

FEDERAL APPEALS COURT SIDES WITH EMPLOYER IN JOB APPLICANT'S BACKGROUND CHECK SUIT: 3 STEPS TO AVOID SIMILAR CLAIMS

Insights
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A job applicant who didn't disclose a felony conviction can't sue her prospective employer under a federal background-check law for failing to provide proper notice before rescinding her offer, according to a recent decision from a federal appeals court. The job applicant didn't claim the background report was wrong. Instead, she argued that she should have been given a chance to explain the conviction before the offer was withdrawn. In *Schumacher v. SC Data Center, Inc.*, the 8th U.S. Circuit Court of Appeals ruled in favor of the employer even though it technically violated the Fair Credit Reporting Act (FCRA). The act doesn't give applicants the right to explain negative but accurate information in a consumer report before the employer can make an adverse employment decision, the court said in a May 3 decision. Although the ruling is good news for employers, you should take the following three steps to comply with FCRA's notice requirements and avoid similar claims.

1. Don't Jump to Conclusions

In the *Schumacher* case, Ria Schumacher applied for a position with SC Data Center. She stated on the job application that she had never been convicted of a felony but added that she "was once arrested in 1996 at age 17 and then found not guilty."

SC Data Center conducted a background investigation through a third party, which revealed that Schumacher was actually convicted of murder and armed robbery in 1996. Based on this information, the employer rescinded

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the offer without giving her a chance to correct or explain the results. Schumacher filed suit against SC Data asserting that the company violated FCRA by taking adverse employment action based on the background check without providing her with a copy of the report to review for accuracy.

In this case, the job applicant did not dispute the accuracy of the report. But when a discrepancy arises in a situation involving your company, you shouldn't automatically assume that the results of the background investigation are correct or that the job candidate lied on the application. It's important not to jump to conclusions but instead follow the proper process outlined by the federal statute.

"One of the primary goals of the FCRA is to protect consumers and employees from the dissemination of inaccurate information," the 8th Circuit said. Congress amended FCRA in 1996 due to concerns about the level of inaccurate information reported by agencies and the challenges consumers face when they try to fix errors.

2. Document Your Process

You should create and follow a process to ensure employees receive required disclosures, provide appropriate authorization and receive all necessary notices from start to finish during the background investigation. Because lawmakers didn't want employers making hiring decisions based on inaccurate information, FCRA requires employers to provide job applicants and employees with notice that they intend to make a decision based on a background report before making the decision, a copy of the report, a description of their FCRA rights, and a reasonable opportunity to respond to any information that may be incorrect. We recommend you read our earlier Insight, [Avoiding Hidden Hiring Landmines: 4-Step FCRA Compliance Plan for Handling Pre-Adverse Action Notices](#), for more detail.

In this case, SC Data Center didn't follow these steps, leading Schumacher to bring a class-action lawsuit. Although the court sided with SC Data Center, the outcome hinged on the accuracy of the felony conviction.

SC Data Center clearly wrote on the report that the offer was rescinded due to undisclosed felony convictions.

“While it is true that Schumacher did not receive a copy of her report prior to rescindment of the job offer, she has not claimed the report was inaccurate,” the 8th Circuit said.

“We decline Schumacher’s request to create an additional right under the FCRA – that is, the right to explain to a prospective employer negative but accurate information in a consumer report prior to the employer taking an adverse employment action,” the court added.

3. Review Laws in Your Locations

Finally, you should always check the rules in your jurisdiction. The legal analysis in this case is a bit technical – focusing on whether the employee alleged a “concrete injury” or only “a bare procedural violation, divorced from any concrete harm.” The 8th Circuit Court of Appeals – which hears cases arising in Missouri, Minnesota, Arkansas, Iowa, Nebraska, North Dakota, and South Dakota – ruled that Schumacher failed to show she suffered a concrete injury from the company’s improper disclosure, so she lacked “standing” to bring the lawsuit.

Other federal circuit courts, however, have reached different results. For example, the 3rd Circuit (with jurisdiction over New Jersey, Pennsylvania, and Delaware) has said “taking an adverse employment action without providing the required consumer report is the very harm that Congress sought to prevent, arising from prototypical conduct proscribed by the FCRA.” This means that employers in the 3rd Circuit may be on the hook for failing to provide a copy of the report, even if the accuracy is not disputed. Additionally, not all state courts, which may also exercise jurisdiction over FCRA actions, require a concrete injury “standing” requirement.

What does it matter? Claims for technical violations can turn into costly class-action lawsuits against employers.

Additionally, state laws on background checks vary significantly and may involve more steps than what is required under FCRA. Some states, counties, and cities also have so-called “ban-the-box” and “fair chance” laws that prohibit employers from asking about criminal history on job applications, or require very specific steps before relying on criminal histories in making employment decisions. Therefore, you should carefully review the

rules in the locations where your employees are located and coordinate with your workplace law counsel to make sure you have appropriate steps in place to comply.

Conclusion

We will monitor these developments and provide updates as events warrant. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our [FCRA and Background Screening Practice Group](#).