Testimony of

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Legislative Hearing on H.R. 3149
The Equal Employment for All Act

Before the House Subcommittee on
Financial Services and Consumer Credit

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My name is Adam Klein, and I am a partner at Outten and Golden LLP. My law firm represents plaintiffs in employment lawsuits, and we bring individual and class-wide claims to challenge discriminatory barriers to employment opportunity. I am honored to testify today in front of the House Subcommittee on Financial Institutions and Consumer Credit in support of the Equal Employment for All Act. The Act would outlaw the use of credit checks to deny employment to individuals, a practice that has a discriminatory impact on racial minorities and violates the letter and spirit of Title VII of the Civil Rights Act of 1964.

1. Has the Use of Credit Checks in Employment Increased in the Last Decade?

In the last 15 years, the use of credit history checks by employers has increased dramatically. In 2004, a Society of Human Resource Management ("SHRM") study found that more employers were using credit checks in 2003 (35%) than in 1996 (19%).[1] A subsequent SHRM study reported that by January 2010, the percentage had risen to 60%[2]—a majority of all employers.

As a result, in today's era of high unemployment, credit checks pose a hurdle for many job-seekers.

2. Do Employee Credit Checks Have a Disparate Impact by Race?

The use of credit scores to screen out employees has a significant impact on applicants who are people of color. In 2000, Freddie Mac conducted a study that found striking race-credit correlations:

percent of group whose credit record is: [3]

Racial Group	"bad"	"indeterminate"	"good"
African Americans	48%	16%	36%
Hispanics	34%	15%	51%
Whites	27%	12%	61%

These numbers are striking, but the more important question is why they exist. Credit scores are based on a weighted mix of factors:

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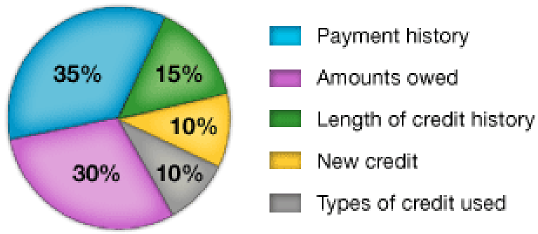
1 Evren Esen, *SHRM Workplace Violence Survey* (Society for Human Resource Management, January 2004) at 19.

2 *Background Checking: Conducting Credit Background Checks* 2 (Society For Human Resources Management, Jan. 22, 2010).

3 Freddie Mac National Consumer Credit Survey (2000).

Factors considered in Calculating Credit Scores[4]



Obviously, the ability to get credit, and the ability to use it effectively, is greatly affected by income. Part of the racial disparity in credit scores is explained by underlying disparities in income. There are dramatic differences by race in median earnings:

Median Annual Earnings[5]

Year	African Americans	Hispanics	Whites
2000	$24,648	$22,748	$30,680
2001	$25,532	$21,684	$31,720
2002	$25,896	$22,048	$32,396
2003	$26,728	$22,880	$33,072
2004	$27,300	$23,712	$34,164
2005	$27,040	$24,492	$34,944
2006	$28,808	$25,272	$35,880
2007	$29,588	$26,156	$37,232
2008	$30,628	$27,508	$38,584
2009	$31,252	$28,132	$39,364

But this is only a partial explanation. Although, statistically, low-income workers tend to have weaker credit scores than higher earners, low-wage workers as a group still have better average credit scores than African Americans, and are about comparable to Hispanics:

Credit Scores by Income[6]

Annual Income	percent of group with "bad" credit
Under $25,000	36%
$25,000-$44,999	33%
$45,000-$64,999	25%
$65,000-$75,000	22%

[4] Fair Isaac, "What's in your FICO score," *available at* http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx (last visited Sept. 20, 2010).
[5] U.S. Bureau of Labor Statistics, Current Population Survey.
[6] Freddie Mac National Consumer Credit Survey (2000).

After all, looking at credit scores by income leaves out the unemployed—a disproportionate number of whom are people of color. These numbers have only grown worse in the recession:

Unemployment Rates by Race[7]

Year	African Americans	Hispanics	Whites
2000	7.6	5.7	3.5
2001	8.6	6.6	4.2
2002	10.2	7.5	5.1
2003	10.8	7.7	5.2
2004	10.4	7.0	4.8
2005	10.0	6.0	4.4
2006	8.9	5.2	4.0
2007	8.3	5.6	4.1
2008	10.1	7.6	5.2
2009	14.8	12.1	8.5

During periods of economic stress like the current recession, some individuals who experience a period of unemployment are able to rely on savings, or can fall back on support from family members as a way to meet credit obligations. Here too, racial inequality has a profound effect on a person's ability to maintain a good credit history. Statistics maintained by the Department of Labor demonstrate that net worth is dramatically lower *in every income quintile* for racial minorities:

Average Net Worth by monthly household income quintile (2002 dollars)[8]

	African Americans	Hispanics	Whites
Lowest Quintile:			
Median net worth	$61	$536	$25,740
Second Quintile:			
Median net worth	$5,657	$6,081	$52,016
Third Quintile:			
Median net worth	$12,334	$12,012	$63,814
Fourth Quintile:			
Median net worth	$34,964	$38,851	$99,573
Highest Quintile:			
Median net worth	$69,864	$78,327	$223,105

Several other factors considered in evaluating credit contribute to the high level of racial inequality. For example, payment history includes information about a consumer's account payments, bankruptcies, judgments, collections, and delinquencies.[9] This poses a problem, as

[7] U.S. Bureau of Labor Statistics, Current Population Survey.
[8] U.S. Census Bureau, Survey of Income and Program Participation, 1996 and 2001 Panels.
[9] Fair Isaac, "What's in your FICO score," *supra* note 4.

"African Americans make up a disproportionate percentage of debtors" in bankruptcy.[10] Taking debt into account also has a disproportionate effect on women of color, almost half of whom (48%) have credit card debt.[11] In addition, consideration of new credit relies on the number of inquiries made, which compounds problems for job-seekers (a disproportionate number of whom are racial minorities, as noted above); their score declines with each credit check conducted by a potential employer.

Further, outright discrimination is often involved in denying opportunities to people of color. Lending discrimination has been observed for years, in which African American borrowers obtain loans (1) far less often and (2) on worse terms. "A 1991 Federal Reserve study of 6.4 million home mortgage applications by race and income confirmed suspicions of bias in lending by reporting a widespread and systemic pattern of institutional discrimination in the nation's banking system": regardless of where the home is located, African Americans are denied loans two to three times more often than whites, even high-income African Americans are denied loans more often than low-income whites, and African Americans who *do* obtain mortgages pay rates 5.4 to 9.2 points higher than whites.[12]

3. Should credit checks be allowed under Title VII?

Title VII was intended to root out both intentional and structural discrimination. Barring the use of credit checks in employment would comport with these goals.

For a given employment practice, it is not necessary to prove intentional discrimination in order to invoke the protections of the statute. "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[13]

Most employers undertaking credit checks are not likely *intending* to screen out members of racial minorities, but that is the clear *effect* of the practice. Letting financial status dictate employment prospects serves to compound pre-existing trends of financial inequality among the races. This perpetuation of barriers to employment opportunity is precisely what Congress sought to eliminate: "The objective of Congress … was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees."[14] Where practices have a disproportionate impact on racial minorities and are not shown to be "job related for the position in question and consistent with business necessity," they are prohibited by law.[15] Employee credit checks do not meet this standard, as they have not been shown to

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[10] Kenneth G. Gunter, *Computerized Credit Scoring's Effect on the Lending Industry*, 4 N.C. BANKING INST. 443 (2000) (citations omitted).
[11] Jose A. Garcia, *Borrowing to Make Ends Meet: The Rapid Growth of Credit Card Debt in America*, Demos (2007).
[12] MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 19, 137-142 (1995).
[13] *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971).
[14] *Id.* at 429-430.
[15] 42 U.S.C.A. § 2000e-2(k)(1)(A)(i).

reveal any information about an applicant that is relevant to his or her ability to perform a given job.

4. Is a Credit Record an Indicator of Someone's Propensity to Commit a Crime or Their Ability to Successfully Perform the Duties of a Job?

There is no indication that lower credit scores correlate with a propensity to commit a crime or with job performance. To the contrary, studies have shown just the opposite. According to a 2003 psychological study examining the credit reports of nearly 200 current and former employees working in the financial service areas of six companies, a person's credit history was found not to be a good predictor of job performance or turnover:

> "Credit history had no validity at differentiating between negative (e.g., terminated for dishonesty) vs. non-negative (e.g., sickness, relocation) reasons for leaving, and had no validity at distinguishing these employees from those who remained on the job."[16]

Indeed, there is substantial evidence that the credit records that employers check are based on factors substantially *un*related to any aspect of the performance of any job.

(i) Poor Credit History Indicates Primarily Past Financial Distress Due to Objective Causes, Not Employment-Related Traits

Bad credit is often the result of a variety of factors that bear no relation to employment suitability. An examination of the single most powerful cause of a negative credit record – a bankruptcy filing – illustrates that many of the primary causes of bad credit are factors that could not possibly correlate to the performance of any job. According to the most significant recent study of how and why bankruptcy filings occur, 85% of bankruptcy filings reportedly occur following "income loss, medical problems, or family breakup" – problems that do not trace to simple irresponsible "over-consumption"[17] or any other trait that could be "job-related," much less a matter of "business necessity."

(ii) Credit Record is a Notoriously Error-Laden Measure

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[16] Dr. Jerry K. Palmer & Dr. Laura L. Koppes, *Further Investigation of Credit History As a Predictor of Employee Turnover*, American Psychological Society (Atlanta 2003).

[17] Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1510 (2004) (citing *The Consumer Bankruptcy Project*, a study that "relied on a diverse group of a dozen professors from seven different research universities to design and implement the study…. These dozen principal investigators brought expertise from a number of policy areas such as family economics, demographics, employment, health care finance, housing policy, small business, women's issues, law, sociology, business, and economics, as well as specific skills in data collection and analysis."). *See also* Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 3 (2005) ("households with children are more likely to experience bankruptcy than childless households, and most individuals filing bankruptcy are women who depend on their jobs to climb their way out of financial distress") (citing other work by Elizabeth Warren).

For a measure that has such significant effects on people's lives, credit records are notoriously error-laden:

> " [A]ll three national credit bureaus have continuously failed to ensure their data is mistake free. For example, in 1991, TRW, a credit reporting company, wrongly characterized every taxpayer in a small Vermont town as a poor credit risk by enclosing false public record information into their reports. A year later, in a separate case, Equifax was forced to settle with the citizens of Middlesex County, Massachusetts for virtually the same offense." [18]

Thus, credit record is not only unrelated to one's qualifications as an employee, it is also a problematic indicator of qualifications *as a borrower*.

Given its clear lack of any indication of suitability for employment, the use of credit checks by employers and its accompanying disparate racial impact is unjustified. Title VII's mandate to eliminate race-based barriers to employment opportunity requires that this practice be prohibited.

[18] Kenneth G. Gunter, *Computerized Credit Scoring's Effect on the Lending Industry*, 4 N.C. BANKING INST. 443 (2000) (citations omitted).