Target's Successful Defense To A FCRA Class Action Is Good News For Employers

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Target requires job applicants to sign a ?Consent & Disclosure? form advising the applicant that Target will obtain an employment background report. The form discloses that a consumer report or investigative consumer report will be obtained and requires the applicant?s consent to obtaining these reports as expressly provided in the Fair Credit Reporting Act (?FCRA?). The Target Consent & Disclosure; however, contains additional statements: (i) a deadline to dispute inaccurate information; (ii) a statement that the applicant?s consent does not create a contract of employment; (iii) a statement that dedication, trust and honesty are required of all employees; (iv) a statement that employment is at-will; and (v) state-specific information on how to request a copy of the consumer report[1]

In Just v. Target Corporation, Case No. 15-cv-04117 (D. Minn., May12, 2016), a job applicant filed a putative class action alleging that Target?s inclusion of the statements not related to disclosure and consent under the FCRA *willfully* violated 15 U.S.C. § 681b(b)(2)(A)(i), which is known as the ?standalone disclosure requirement,? because the disclosure that an employer will obtain a consumer report must be ?*in a document that consists solely of the disclosure*,? although Plaintiff recognized that the consent requirement in the Consent & Disclosure was proper because it is expressly permitted by 15 U.S.C. § 1681b(b)(2)(A)(ii).

Target moved to dismiss the Complaint asserting that, based on the state of the law; it was not objectively unreasonable for Target to include the additional language found in the Consent & Disclosure. Although the Consent and Disclosure contained information that ?clearly? was in addition to the information permitted by statute, the Court decided the motion based on a finding that there was no ?willful? violation of the statute and dismissed the case.

Target won dismissal of the case because it argued that it was not ?objectively unreasonable? to include the additional language under the standard for a willful violation of the FCRA set forth in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) (?Safeco?s reading of the statute, albeit erroneous, was not objectively unreasonable.?).

The decision that Target?s reading of the FCRA was not ?objectively unreasonable? was based on three facts: (1) a lack of decisions from federal courts of appeal on the meaning of 15 U.S.C. § 1681b(b)(2)(A), (2) the fact that none of the informal advisory opinions of the Federal Trade Commission prohibited the additional language added by Target and (3) the ambiguous text of 15 U.S.C. § 1681b(b)(2)(A) (subsection (i) says the form should consist solely of the disclosure, and subsection (ii) requires authorization of a background report and permits the authorization to be included in the form) . Thus, Just failed to allege facts sufficient to support a willful violation of the FCRA.

For employers, Target?s experience has two implications. First, non-statutorily mandated information in a disclosure and consent form for an employment background check risks class action litigation. Second, not every violation of a technical provision of the FCRA will constitute a *willful* violation supporting a class action.

[1] Mem. Op. and Order (Doc. 23) at 3-4.

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