



The GSH 60-Second Memo

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Illegal Employment Discrimination on the Basis of Credit History?

by Warren E. Buliox, Esq.

Credit history is not a protected class . . . right? Well, in some states, it is and in others it may soon one day be. Accordingly, legal liability may follow in instances when an employer takes action against someone because of his/her credit history. Further, and as is explained below, the same may hold true in states that have not transformed credit history into a protected class.

For years, employers have refused to hire or employ individuals with blemished credit histories. Estimates reveal that nearly half of all employers base at least one important employment decision on the basis of an applicant's or employee's credit report. Legally, is this okay? Practically, does it make sense?

For employees and job seekers who have had to file for bankruptcy or have otherwise less than perfect credit histories, the answer is often no. For many employers, however, credit histories provide invaluable insight into whether an individual is responsible, trustworthy and capable of using good judgment.

Amidst strong feelings on both sides of the issue, some legislators across the country are seeking to strike a balance.

Hawaii and Washington, for instance, prohibit discrimination on the basis of credit history, but with exceptions. Wisconsin, Ohio, Michigan, and New Jersey have similar legislation in the works.

In many states, credit history discrimination cases will be analyzed in the same or similar way conviction/arrest record discrimination cases are analyzed. That is, employers are (or would be) prohibited from taking action against an individual on the basis of his/her credit history unless the credit history is substantially related to the circumstances of the individual's position. Under this analysis, if the circumstances of the individual's credit history suggest that the individual lacks the ability and/or willingness to act with honesty, integrity or responsibility in performing a particular job, the credit history would be substantially related to the position at issue and the employer would be free to take action against the individual. Factors used in this analysis would include, but not be limited to, the nature of the job or activity, the essential duties of the job or activity, and the individual's character traits as revealed by the circumstances of his/her credit history.

At the end of the day, whether an individual's credit history is substantially related to a given position will require a case-by-case analysis. That being said, it is relatively safe to assume (without looking too deep into actual circumstances) that an individual's credit history may be substantially related to a job involving the management of money at a financial firm. Conversely, a person's credit history may not be substantially related to a position at a fast food restaurant, even if the position requires the occasional handling of cash. As with conviction/arrest record discrimination cases, the relationship must be truly substantial to shield an employer who takes action on the basis of credit history from liability.

Notably, express prohibitions against an employer's ability to consider credit history in employment-related decisions are a creation of state legislation, as opposed to federal law. Are employers who do business outside of the few states that have considered this issue, then, in the clear? Not necessarily.

Title VII prohibits discrimination in employment on the basis of race, national origin and gender. As the Supreme Court has held, the law not only prohibits overt discrimination, but also prohibits "practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Hence, employment practices that have a "disparate impact" on members of a protected class run afoul to Title VII unless certain conditions (discussed below) are met.

Many have maintained, some successfully, that taking action against someone on the basis of his/her credit history has a disparate impact on minorities and women. Indeed, minorities and women have historically received lower wages and fewer opportunities in the workplace than their White male counterparts. See e.g. Bureau of Labor Statistics, Dep't of Labor, Usual Weekly Earnings of Wage and Salary Workers: Fourth Quarter 2008 (2009). Accordingly, it is not surprising that demographic data from various studies show that minorities and women are more likely to have lower household incomes, live in poverty and, therefore, struggle

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with credit. From these studies, direct correlations have been drawn between race/gender and credit scores. These correlations have been used to support findings that employment practices that take credit history into consideration may disparately impact minority groups and women. Indeed, as Chairman Stuart J. Ishimaru of the EEOC noted earlier this year, "the EEOC has had a longstanding position that credit check policies can have an unlawful disparate impact in violation of Title VII's prohibitions against . . . discrimination."

If a practice (such as using credit scores in employment-related decisions) disparately impacts a protected class, an employer can avoid liability by showing that the practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. §2000e-2(k)(1)(A)(i). This, however, can often be a difficult showing, requiring employers to "measure the person for the job and not the person in the abstract." *Griggs*, 401 U.S. at 436. According to the EEOC, this requires the employer to "show that a credit check policy accurately measures whether applicants possess the qualifications needed for the positions from which they are excluded." Again, this can be a tough showing.

The bottom line in all of this is that employers should use caution in taking action against individuals on the basis of credit history. Whether or not state legislators have enacted laws to expressly prohibit discrimination on the basis of credit history, liability can flow from even the most facially neutral policies and/or practices. One of the best ways to avoid liability in this arena is to make sure that an individual's credit is not an automatic bar to employment, unless there is a very strong relationship between the individual's credit history and the particular job.

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