

Chicago Daily Law Bulletin.

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November 16, 2016

Credit check on job applicant falls victim to Employee Credit Privacy Act

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Catherine Ohle was denied a job because of a failed credit check that she claimed was a violation of the Illinois Employee Credit Privacy Act.

The act (820 ILCS 70/1, et seq.), with a few exceptions, prohibits credit checks of applicants and employees. The circuit court granted the employer summary judgment and Ohle appealed.

By way of background, Ohle applied for a job at Neiman Marcus' Oak Brook store as an entry-level "dress collections sales associate." Ohle was interviewed and was informed that she should expect an offer for the position, pending completion of a successful background check.

Neiman Marcus ran a background check through a third-party vendor. The third party informed Neiman Marcus that Ohle failed her credit check and, on that basis, did not investigate the remaining areas of inquiry. The report indicated Ohle had several civil judgments against her and several accounts in collections.

On July 17, 2012, Ohle received a letter from the reporting agency informing her that she failed the credit check and, based on her credit report, would not be hired.

Ohle filed suit individually and on behalf of a class, alleging a claim for violation of the act, which prohibits an employer from inquiring into a potential employee's credit history and prohibits an employer from refusing to hire the applicant or discriminating against the applicant because of her credit history.

The act provides an exemption where a satisfactory credit history is an "established bona fide occupational requirement of a particular position." An individual who is injured by a violation of the act may bring a civil action to obtain injunctive relief, damages or both, and if she prevails, she may be awarded costs and reasonable attorney fees.

In September 2013, defendant, the Neiman Marcus Group, moved for summary judgment, arguing that there were no material facts in dispute and that Neiman Marcus didn't hire Ohle for a lawful and legitimate reason, namely, that a satisfactory credit check was a bona fide occupational requirement for the sales associate position.

Neiman Marcus argued that three of the enumerated circumstances in the act were involved in the dress collections associate position, and therefore, a satisfactory credit history was a bona fide occupational requirement for employment in that position. Those three circumstances were the following:

- The position involves access to personal or confidential information
- The position includes custody of or unsupervised access to cash
- The position includes signatory power of \$100 or more per transaction.

Specifically, retailer's position was that the duties of the sales associate involve access to personal or confidential customer information because applications for a Neiman Marcus credit card provide the associates with Social Security numbers, date of birth, addresses and income information, which the associates enter into a computer.

According to the defendant, the job entails the custody of cash valued at \$2,500 or more; sales associates routinely sell dresses and items worth more than \$2,500; purchases can be made with cash, check or credit card and as long as a purchase is less than \$10,000, it can be made with any sales associate.

In addition, associates have signatory power of more than \$100 because they issue gift cards and process cash returns.

The trial court granted Neiman Marcus' motion for summary judgment, finding the sales associate position involves access to personal or confidential customer information, and therefore, the job is exempt from the act.

The parties agreed that Social Security numbers and other personal or confidential customer information were contained in completed Neiman Marcus credit card applications. Therefore, the outcome of whether the exemption applied to the case turned on the interpretation of one word: "access."

The appeals court found that sales associates are neither managers nor among the select few employees whom Neiman Marcus trusts with personal and confidential information so as to exempt the sales associate position from the protections of the act.

Neiman Marcus' employees testified that only its managers or select few employees — not low-level employees — are entrusted with the confidential information the customer gives the store with the explicit authorization to process and keep.

A sales associate essentially acts as a conduit by receiving the application from the customer, ensuring it gets to Neiman Marcus manager or trusted employee or entering the information into the sales system for immediate credit approval, which is a task no more sensitive in nature than entering credit card numbers into a credit card machine or taking down driver's license information to accept a personal check for a sale.

The court agreed with Ohle that if the sales associate position were exempt from the act, the exemption would swallow the rule. If "access" were construed in such a broad manner, the act effectively would accomplish nothing and fail to protect the majority of retail sales clerks.

If the act applied where employees are simply handed credit card applications and then place the application in a drawer for processing at a later time by a different department, then retail clerks in most stores, including retailers like Neiman Marcus, would be exempt and employers would be allowed to deny employment to citizens who face financial hardships that are often unpreventable due to the harshest economic situation in decades and who are not able to obtain employment despite bad credit.

If the extent of a sales associate's "access" to an application is merely securing it in the register and taking it to the cash office then it was clear to the court from the legislative history that this broad

interpretation of the exemption was not what the legislature intended.

Neiman Marcus failed to meet its burden of proof that an exemption to the act applied to the dress collection sales associate position, and therefore, it discriminated against Ohle when she applied for that job.

The appeals court reversed the judgment of the circuit court and remanded for further proceedings.

The case is *Catherine Ohle v. The Neiman Marcus Group*, 2016 IL App (1st) 141994.

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