
# Avoid the use of adverse adjudication statuses at pre-adverse action stage

A recent trend in cases filed by plaintiffs' counsel alleges violations of the Fair Credit Reporting Act (FCRA)'s pre-adverse and adverse action requirements based on employers' use of certain adjudication statuses, such as "fail" or "ineligible," at the pre-adverse action stage. Plaintiffs argue that the adjudication to "fail" or "ineligible" indicates that the employer made a final decision not to hire the individual before providing the individual with a copy of his or her report and an opportunity to dispute.

> In making this argument, plaintiffs focus on the wording used – "fail" or "ineligible" – to illustrate that the decision was no longer pending or subject to review, and therefore in violation of the FCRA.

In *Manuel v. Wells Fargo Bank, N.A,*[1] upon receiving the plaintiff's report, Wells Fargo coded the plaintiff as "ineligible" in the background check vendor's system, which triggered the adverse action protocol. Specifically, the plaintiff received a "Pre-Adverse Action Notice," a copy of the report, and a summary of rights under the FCRA. The plaintiff disputed the report and appealed pursuant to Wells Fargo's appeal process. The vendor then generated a revised report that still contained the disputed convictions, and Wells Fargo sent an adverse action notice to the plaintiff advising him that Wells Fargo would not consider him further for the position. The plaintiff claimed that Wells Fargo's coding of the plaintiff as "ineligible" in the vendor's system, which triggered the adverse action protocol, violated the FCRA requirement that the pre-adverse action notice, a copy of the report, and summary of rights be provided to the individual before the adverse action. Wells Fargo argued that the

1 No. 3:14-cv-00238 (E.D. Va., Mar. 15, 2016).

"ineligible" coding was only a preliminary determination, not a final decision.

The court found that a triable issue existed as to whether the "ineligible" coding was an adverse action under the FCRA. The court emphasized that, under Wells Fargo's procedure, its use of the ineligibility code was the only communication that Wells Fargo made to its vendor about the applicant unless the applicant disputed the background check after he or she received the pre-adverse action notice. The court held that a reasonable jury could find that Wells Fargo's initial coding of "ineligible" was final when it was first relayed to the vendor because Wells Fargo was comfortable adhering to that decision without reviewing it if the individual did not file a dispute.

Following the court's ruling, Wells Fargo agreed to a class-action settlement in the amount of $12 million to resolve the claims that it failed to follow the FCRA's pre-adverse and adverse action process and failed to provide applicants with standalone disclosure forms. The class consists of roughly 250,000 people.

In the similar case of *Branch v. Government Employees Insurance Company (GEICO)*,[2] the plaintiff alleged that upon extending a conditional job offer, GEICO's policy was to request a background report and to assign each report a preliminary grade of "pass" or "fail." Reasons for a "fail" grade included felony convictions, certain misdemeanor convictions, and the applicant's failure to disclose a conviction. GEICO alleged that the applicant then had seven business days after receiving written notice to address the deficiencies contained in the report. Because this grading occurred before the plaintiff was provided with a copy of his or her report and an opportunity to dispute, the plaintiff alleged an FCRA violation.

In response to the plaintiff's argument that GEICO's "fail" rating was, in fact, a final adverse action, GEICO moved for summary judgment, asserting that assigning a "fail" grade to an applicant's background report did not qualify as an adverse action under the FCRA, but rather merely intent to take adverse action. The record contained evidence that could support either GEICO's contention that the "fail" grade was an intent to take adverse action, or the applicant's contention that the "fail" grade itself constituted an adverse action. The notification letter included tentative language stating that GEICO would be completing its review in the next few days and "may take action based on the enclosed report," and allowed seven business days for the applicant to cure deficiencies. Additionally, GEICO's policies prohibited GEICO employees from rescinding a conditional offer before the seven-day period expired. In fact, 96 of the 426 applicants receiving a "fail" grade because of their criminal background were able to correct the deficiencies following their initial "fail" grade.

However, although many of the applicant's assertions that the "fail" grade was a final decision either lacked evidentiary support or was unconvincing, the applicant had presented evidence that a GEICO employee told her in a phone conversation, before the pre-adverse notification was sent, that GEICO was rescinding its employment offer. That evidence showed only that the GEICO employee, in the single case of the applicant, may have deviated from GEICO's policy of waiting until the end of the seven-day period to inform the

2 No. 3:16-cv-1010, 2018 WL 358504 (E.D. Va., Jan. 10, 2018).

applicant it was rescinding the offer. Based on that fact, the Virginia federal court denied plaintiff's motion to certify a class action but also denied GEICO's summary judgement motion, allowing the plaintiff's pre-adverse action claim to continue, finding that GEICO may have violated the FCRA when it denied employment to the applicant based on her criminal record and that there was a genuine material dispute about whether GEICO's initial negative decision regarding the applicant was a tentative internal decision or a final decision.

In some instances, employers may be able to prevail on the facts and get a case dismissed, such as in *Culberson II v. The Walt Disney Co.,*[3] where a California judge granted Disneyland's motion for summary judgment in a class action. The plaintiff had alleged that Disneyland's practice of coding certain applicants with potentially adverse background checks as "no-hire" and preventing them from attending orientation pending possible appeals violated the FCRA's pre-adverse action requirements. The plaintiff alleged that the park tells it's casting department that an applicant who receives an unfavorable background check is a "no-hire" and cannot attend orientation before giving the applicant notice, even though the applicant can appeal the findings, arguing that doing so is an "adverse action" under the FCRA. Similar to GEICO, Disneyland argued that its "coding" was not an adverse action itself, but rather only an "internal decision" to potentially take an adverse action in the future.

Disneyland initially fought and lost on plaintiff's motion for class certification, with the Los Angeles Superior Court agreeing to certify the case as a class action,[4] but the court ultimately granted Disneyland's motion for summary judgment, finding that its "no-hire" coding did not constitute an "adverse action" because it was simply an "internal decision."[5] Similarly, in *Reid v. Kroger*,[6] a federal district court rejected a plaintiff's argument that an employer's use of a "Not Clear for Hire" adjudication status at the pre-adverse action stage indicated a final adverse action, concluding that the employer produced sufficient evidence to show that it had only made a preliminary determination of employment eligibility when it used the "Not Clear for Hire" status and that the job remained open and available to the plaintiff throughout the dispute process.

While employers may be able to ultimately prevail in these FCRA actions using motions to dismiss or motions for summary judgement, the road to victory is almost always a long and expensive one, as illustrated in the Culberson case where Disneyland spent time and resources over four years to fight (and lose) the class certification battle before prevailing with a summary judgment motion. Thus, employers would be well-advised to avoid using adjudication labels that are commonly challenged by plaintiffs in order to minimize the risk of being pulled into costly litigation. Instead of using words that could potentially be interpreted as having adverse implications, employers would be well-advised to use labels and statuses that are as neutral and merely factual as possible (particularly at the pre-adverse stage, where no final employment decisions have been made).

In light of the above guidance, if you would like to review and/or modify the adjudication statuses currently used by your organization, please contact your account manager for assistance.

3 No. BC526351 (Superior Court of Cal., County of Los Angeles, Feb. 9, 2018), https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/501/2018/02/Culberson-v-Walt-Disney-Parks.pdf.

4 "This class consisted of approximately 715 putative class members. According to the court, the plaintiff had presented evidence that the employer had a "uniform practice of sending" the pre-adverse action notice after rendering a "no hire" adjudication. In fact, one employer witness testified that this was "normal protocol" for the company. In granting class certification on this issue, the court noted that the primary common question at issue could easily be answered for each class member: did he or she receive a pre-adverse action notice and summary of rights before the employer made its final decision?" See Rod Fliegel & Jennifer Mora, *California Court Certifies FCRA Class of Over 40,000 Applicants*, LITTLER MENDELSON P.C. (July 17, 2017), *available* at https://www.littler.com/publication-press/publication/california-court-certifies-fcra-class-over-40000-applicants.

5 *Id.*

6 No. 1:16-cv-815 (S.D. Ohio, Mar. 15, 2018).