. Although the vendor's report does not classify the applicant's race, the EEOC maintained that a disproportionate number of African-Americans were singled out for scrutiny based on their credit histories. To support this claim, the EEOC relied on a statistical analysis prepared by its expert, Kevin Murphy, who holds a doctorate in industrial and organizational psychology.

Murphy developed a "race rating" system to identify the race of applicants subject to credit checks based on their driver's license photos. From that sample, he concluded that a disparate percentage of African-American applicants were flagged for review on account of their credit reports. In a brief opinion, however, the Sixth Circuit summarily rejected that "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." On these grounds, the court affirmed the award of summary judgment in favor of Kaplan.

Takeaway

Although the Sixth Circuit's decision is a positive outcome for employers that utilize credit checks to screen applicants, employers still should ensure their procedures comply with existing federal, state and local law. Ten states—California, Maryland, Connecticut, Hawaii, Illinois, Washington, Oregon, Vermont, Colorado, and Nevada—and at least two localities—Chicago (IL) and Madison (WI)—have restricted the use of credit checks in hiring and personnel decisions. Moreover, even where the law permits the use of credit checks, employers must remember to follow their obligations under the Fair Credit Reporting Act and any state or local equivalents. As *Freeman* and *Kaplan* demonstrate, the EEOC is committed to pursuing disparate impact claims arising from employer background checks. If you have any questions regarding this decision or background checks generally, please contact your Proskauer lawyer.

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