



Appeals Court ruling rejects EEOC method to show employment discrimination through credit checks

The 6th Circuit Court of Appeals rejected the methods used by the EEOC, but supporters say the underlying issues of discrimination are still present

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The 6th Circuit Court of Appeals recently issued a ruling that, in effect, allows businesses and other organizations the right to continue to screen employment applications through credit checks.

While the legal team that represented the defendant in the case, Kaplan Higher Education Corp., was pleased with the victory, others, such as the Equal Employment Opportunity Commission (EEOC), which brought the case, were disappointed.

"We are disappointed by the Sixth Circuit's decision, of course, and will review it carefully," David Lopez, General Counsel, EEOC, said in a statement e-mailed to *InsideCounsel*.

"However, the decision is an evidentiary ruling that does not go to the merits of the underlying discrimination allegation made by the EEOC. The Commission continues to be concerned about the impact of using credit history to screen out worthy applicants for employment and will not abandon its efforts to challenge such practices for their impact on protected groups in appropriate cases."

But in an interview with *InsideCounsel*, the lead counsel in the case, Gerald Maatman, a noted employment lawyer with Seyfarth Shaw, who also argued the appeal, noted that the Kaplan case

was in the EEOC's own early words a "first significant test case" to challenge employment screening.

"The EEOC made it kind of a centerpiece," Maatman said, adding it was a "stunning defeat" for the EEOC.

"If this was the best the EEOC could come up with, it wasn't very good," Maatman added, suggesting that the EEOC now needs to rethink its case theories.

And given the number of employers who do these kinds of credit checks for employment, the case became a "very, very important issue," he added.

On the other hand, Johnathan Smith, an attorney with the NAACP Legal Defense Fund, who formerly worked for Fried, Frank, Harris, Shriver & Jacobson, said he was disappointed with the appeals court's decision.

"Far too many Americans, particularly far too many Americans of color are unjustly denied employment because of credit checks," he explained in an interview.

"Credit checks if not used appropriately can have adverse impact on a protected class, including racial minorities," he added. He confirmed that the problem is made worse because the U.S. economy is still recovering – and economic conditions impact millions of Americans.

He said there may be times that credit checks could relate to a specific job, but often employers are using credit checks in a "very broad manner not related to the job at issue."

And what about an appeal of the decision? The EEOC said in a statement on Thursday that "those decisions are made by the Solicitor General of Department of Justice, which conducts all EEOC litigation before the Court, and we have no comment."

Meanwhile, the EEOC had argued that by using credit screening for its applicant pool, Kaplan screened out more African-American applicants than white applicants, which led to a [disparate impact](#), which in turn is a violation of Title VII of the U.S. Civil Rights Act.

But the appeals court was not moved by the methods used to prove its case – with them being developed by Kevin Murphy, a psychologist. The appeals court noted that the lower court said Murphy's methodology flunked tests on expert witness admissibility.

"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," the appeals court said in its ruling.

Several conservative organizations championed the decision. For instance, the Cato Institute's Walter Olson said the case came about after Kaplan University had a series of employee thefts, and it then heightened screening procedures for the hiring of new employees. In fact, Kaplan said

that some of its financial aid officers had been stealing money away from students, Forbes reported.

“These checks made no mention of any applicant’s race and Kaplan didn’t collect any race information from applicants, thus making the hiring process both race-neutral and race-ignorant. Nevertheless, the Equal Employment Opportunity Commission, which itself uses credit checks in hiring decisions, sued Kaplan under Title VII of the Civil Rights Act, claiming that the use of credit checks has an unlawfully disparate impact on African American applicants,” Cato said in a [blog post](#).

The EEOC in making its case used “race raters,” which are “a group of seemingly random people who sorted Kaplan’s job applicants into racial categories based only on the applicant’s name and DMV photo,” Cato added.

In addition, appeals judges also noted how the EEOC sued the company for “using the same type of background check that the EEOC itself uses” – which no doubt becomes an embarrassment for the EEOC. In fact, [Forbes](#) reported the screening methods are used by the EEOC for 87 percent of its positions. Maatman, who fought in court to have the EEOC practices revealed, called the fact the EEOC uses similar screening practices, an “irony” which showed “unfairness.”

Conservatives hope the decision sets a precedent.

“It’s a sharp setback for the agency’s dubious ‘disparate impact’ campaign against employer use of credit and criminal records in hiring,” Olson, a strong advocate for tort reform, said in his comments on the ruling. “And it’s also part of a pattern of rebuffs and defeats the EEOC has been dealt by judges across the country since President Obama turned the agency on a sharp leftward course with his appointments.”

Ed Silverstein is a veteran writer and editor for magazines, websites and newspapers. A graduate of Harvard's Kennedy School of Government, he has won several awards for his published articles.