



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of the Chairman

Testimony Before the Hawaii State Senate Committee on Labor
Thursday, March 19, 2009
Conference Room 224, 2:45 p.m.

RE: House Bill 31 - Relating to Employment Practices; Credit History Check Prohibition

Chair Takamine, Vice Chair Taniguchi, and Members of the Committee:

I am Stuart J. Ishimaru, Commissioner and currently, Acting Chairman of the United States Equal Employment Opportunity Commission (EEOC). The EEOC's mission is to promote equal opportunity in the workplace and enforce federal laws prohibiting employment discrimination based on race, color, national origin, religion, gender, pregnancy, age and disability. These statutes include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, sections of the Rehabilitation Act of 1973, the Equal Pay Act, Title I of the Americans with Disabilities Act of 1990, and sections of the Civil Rights Act of 1991.

Recognizing the potential discriminatory implications of employer credit checks, 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 race and national origin discrimination. As early as the 1970s, the EEOC issued decisions finding that employers could violate Title VII by basing employment decisions on a worker's financial status.¹ Because of this concern and the EEOC's strong commitment to eliminating employment discrimination, this testimony is being submitted to share with you the EEOC's experience with this issue as you consider House Bill 31.

Under Title VII of the Civil Rights Act of 1964 (Title VII), employers are prohibited from discriminating on the basis of race, color, religion, sex, or national origin. As the United States Supreme Court explained in 1971, "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."² Thus, if an employment practice has a disparate impact based on race or any other protected characteristic, the practice would be unlawful unless the employer could establish that the practice is "job related for the position in question and consistent with business necessity."³

¹ EEOC Dec. 72-1176, ¶ 6359 (CCH) (1972) (bank policy of using credit information to evaluate potential employee was unlawful in the absence of business justification); EEOC Dec. 74-02, ¶ 6386 (CCH) (1973) (manufacturing company's policy of looking at applicants' financial status was unlawful in absence of business justification).

² *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

³ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

As with other screening tools, employer credit checks must comply with the requirements of anti-discrimination laws. The Fair Credit Reporting Act (FCRA) authorizes the use of credit information for employment purposes.⁴ However, employers are still required to comply with Title VII as to *how* they use credit information. Thus, the FCRA specifically requires certification from any individual requesting a credit report for employment purposes that “information from the [credit] report will not be used in violation of any applicable Federal or State equal employment law or regulation.”⁵

Although Title VII was enacted over 40 years ago, persons of color continue to be paid less than White individuals⁶ and are more likely to hold low-paying jobs that lack opportunities for advancement.⁷ Not surprisingly, then, demographic data show that African-American and Hispanic families have lower household incomes on average than non-Hispanic White households⁸ and are much more likely to be living in poverty⁹ and/or without health insurance.¹⁰ Hawaiians and other Pacific Islanders also tend to be economically disadvantaged, with Native Hawaiians having the highest unemployment rate and lowest income of any ethnic group in the Hawaiian islands.¹¹

Studies have also shown that racial or ethnic minorities are more likely than Whites to have low average credit scores. For example, a 2006 study by the Brookings Institution, which examined

⁴ 15 U.S.C. § 1681b(a)(3)(B) (credit information may be released to person who intends to use it for employment purposes).

⁵ *Id.* § 1681b(b)(1)(A)(ii).

⁶ *See, e.g.*, BUREAU OF LABOR STATISTICS, DEP’T OF LABOR, USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS: FOURTH QUARTER 2008 (2009), <http://www.bls.gov/news.release/wkyeng.nr0.htm> (during the fourth quarter of 2008, the median earnings for whites working full time were \$748 per week, compared with \$593 for blacks and \$535 for Hispanics).

⁷ *See, e.g.*, E.E.O.C., CHARACTERISTICS OF PRIVATE-SECTOR EMPLOYMENT (2003), *available at* <http://www.eeoc.gov/stats/reports/ceosummit/index.html>.

⁸ U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 5 (2006), <http://www.census.gov/prod/2006pubs/p60-231.pdf> (in 2005, median household income for African-Americans and Hispanics was 61% and 71%, respectively, of the median income of White households).

⁹ *Id.* at 13 (in 2005, poverty rates of African-Americans and Hispanics were two and one-half to three times that of Whites).

¹⁰ *Id.* at 23 (in 2005, 11.3% of non-Hispanic Whites were not covered by any private or government-provided health insurance, compared with 19.6% of African-Americans, 17.9% of Asians, and 32.7% of Hispanics).

¹¹ Asian-Nation, <http://www.asian-nation.org/hawaiian-pacific.shtml> (Native Hawaiians and other Pacific Islanders “tend to lag behind most other groups,” with per-capita income in 1999 of \$15,054, which was 37% lower than the \$23,918 per capita income for Whites and 31% lower than the \$21,823 figure for Asian Americans). “Among Pacific Islanders, Native Hawaiians earn lower incomes, hold lower-status jobs, and have the highest unemployment rate of all the ethnic groups in the islands. Due to their low incomes that hinder access to health care, Native Hawaiians also suffer higher disease, cancer, and mortality rates and their life expectancy is shorter by eight years than other groups.” *Id.*

the variability of credit scores across U.S. counties, found that counties with high proportions of racial or ethnic minorities are more likely to have low average credit scores.¹² Similarly, at a May 2007 Commission meeting, Adam Klein, who is an expert on employee credit checks, cited a Freddie Mac study as establishing a correlation between race and credit status.¹³ Based on such a correlation, Mr. Klein concluded that employer credit check policies have a disparate impact based on race. The data on this subject, however, are limited, and the EEOC is unaware of any studies examining credit scores based on ethnicities within racial groups. While national credit data are limited, income or poverty data showing that a particular group, such as Native Hawaiians, are economically disadvantaged would suggest that members of that group would also be likely to have correspondingly low average credit scores.

Although a policy having a disparate impact is not unlawful per se under Title VII, it must be justified by business necessity and there must not be a less discriminatory alternative. To establish a business necessity for excluding applicants on the basis of negative credit reports, “bare or ‘commonsense’-based assertions” are not enough.¹⁴ Rather, as explained by the Supreme Court, the practice at issue must “measure the person for the job and not the person in the abstract.”¹⁵ Thus, the employer must show that a credit check policy accurately measures whether applicants possess the qualifications needed for the positions from which they are excluded.

Under this standard, it seems likely that in most cases credit check policies will be legally problematic. First, credit reports are often inaccurate and may include errors that are serious enough for an individual to be denied a loan or employment.¹⁶ Second, negative credit information may not account for individual circumstances that could have been beyond an individual’s control, such as developing a disability, divorce, death of a spouse, illness of a family member, identity theft, or employer downsizing.¹⁷ Finally, even assuming that a credit

¹² Matt Fellowes, BROOKINGS INST., CREDIT SCORES, REPORTS, AND GETTING AHEAD IN AMERICA 9 (2006), http://www.brookings.edu/~media/Files/rc/reports/2006/05childrenfamilies_fellowes/20060501_creditscores.pdf (counties with average credit scores between 500 and 559 – very high risk – had a 49% combined Hispanic and black population while counties with average credit scores between 720 and 850 – very low risk – had a combined Hispanic and black population of 5%). While the study did not determine the underlying causes of the link between credit score and race, it stated that the association reflects, among other factors, the historical disparities between races in access to education, jobs, and loans. *Id.* at 10.

¹³ Statement of Adam T. Klein, Esq., EEOC Commission Meeting (May 17, 2007), <http://www.eeoc.gov/abouteeoc/meetings/5-16-07/klein.html>.

¹⁴ *See El v. Southeastern Pa. Trans. Auth.*, 439 F.3d 232, 240 (3d Cir. 2007).

¹⁵ *Griggs*, 401 U.S. at 436.

¹⁶ *CR Investigates. Credit Scores: What You Don’t Know Can Be Held Against You*, CONSUMER REPORTS, Aug. 2005, 2005 WLNR 11847414 (According to a 2004 survey by the U.S. Public Interest Research Group, 25% of credit reports include errors that are serious enough for an individual to be denied a loan or employment.).

¹⁷ Jerry K. Palmer & Laura L. Koppes, INVESTIGATION OF CREDIT HISTORY VALIDITY AT PREDICTING PERFORMANCE AND TURNOVER, Society for Industrial and Organizational Psychology, Chicago, IL, Apr. 3, 2004, at 7.

report is an accurate account of an individual's credit history, there is little, if any, evidence that credit information will generally be predictive of successful job performance.¹⁸

While the EEOC has long been concerned that credit check policies can have an unlawful disparate impact in violation of Title VII's prohibitions against race and national origin discrimination, the EEOC has reiterated its concerns during the past few years as employer credit checks have become more common.¹⁹ For example, in race discrimination guidance issued in 2005, the Commission stated that credit checks and other employment policies relating to off-the-job employee conduct may be challenged under the disparate impact framework. We noted that similar to credit check policies, people of color have also used the disparate impact framework to challenge employer policies of discharging persons whose wages have been garnished to satisfy creditors' judgments.²⁰ On May 17, 2007, the EEOC held a public commission meeting at which the potential discriminatory effect of credit checks was discussed.²¹ In one of the goals of the Commission's E-RACE initiative posted in November of 2007, employer credit checks was raised as a topic on which the Commission should issue additional guidance.²² The issue of relying on credit checks in employment decisions remains an issue of concern for the EEOC and is likely to be raised more frequently in the coming years because of the ease of access to credit history information.

Thank you for the opportunity to submit this testimony.

¹⁸ See *id.* at 16 (2004 study by two researchers at Eastern Kentucky University found that workers with a history of late payments did *not* receive lower performance evaluations than workers with good credit histories, nor did they leave their employers at a greater rate than workers with good credit histories).

¹⁹ SOCIETY FOR HUMAN RES. MGMT., WORKPLACE VIOLENCE SURVEY 19 (2004), available at http://www.slcc.edu/hr/docs/Workplace_Violence_Survey.pdf (5% of companies responding to a 2003 SHRM survey said that they use credit checks in pre-employment screening, up from only 19% in 1996).

²⁰ Section 15: *Race and Color Discrimination*, EEOC Compliance Manual, Volume II (BNA), § 15-VI B.2 (2005).

²¹ Transcript, EEOC Commission Meeting (May 17, 2007), <http://www.eeoc.gov/abouteeoc/meetings/5-16-07/transcript.html#12>.

²² <http://www.eeoc.gov/initiatives/e-race/goals.html>.

**Testimony Before the Hawaii State Senate Committee on Labor
Tuesday, March 24, 2009
Conference Room 224, 2:45 p.m.
RE: House Bill 31 - Relating to Employment Practices; Credit History Check
Prohibition**

Chair Takamine, Vice Chair Taniguchi, and Members of the Committee:

We strongly support HB 31, and oppose the use of credit reports in hiring.

We are residents of Hawai'i Island. Kawika has been unemployed due to the tourism down-turn since November 2008. He has been passed over by two positions for which he is well qualified; both of these potential employers obtained credit reports. One potential employer received very strong recommendations from local business contacts he had in the same industry.

We are appalled that a credit report would bar an individual from being able to earn a living and be a responsible citizen and consumer. The longer this economic downturn continues, the more damage will be done to individual's ability to meet expenses and obligations. To then make the financial hard times be the cause of not being hired only exacerbates financial problems. Several years ago we had to file bankruptcy. Since then we have reestablished our consumer credit. We are now struggling again to keep our home.

We personally resent the implication that an individual would not provide fine service or would be some kind of risk to an employer due to a blemished credit report.

Stuart J. Ishimaru, Commissioner and currently, Acting Chairman of the United States Equal Employment Opportunity Commission (EEOC), offered testimony to you which cited a 2004 study by two researchers at Eastern Kentucky University found that workers with a history of late payments did *not* receive lower performance evaluations than workers with good credit histories, nor did they leave their employers at a greater rate than workers with good credit histories.

We urge you to pass HB 31 immediately and help us use all of our talents to restore our economy.

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