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"Do As I Say, Not As I Do:" EEOC Required to Provide Discovery of Its Employment Practices

By Rod Fliegel and Alex Frondorf

In December 2010, the Equal Employment Opportunity Commission (EEOC) filed a lawsuit against Kaplan Higher Education Corporation ("Kaplan") in federal district court in Ohio, alleging that Kaplan's use of credit checks as part of its background checks for job applicants and employees has an unlawful disparate impact on African American individuals in violation of Title VII of the Civil Rights Act of 1964 ("Title VII").[1] As it turns out, the EEOC itself considers credit history information in employment decisions. Unsurprisingly, Kaplan asserted in the lawsuit, *inter alia*, the defenses of "business necessity" and estoppel. Based on recent developments in the pertinent case law, Kaplan also sought in discovery the identities of the specific individuals who the EEOC claims have been aggrieved by Kaplan's policies.

The litigation in *Kaplan* is ongoing, but many employers have expressed widespread interest in the EEOC's intensive focus on how employers use criminal records and credit history information for employment purposes; in particular, such focus in the EEOC's pervasive "systemic discrimination" investigations. Littler recently published an ASAP which discusses the EEOC's updated April 25, 2012, enforcement guidance concerning the consideration of arrest and conviction records in the employment context.[2]

EEOC Required to Disclose Its Employment Practices Regarding Credit Checks

During discovery in the litigation, Kaplan sought information from the EEOC regarding the Commission's own policies pertaining to credit checks for certain sensitive government positions. The district court previously ruled in the case that the "EEOC's use of background or credit checks in its own hiring of employees was relevant to Kaplan's asserted defense of business necessity in using such check in its hiring process."

In dispute was Kaplan's request for the EEOC's policies and procedures used to designate job positions as "public trust" or "national security," which, according to the EEOC's internal standards, require a background investigation, including a credit check. Kaplan argued to the district court that the "EEOC's own determination as to which of its positions require credit inquiries demonstrates the type of job duties that the EEOC believes warrant the use of a credit check, and it shows the business necessity that the EEOC believes justifies its own use of credit

checks." Kaplan further argued that "to the extent the EEOC's use of credit checks for specific positions is consistent with the practices it challenges in this lawsuit, this consistency supports Kaplan's estoppel defense." In opposition to Kaplan's motion, the EEOC argued that Kaplan's discovery request was overly broad, unduly burdensome, and not relevant to the case. The district court rejected the EEOC's arguments and, on April 18, 2012, granted Kaplan's motion to compel discovery from the EEOC.

EEOC Required to Disclose the Identity of the Individuals on Whose Behalf It is Suing

Kaplan also sought information regarding the identities of the specific individuals the EEOC claims have been aggrieved by Kaplan's use of credit checks. The EEOC argued that the identities were not relevant to the liability phase of the case. Kaplan, however, persuaded the district court that it has a right to focus its liability defense on "those individuals that the EEOC claims were aggrieved by its policies," and that it would be "severely disadvantaged" if the EEOC were to keep "Kaplan in the dark as to their identities." The district court agreed and ruled for Kaplan, reasoning that Kaplan was entitled to focus its defense on the specific individuals on whose behalf the EEOC intends to seek damages.

Significance of the *Kaplan* Discovery Order

The *Kaplan* discovery order, while significant for the *Kaplan* litigation, may also have broader ramifications for the EEOC. The EEOC indisputably is pursuing an aggressive agenda of targeting what it views as discriminatory practices through "practice and pattern" cases, including investigations and lawsuits focusing on hiring and employment policies related to credit checks and criminal records.[3] A very concrete and recent example of this is the EEOC's January 2012 $3.13 million settlement in a dispute concerning criminal records.[4] Importantly, at least some of the federal courts are requiring that the EEOC prosecute its cases based on sound, credible evidence.[5] As a very recent example, in *EEOC v. Bloomberg*, 778 F. Supp. 2d. 458 (S.D.N.Y. 2011), a federal district court in New York dismissed the EEOC's lawsuit after the EEOC failed to provide "statistically sound" evidence that the company violated the Pregnancy Discrimination Act against a whole class of women who took maternity leave.[6]

No less authority than the United States Supreme Court has recognized that background check investigations serve legitimate business purposes for employers.[7] Indeed, this seems readily apparent from the screening policies deployed by the EEOC and other government agencies. The *Kaplan* decision suggests that the EEOC cannot litigate a case based on "Do As I Say, Not As I Do," and that the EEOC itself recognizes the practical utility of conducting employment-related background investigations. This lesson is all the more important given that, on April 25, 2012, the EEOC issued its updated enforcement guidance concerning the use of arrest and conviction records for employment purposes (Although the EEOC was also slated to vote on its updated enforcement guidance concerning the use of credit history information on April 25, 2012, the EEOC did not do so).

Of course, employers that consider credit history information and/or criminal records for employment purposes must be mindful not only of the EEOC's interpretation of Title VII, but related federal and state laws, including the fair credit reporting laws, such as the Fair Credit Reporting Act ("FCRA"),[8] and state fair employment laws restricting inquiries into, and the use of, credit history and criminal records (e.g., the new laws in California and Massachusetts[9]).

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[1] *EEOC v. Kaplan Higher Education Corp.*, No. 1:10-cv-2882, 2012 U.S. Dist. LEXIS 54949 (N.D. Ohio Apr. 18, 2012).

[2] Rod Fliegel, Barry Hartstein, and Jennifer Mora, *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 30, 2012), available at www.littler.com/publication-press/publication/eeoc-issues-updated-criminal-record-guidance-highlights-important-stra.

[3] *See* EEOC, E-RACE Goals and Objectives, www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm#goal3.

[4] *See* Press Release, EEOC, Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), *available* at www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm.

[5] In *EEOC v. Peoplemark*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2001), *aff'd*, 2011 U.S. Dist. LEXIS 154429 (W.D. Mich. Oct. 17, 2011), the district court ordered the

EEOC to pay more than $750,000 for attorney's fees, expert fees, and court costs to the defendant employer, after the EEOC conceded its claims of discrimination against the employer for refusing to hire job applicants with criminal records. The employer had no such policy and the district court found that the EEOC's complaint was "without foundation from the beginning." The decision, however, has been appealed to the U.S. Court of Appeals for the Sixth Circuit. *See Id., appeal docketed,* No. 11-2582 (6th Cir. Dec. 16, 2011).

[6] *See* Sue Douglas and Meredith Shoop, *"'J'accuse!' is not enough in court": Court Dismisses EEOC's Systemic Allegations as Unsupported by Reliable and Persuasive Evidence*, Littler ASAP (Aug. 24, 2011), *available* at http://www.littler.com/publication-press/publication/jaccuse-not-enough-court-court-dismisses-eeocs-systemic-allegations-un.

[7] *See* Rod Fliegel and William Simmons, *U.S. Supreme Court Holds that Constitutional Privacy Rights Do Not Restrict the Government's Discretion to Background Check Federal Contractors*, Littler ASAP (Jan. 24, 2011), *available* at www.littler.com/publication-press/publication/us-supreme-court-holds-constitutional-privacy-rights-do-not-restrict-g.

[8] *See* Rod Fliegel and Jennifer Mora, *The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011), *available* at www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illumin.

[9] *See* Christopher Kaczmarek, Carie Torrence, and Joseph Lazazzero, *Massachusetts Employers Face New Obligations When Conducting Background Checks Involving Criminal History Records*, Littler ASAP (Mar. 9, 2012), *available* at http://www.littler.com/publication-press/publication/massachusetts-employers-face-new-obligations-when-conducting-backgroun (discussing the new "CORI" law in Massachusetts); *see also* Rod Fliegel and Jennifer Mora, *California Joins States Restricting Use of Credit Reports for Employment Purposes*, Littler ASAP (Oct. 10, 2011), available at http://www.littler.com/publication-press/publication/california-joins-states-restricting-use-credit-reports-employment-purp (discussing California's new restrictions on using credit history information).