



Kaplan Asks 6th Circ. To Ignore 'Amici' In Race Bias Row

By Ben James

October 21, 2013

Kaplan Inc. urged the Sixth Circuit on Friday to ignore an amicus brief asking the court to not revive a U.S. Equal Employment Opportunity Commission race bias case over the company's use of credit checks in hiring, even though the brief supported Kaplan.

The test preparation company asked the Sixth Circuit to deny the Cato Institute, Pacific Legal Foundation and other conservative groups' motion to file their brief, arguing that the would-be amici are raising new arguments that weren't put before the district court or argued by Kaplan or the EEOC on appeal.

The Sixth Circuit will only address arguments raised for the first time on appeal in exceptional cases or if failing to tackle the new arguments would result in "plain miscarriage of justice," according to Kaplan, which added that other circuits also stick to this rule.

There are no exceptional circumstances present, and declining to consider the brief wouldn't translate to a miscarriage of justice, the company said.

"The court is fully able to dispose of this case on the issues presented by the parties and on which the district court entered judgment," Kaplan asserted.

The groups filed their motion — and the brief itself — last week. Both the proposed amicus brief and a brief Kaplan filed earlier this month seek to have Kaplan's trial court win affirmed in this closely watched case.

The EEOC is appealing U.S. District Judge Patricia A. Gaughan's January decision granting summary judgment to Kaplan, in the agency's suit claiming the test prep company's use of credit

checks as a screening tool had an unlawfully disparate impact on black job applicants and employees.

In the brief lodged last week, the groups make equal protection arguments that are being brought into the lawsuit for the first time, Kaplan said. The groups claim that the use of “race raters”— who determined the race of rejected applicants in the case based on their names and DMV photos — ran afoul of the Fifth Amendment's equal protection clause.

The proposed amicus brief also argued that Title VII's disparate impact theory raises equal protection concerns, Kaplan said in its opposition.

The groups' brief asks the appeals court to uphold the district court's ruling that threw out expert testimony that relied on the race raters and nixed the case.

The EEOC defended its expert's use of race raters in its own brief to the Sixth Circuit in August, saying the agency had proved that the use of color photographs to identify the race of applicants was reliable and that the statistical report based on it should therefore not have been excluded.

“Kaplan’s motion speaks for itself. The issues raised in the amicus brief were never part of the case at the district court, and Kaplan believes those arguments are unnecessary for review by the Sixth Circuit,” an attorney for Kaplan said in an email Monday.

An EEOC spokeswoman declined to comment.

The proposed amici are represented by Pacific Legal Foundation's Anastasia P. Boden, Joshua P. Thompson and Meriem L. Hubbard.

Kaplan is represented by Gerald L. Maatman Jr., David J. Rowland, David B. Ross, Pamela Q. Devata, Jennifer A. Riley and Matthew J. Gagnon of Seyfarth Shaw LLP.

The case is Equal Opportunity Employment Commission v. Kaplan Higher Education Corp. et al., case number 13-3408, in the U.S. Court of Appeals for the Sixth Circuit.