No. 13-3408

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KAPLAN HIGHER EDUCATION CORP., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio, No. 1:10 CV 02882
The Honorable Patricia A. Gaughan

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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Introduction

This case addresses whether Kaplan's use of credit history operated as an unlawful "built-in headwind" to the employment of African-Americans that was not job-related and consistent with business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). At issue is whether the district court abused its discretion by excluding expert testimony showing that Kaplan's use of credit history had a disparate impact on black applicants.

To meet its initial burden, EEOC presented expert testimony from Dr. Kevin Murphy, an Industrial Organizational Psychologist. Working around Kaplan's failure to retain race identification information, which would have indicated whether the credit checks had a disparate impact on black applicants, Murphy obtained color photographs of applicants from state Departments of Motor Vehicles (DMVs) and race identified them using a methodology with meaningful controls to establish reliability. Murphy measured the accuracy of the photo race identifications by comparing a substantial number of them to independent race information obtained for the same applicants. Using the photo race identifications and race identifications from other sources (DMV race data and Kaplan hire data), Murphy analyzed the pass/fail rates of the black and white applicants for whom he had matching credit outcomes. Murphy also separately analyzed black and white pass/fail rates for the subgroup of applicants race identified without reliance on

photographs. Based on these analyses, both of which showed statistically significant disparities, Murphy concluded that Kaplan's use of credit history had a disparate impact on black applicants.

The district court, however, excluded Murphy's testimony as unreliable. Ignoring the controls Murphy used in producing race identifications from photographs, evidence of a low error rate, and the context of Kaplan's failure to retain race identification information, the district court instead credited numerous speculative challenges to Murphy's analyses without any explanation of how the purported flaws affected the scientific validity of the analyses. In excluding Murphy's testimony in this manner, the district court abused its discretion and made "the perfect the enemy of the good."

Argument

I. The district court abused its discretion when it excluded EEOC's expert testimony.

Although a district court has discretion to exclude expert testimony, that discretion is not unfettered. A district court abuses its discretion in excluding expert evidence if it "predicates a ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *V&M Star Steel v. Centimark*, 678 F.3d 459, 466 (6th Cir. 2012), *reh'g and reh'g en banc denied*, No. 10 3584, 2012 U.S. App. LEXIS 13714 (6th Cir. July 2, 2012). In *V&M Star Steel*, this Court reversed the district court's exclusion of expert evidence because it found that the

court did not consider the expert's testimony in proper context, misinterpreted the testimony, and wrongly concluded that it rested on insufficient facts. *Id.* at 466-68. Similarly, in *Andler v. Clear Channel Broadcasting, Inc.*, 670 F.3d 717, 728-29 (6th Cir. 2012), this Court reversed the exclusion of expert testimony because the district court erred in concluding that the expert's methodology was unreasonably speculative. In *Dilts v. United Group Services, LLC*, 500 F. App'x 440, 445-46 (6th Cir. 2012), *cert. denied sub nom., Maxim Crane Works, LP v. Dilts*, 133 S. Ct. 2022 (2013), this Court reversed the exclusion of expert evidence and disagreed with the district court's conclusion that the expert failed to rely on valid and reliable scientific principles. *See also Nemir v. Mitsubishi Motor Sales of Am.*, 6 F. App'x 266, 270-74 (6th Cir. 2001) (although the district court held many oral arguments and appeared to exhaust the topic, the court erred in excluding the expert's entire testimony because its decision was arbitrary and based on an incomplete review of the evidence).

Moreover, a district court abuses its discretion in applying particular *Daubert* factors where they are not a reasonable measure of reliability. As this Court has said, "the *Daubert* factors 'are not dispositive in every case' and should be applied only 'where they are reasonable measures of the reliability of expert testimony.'" *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529 (6th Cir. 2008), *quoting Gross v. Comm'r of Internal Revenue*, 272 F.3d 333, 339 (6th Cir.

2001). Indeed, a district court does not even have to mention the *Daubert* factors when considering admissibility where they "are not pertinent to assessing the reliability of a particular expert." *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 470 (6th Cir. 2004). Although the district court has discretion to decide how it measures reliability, this Court must still conduct a review of the record to determine whether the district court erred in its assessment of reliability. *Dilts v. United Group Services, LLC,* 500 F. App'x at 445.

Kaplan attempts to distinguish *In re Scrap Metal* and *Gross* as dealing with credibility or correctness rather than reliability and admissibility. But in *In re Scrap Metal*, the court was determining whether expert testimony was reliable and therefore admissible. *In re Scrap Metal Antitrust Litigation*, 527 F.3d at 522 (critical question is whether plaintiff's expert's damages calculations are unreliable and therefore inadmissible), *id.* at 524 (first question on appeal is whether the district court erred in denying motion to exclude expert's testimony). There, the court said that the defendant confused admissibility with credibility and accuracy and that in determining reliability courts do not decide whether the expert's opinion is correct. *Id.* at 529-30. The court concluded that the expert's testimony was reliable in spite of possible mistakes. *Id.* at 531-32.

In *Gross*, the issue was the admissibility of the government's expert testimony and the court analyzed it for reliability. *Gross v. Comm'r of Internal*

Revenue, 272 F.2d at 338-41. In *Gross*, the court rejected the plaintiffs' *Daubert* challenge because it found the plaintiffs were attacking the correctness rather than the reliability of the expert's valuation methods. *Id.* at 340. As in *In re Scrap Metal*, the issue was reliability, and in both cases the courts' credibility/correctness statements constitute their reasons for finding the testimony reliable. Those statements do not change the issue to one of credibility rather than reliability. The testimony in both cases was reliable because the challenges to methodology involved only the issue of correctness. (Here, Kaplan does not appear to be challenging the correctness of Murphy's photo identifications. Def. Br. at 27.). In (over)emphasizing the district court's discretion, Kaplan misstates the Supreme Court's analysis in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Kaplan says that in *Kumho* the plaintiffs argued that expert evidence was improperly excluded because the trial court applied *Daubert* factors "too inflexibly." Def. Br. at 22. Kaplan then claims that "[t]hat contention was flatly rejected by the Supreme Court," wrongly suggesting that the Court approved of the inflexible application of specific "*Daubert* factors." *Id.* But the Court did not approve of inflexibility in *Kumho*. The Court said the opposite, holding that the district court did not err in excluding the evidence because, on reconsideration, it properly recognized that the relevant reliability inquiry should be "flexible." *Kumho*, 526 U.S. at 158. The Court concluded that the district court had not

applied *Daubert* too inflexibly because its decision was based on the failure to satisfy not just "the *Daubert* factors" but also "*any other* set of reasonable reliability criteria." *Id.* *Kumho* makes clear that the *Daubert* factors do not necessarily apply in every case because too much depends on the circumstances of the case and the kind of evidence at issue. *Id.* at 151. Here, the district court erroneously equated reliability with the specific *Daubert* factors and disregarded the rigor of Murphy's photo identification process and the accuracy of its results. Opinion, R110, PID-5638 (excluding Murphy's testimony on the ground that EEOC offered no evidence to satisfy the *Daubert* factors of testability, error rate, peer review, and general acceptance).

II. EEOC established that Murphy's testimony is reliable.

EEOC more than satisfied its obligation to show by a preponderance of the evidence that Murphy's photo identification process was reliable. Murphy empanelled five individuals with extensive (a median of 24 years) experience in multicultural, multiracial, treatment outcome research where there is often a question about how individuals are characterized by race. Murphy Report, R92-2, PID-4227. Their field research involved the process of trying to determine how people should be grouped according to race. Murphy Deposition, R83-5, PID-3910. As the district court acknowledged, the panelists, who reviewed over 98%

of the photos, also held advanced degrees in cultural anthropology, education, human development, and psychology. Opinion, R110, PID-5635.

The panelists were provided with consistent instructions, viewed identical photographs, and recorded their observations on the same forms. They were given five racial categories in which to place applicants, including the category "other" for applicants considered multiracial. Murphy Report, R92-2, PID-4227; Murphy Deposition, R95, PID-4442. All panelists participated in each viewing session, during which they looked at the photos independently and recorded their observations without input from one another. Murphy Deposition, R95, PID-4442. The panelists matched their observations to the applicants whose photos they reviewed and their observations were transferred to an electronic file. *Id.* After Kaplan identified some coding errors, Murphy reread all of the forms the panelists used to record their observations and compared those observations to the race identifications in Murphy's electronic file. Murphy Deposition Ex. 14, R83-3, PID-3984. Murphy found a small number of coding discrepancies (3% of all photos identified) and corrected them. *Id.*

The panelists viewed color photos from state Departments of Motor Vehicles (DMVs) that were large enough to depict recognizable faces and consisted of clear images. Murphy Declaration, R92, PID-4167; DMV Photo Sample, R92-5, PID-4281-87. Before giving the photos to the panelists, Murphy

looked at each photo himself to make sure it was appropriately clear to support race identifications. Murphy Declaration, R92, PID-4167. Where the DMVs produced multiple photos for the same person, Murphy or his staff gave panelists the clearest photo to review. Murphy Deposition, R83-5, PID-3930-31.

Murphy required at least four out of the five panelists to agree in order to accept any race identification. Murphy Report, R92-2, PID-4227. Panelists agreed on a significant percentage of all photos they race identified. Out of 891 photos reviewed, at least four of the five panelists agreed on 88% of the photos and all five panelists reached perfect agreement on 74.9% of the photos.[1] Murphy and two of his staff reached perfect agreement on an additional 15 DMV photos reviewed after Kaplan produced supplemental outcome information.

III. Murphy's photo identification process was a scientifically valid method of determining the race of applicants.

A. Murphy imposed controls on the photo identification process and tested his results.

Murphy established controls to enhance the accuracy of the photo identification process. The panelists viewed the photos separately from each other and, therefore, came to independent determinations about each photo. Where

[1] On page 13 of its opening brief, EEOC incorrectly stated that the 5 panelists reviewed 906 photos. EEOC Br. at 13. As EEOC correctly stated later in the brief, the 5 panelists reviewed 891 photos, and Murphy and 2 of this staff reviewed an additional 15 photos. *Id.* at 15.

multiple photos were produced for the same applicant, Murphy or his staff examined each of them to determine which was clearest. In addition, Murphy imposed interrater reliability standards, requiring that at least 80% of the panelists agree in order to accept any race identification.

Murphy had independent race data for 57 applicants identified by photo: 47 race identifications from DMVs and 10 from Kaplan's PeopleSoft human resources database. Murphy compared the photo identification and other race data produced for the same applicant to determine whether the identifications were consistent. Murphy Deposition, R95, PID-4443. The panelists' race identifications were consistent with the DMV data at a rate of 95.7% and consistent with PeopleSoft at a rate of 80%. Murphy Deposition Ex. 13, R83-7, PID-3949. The court did not find that the error rate was unacceptable (Def. Br. at 29), and neither Kaplan nor its expert claimed the error rate was too high.

Kaplan argues that the low error rate Murphy found when he compared the photo identifications to other DMV data was based on a small "sample" of 57 cases. But as the district court acknowledged, Murphy explained that the 57 cases were not a "sample," because they represented *all* cross-references in his data where he had photo identifications and another race information source for the same applicants. Opinion, R110, PID-5639. Even if by "too small" Kaplan meant that the 57 cases were insufficient in some statistical sense, statistical proof can be

relevant and admissible without meeting standard tests of significance. *See EEOC v. American National Bank*, 652 F.2d 1176, 1190-93 (4th Cir. 1981) (recognizing that probability levels of less than two standard deviations can be probative of discrimination); c*f. Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 312 n.17 (1977) (indicating that precise calculations of statistical significance may not always be necessary in employing statistical proof). Further, the district court erroneously concluded that because the 57 comparisons were not a sample, they were "not intended to support a scientific analysis." Opinion, R110, PID-5639. But Murphy did not say this. Murphy's Declaration, which the district court cited, said the opposite – that the comparisons "support the conclusion that the [photo identification] methodology is reliable." *Id.*

B. Murphy's involvement in the photo identification process was appropriate.

The district court relied on pure supposition when it assumed that Murphy's participation with 2 of his staff in reviewing 15 photos could have biased the results of his analysis. Further, in doing so, the court ignored the statement of Kaplan's expert, Saad, that the photo identification process was flawed because Murphy did not race identify all of the photographs himself. Saad Report, R83-2, PID-3716-17. The court also erred when it hypothesized that Murphy or his staff could have skewed the results when they chose one photo from among multiples produced for the same person. Opinion, R110, PID-5640. To the contrary, the fact

that Murphy gave panelists the clearest photos to review should have enhanced the accuracy of the identification process.

Kaplan's attempted distinctions of *McReynolds v. Sodexho Marriott Services, Inc.*, 349 F.Supp.2d 30 (D.D.C. 2004), and *Davis v. Cintas Corp.*, 717 F.3d 476 (6th Cir. 2013), are based on a factor irrelevant to whether an expert could bias an outcome by determining which data to include in his statistical analysis. Deciding which people were promoted, as in *McReynolds*, and what jobs should be considered as part of the relevant external labor market, as in *Cintas*, constitute much more involvement in determining "critical facts" than Murphy's participation in determining the race of less than 2% of the applicants and in selecting the clearest of multiple pictures for some applicants. The experts' decisions in both *McReynolds* and *Cintas* were not only determinative of whether there would be a statistically significant disparity, but the experts in both cases clearly knew when making those decisions how they would affect the analyses. The fact that the experts' decisions in those cases involved determining which parts of previously created data to use (Kaplan's purported distinction) is irrelevant; it is the act of selecting that matters.

Kaplan argues that Murphy should have thrown out all multiple photos "because of a lack of consistency in the pictures," citing Murphy's deposition at R83-5, PID-3930-31. Def. Br. at 12. Murphy's testimony does not support that

supposition. In the testimony Kaplan cites, Murphy says only that he gave panelists the clearest photos to review. Murphy Deposition, R83-5, PID-3930-31.[2]

Kaplan argues that EEOC is attempting to shift the burden of proof in establishing reliability when EEOC points out that Kaplan has not shown that any of Murphy's race identifications were incorrect, or how Murphy's involvement in the identification process could have skewed the results. Def. Br. at 29-30, 41. EEOC does not disagree that it has the burden of showing reliability. But the only nonspeculative indication that Murphy's process was unreliable would be that mistakes were made in identifying race by photo. And Kaplan has not shown this; arguing instead that it does not matter whether the identifications were correct. Def. Br. at 27, 29.

C. The panelists' access to applicants' names did not affect the reliability of the photo identification process.

The district court erred when it assumed that giving panelists the applicants' names "may [have] create[d] unintended bias on the part of the panel." Opinion, R110, PID-5641. The court merely guessed that panelists "may be likely" to identify an applicant as Hispanic based solely on surname, even if the name was

[2] Moreover, Kaplan ignores Murphy's testimony that he looked at each set of multiple photos to ensure that they were not dissimilar. Murphy Declaration, R92, PID-4167.

obtained through marriage.[3] There is no evidence that a single photo was race identified based on an applicant's surname.

Further, even if panelists in some instances were influenced by the name associated with a photo, courts have considered surnames a legitimate method of national origin identification. See EEOC Br. at 49-50. Kaplan attempts to distinguish *EEOC v. Paramount Staffing, Inc.*, No. 02 06 CV 2624, 2010 U.S. Dist. LEXIS 49042 (W.D. Tenn., May 17, 2010), and *Gomes v. AVCO Corp.*, 816 F. Supp. 131 (D. Conn. 1993), on the ground that both courts acknowledged that national origin identification by name was not completely accurate. These courts, however, obviously considered that method accurate enough to resolve issues determinative of the merits of the claims before them. Kaplan attempts to distinguish *Castaneda v. Partida,* 430 U.S. 482 (1977), on the ground that the discrimination in that case (exclusion of Mexican-Americans from grand jury service) was carried out on the basis of surnames. But the Court in *Castaneda* repeatedly affirmed the accuracy of national origin identification through surnames (*id.* at 495, equating identifiability of Spanish surnames with documentary racial designations in other Supreme Court cases); *id.* at 497, "persons with Spanish

[3] In *Castaneda v. Partida*, 430 U.S. 482 (1977), in determining the underrepresentation of Mexican-Americans on grand juries through the use of surnames, the Court apparently did not share the state appellate court's concern that the plaintiff failed to "show[] how many of the females on grand juries were Mexican-Americans married to men with Anglo-American surnames." *Id.* at 489.

surnames are easily identifiable"); *see also id.* at 501-02, Marshall, J., concurring ("commissioners who constructed the grand jury panels had ample opportunity to discriminate against Mexican-Americans, . . . since Spanish-surnamed persons are readily identified"). EEOC, however, is not relying on the ability of the panelists to identify Hispanic applicants by surname. On the contrary, Kaplan is arguing that the panelists' access to surnames impaired the photo identification process in some manner, but provides no example of this occurring.

IV. The district court erred in excluding Murphy's testimony based on a failure to show representativeness.

A. Murphy did not "cherry-pick" his data from a larger pool of race identified applicants with matching credit check outcomes.

As it did in the district court, Kaplan implies erroneously that Murphy ignored hundreds of race identified applicants with matching credit outcomes and, instead, "cherry-picked" his dataset. On page 13 of its brief, Kaplan says that "Murphy had access to either photographs or race information from state DMV's for over 800 additional applicants in the GIS data set, which Murphy could have included in his analysis but did not." Murphy testified, however, that he could not match credit check outcomes to all applicants for whom the DMVs produced race data or photos. Kaplan does not dispute this testimony and does not suggest that Murphy should have included applicants without matching credit check outcomes. To support its claim that Murphy "could have included" an additional 800

applicants for whom the DMVs produced race data or photos, Kaplan cites Saad's Declaration at PID-4004. But Saad's Declaration does not say that Murphy could have included additional applicants in his analysis, nor does it say that 800 applicants could have been added. Saad Declaration, R84, PID-4004. Saad merely identified the number of people for whom he believed the DMVs produced race data or photos.[4] *Id.* Kaplan also cites Murphy's deposition testimony, but that provides no support. In the excerpt cited, Kaplan asked Murphy whether he "could conceivably" race identify more applicants using DMV photos if he had credit check outcomes for those applicants. Murphy Dep., R83-5, PID-3934. Murphy answered that, yes, he could empanel more reviewers to race identify DMV photos if he had more matching credit check outcomes. *Id.*

Kaplan claims that "Murphy also had access to self-reported race information for an additional 1,250 hired individuals from the Peoplesoft [sic] database." Def. Br. at 13. This statement misleadingly implies that (1) PeopleSoft included 1,250 applicants race identified as black or white, and (2) that Murphy failed to include PeopleSoft applicants in his analysis. Kaplan provides no record citation to support the claim, but its source appears to be Saad's Declaration at PID

[4] Specifically, Saad claims the DMVs produced race data for 1,000 people and photos for 900 people. Saad Declaration, R84, PID-4004. But Murphy explained that the DMV race data, which included redundancies, actually produced race identifications for 498 people. Murphy Report, R92-2, PID-4227. Moreover, Kaplan does not dispute Murphy's testimony that 906 photos, not 900, were reviewed.

4004, ¶8. There, referring to PeopleSoft, Saad observed that "Defendants produced self-reported race information for approximately 1,250 individuals in the GIS data . . . ." Saad did not say how many of the 1,250 were identified as black or white, while Murphy's undisputed testimony is that PeopleSoft identified an additional 808 applicants as black or white, all of whom he added to his analysis. Murphy Dep. Ex. 15, R83-9, PID-3992-95; Murphy Dep., R83-5, PID-3901-02.[5]

Kaplan also notes that Murphy did not include applicants credit checked over a 10-month period by HireRight. Def. Br. at 6. Murphy's undisputed testimony was that he did not believe the HireRight data was similar enough to the other credit check data produced to be included in one analysis. Murphy Declaration, R92, PID-4171, ¶19. Moreover, HireRight screened only approximately 709 applicants (compared to the 4,670 screened by GIS). Saad Declaration, R84, PID-4005.

[5] Kaplan claims that "[u]ltimately, Murphy had access to race information for almost 3,150 specific persons identified in the GIS data"; however, the number 3,150 is simply the sum of the purported 1,250 PeopleSoft applicants (808 of whom PeopleSoft identified as black or white and were included in Murphy's analysis), and the 1,900 people for whom Saad believes the DMVs produced race data or photos. As discussed above, the fact that Murphy "had access" to such race information does not mean it could be matched with applicants for whom he had credit check outcome data.

B. The applicants in Murphy's analysis were not a "sample."

Kaplan argues that Murphy "failed to apply a sampling methodology that could convince the District Court that his sample was fairly representative of the applicant pool as a whole. It is not *who* was selected that is important, but *how* they were selected." Def. Br. at 45. But as Kaplan knows, Murphy did not "select" the applicants in his analysis using a sampling methodology. As Kaplan acknowledged in the district court, the set of 4,670 credit checked people in Murphy's original dataset accounted for the applicants who were processed by GIS. Def. Mot. to Exclude, R82-1, PID-3640, n.3. From that dataset, Murphy included all applicants for whom he was able to obtain both racial identification and matching credit outcomes. That constitutes the compilation of relevant data, not the use of a sampling methodology.[6]

Kaplan's expert observed that before Murphy added the PeopleSoft data, the applicants who were credit checked using GIS failed at a rate of 13.3% while 23.8% of the applicants in Murphy's analysis failed the credit check. The district court erred in concluding from this testimony that Murphy's analysis should be excluded because his "sample" was not representative of the applicant pool as a

[6] If Murphy had randomly selected from the entire set of 4,670 credit checked applicants, and then included only the applicants he race identified and matched to credit check outcomes, that process would have produced an analysis of *even fewer* applicants.

whole. Opinion, R110, PID-5646. Kaplan's expert conceded in the same Declaration that the pass rate of the applicants in Murphy's analysis dramatically increased (and, therefore, the failure rate sharply decreased) after Murphy added the PeopleSoft data. Saad Declaration, R84, PID-4007. EEOC's opening brief pointed out that fact and Kaplan does not dispute it. EEOC Br. at 53. Therefore, after adding PeopleSoft, no significant disparity remained in the failure rate between the race identified applicants included in Murphy's analysis and the failure rate of those in the larger GIS dataset.[7]

The district court also erred in concluding that Murphy's dataset may have been unrepresentative because it included a greater percentage of applicants from Georgia and a lesser percentage of applicants from Wisconsin compared to those in the GIS data. Opinion, R110, PID-5646. Kaplan's expert did not testify that this disparity skewed Murphy's results (Saad Declaration, R84, PID-4005), and there is no evidence that it did. Further, it is not surprising that in 2 out of 46 jurisdictions (4.3%), the numbers in the datasets would vary considerably.

[7] Kaplan highlights the fact that the blacks and whites in the PeopleSoft data did not pass the credit check at statistically significant different rates. Def. Br. at 9. That is to be expected because PeopleSoft included only the names of applicants whom Kaplan hired and, therefore, who passed Kaplan's credit checks. Murphy Declaration, R92, PID-4170, ¶17. But even after adding the PeopleSoft data, Murphy still found a statistically significant disparity in the black/white failure rates. *Id.*, ¶18.

V. Courts accept visual racial identifications.

Kaplan compares Murphy's photos to the highway photos used in a New Jersey study that was rejected in *United States v. Mesa-Roche*, 288 F.Supp.2d 1172 (D. Kan. 2003), and *United States v. Duque-Nava*, 315 F.Supp.2d 1144 (D. Kan. 2004). Def. Br. at 33-34. But both the quality of the photographs in the New Jersey study and the circumstances under which they were takes differ significantly from Murphy's analysis. Kaplan refers to the "high-quality digital photographs" used in the New Jersey Study (Def. Br. at 34), but at least one team of scholars has noted that the New Jersey study was limited to a review of black and white photographs. Richard J. Lundman & Brian R. Kowalski, *Speeding While Black? Assessing the Generalizability of Lange et al.'s (2001, 2005) New Jersey Turnpike Speeding Survey Findings*, 26 Justice Quarterly 3, 504, 506, 512 (2009) (New Jersey study had access to only black and white photographs). Moreover, the photographs used in the New Jersey study were taken of motorists driving at high speed onto the New Jersey turnpike. *United States v. Mesa-Roche*, 288 F.Supp.2d at 1181 n.10 (study measured which motorists were driving 15 mph over the 65 mph speed limit). Here, all photos reviewed were clear, color, DMV photos taken at close range of people while they were seated or standing still.

Kaplan cites *United States v. Alcaraz-Arrellano*, 302 F.Supp.2d 1217 (D. Kan. 2004), for the proposition that distinguishing between Hispanics and whites is

a difficult task subject to error. Def. Br. at 34. That conjecture, however, came from evidence offered by the government to discount the value of a racial profiling study (not, as Kaplan states, from the author of the *Lamberth* study). *Alcaraz-Arrellano*, 302 F.Supp.2d at 1230. As in *Mesa-Roche* and *Duque-Nava*, the court in *Alcaraz-Arrellano* analyzed the *Lamberth* study and found the transient motor population data unreliable for reasons that are distinguishable from Murphy's race identifications. *Alcaraz-Arrellano*, 302 F.Supp.2d at 1230. But the court agreed with the government's expert that it would have been better to have two or three people look at the same car and measure the extent to which they uniformly perceived race. *Id*. Murphy did more than that, using five observers and requiring 80% agreement among them.

Kaplan attempts to distinguish *Vulcan Soc'y of the New York Fire Dep't, Inc. v. Civil Service Comm'n of the City of New York*, 490 F.2d 387 (2d Cir. 1973), on the basis that observers in that case were required only to distinguish between whites and minorities, rather than make the "more difficult" black, Hispanic, and other distinctions in Murphy's process. Def. Br. at 36. But the observers in *Vulcan* were told to count candidates as "minority" only if they were black or Hispanic, *Vulcan*, 490 F.2d at 392; thus, the accuracy of their race identifications depended on correctly distinguishing both black and Hispanic candidates from white candidates. Further, Murphy's visual race identifications were conducted

under more favorable conditions than in *Vulcan*. Panelists observed still photographs one at a time under no particular time constraints, as opposed to looking at individuals as they walked into an examination hall. Kaplan also says that in *Vulcan* "observers were instructed to identify someone as a minority only if they were absolutely certain" (adding the word "absolutely" to the court's language), while Murphy did not issue a similar instruction. Def. Br. at 35-36. But Murphy's requirement of interrater agreement, an objective standard not dependent on an observer's understanding of a word like "certain," or his or her inclination to follow the instruction, served as a much better control on the identification process.

VI. EEOC is not asking for a relaxed reliability standard due to Kaplan's failure to maintain race identification records.

Kaplan mischaracterizes EEOC's discussion of its failure to maintain racial identification information as required by the agency's Uniform Guidelines on Employee Selection Procedures (UGESP), 29 C.F.R. § 1607.4A&B. EEOC is not asking for an inference, adverse or otherwise, based on Kaplan's failure to follow UGESP's recordkeeping requirements. As explained above and in EEOC's opening brief, Murphy's analysis clearly meets the reliability standards of *Daubert* and Fed. R. Evid. 702. An expert's analysis does not have to be error-free to be reliable, and although Kaplan has not shown that any (uncorrected) mistakes were made in Murphy's racial identification process, the purpose of EEOC's UGESP

discussion was merely to point out that whatever limitations inhere in identifying race through color photographs, EEOC relied on that method only due to Kaplan's failure to meet its obligations under section 709(c) of Title VII.

Further, in contending that UGESP's recordkeeping requirements are not mandatory, Kaplan ignores the substantive/procedural distinction in the legal effect of EEOC's Title VII regulations.[8] EEOC does not dispute that the agency's Title VII substantive regulations, including those in UGESP, do not have the force of law. But UGESP's recordkeeping requirements are expressly authorized by section 709(c) of Title VII.[9] Similarly, the cases EEOC cited in its opening brief in support of the binding effect of regulations issued under section 709(c) – *EEOC v. Rogers Bros., Inc.*, 470 F.2d 965, 966 (5th Cir. 1972), and *EEOC v. Koch Meat Co., Inc.*, No. 91 C 4715, 1993 WL 27310, at *4-5 (N.D. Ill. Dec. 7, 1992) – are not distinguishable merely because they involve different reporting and

[8] In its discussion of the substantive/procedural distinction in note 22 at page 33 of its opening brief, EEOC mistakenly used the word "deciding" rather than the opposite, and correct, word "declining" in the sentence citing the Supreme Court's reference to the substantive/procedural distinction in *Gilbert v. General Electric Co.*, 429 U.S. 125, 141 n.20 (1976). EEOC regrets this error.

[9] EEOC has taken the position since shortly after the adoption of UGESP (43 Fed. Reg. 38290, Aug. 25, 1978) (to be codified at 29 C.F.R. pt. 1607) that the guidelines' recordkeeping provisions are mandatory. See Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of [UGESP], 44 Fed. Reg. 11996, 12088 (March 2, 1979) (Questions and Answers 84 & 87). *See also Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657-58 (1989) (stating that employers are "required" to maintain the records described in section 1607.4A of UGESP).

recordkeeping regulations than those applicable in the present case. Defendant (unwittingly) acknowledges this in stating (Def. Br. at 51) that EEO-1 reports (mentioned nowhere in Title VII) are statutorily required, and citing as authority 29 C.F.R. §§ 1602.7 et seq., reporting and recordkeeping regulations issued under section 709(c) of Title VII.

VII. There are no alternate grounds on which the district court's decision can be affirmed.

Kaplan's argument that the Court should affirm on alternate grounds is premised on the admission of Murphy's testimony. Thus, before even getting to the legal questions, the Court would have to determine that there is no disputed issue of material fact regarding Murphy's identification of a particular employment practice or his need to control for factors other than credit history. See Murphy Declaration, R92, PID-4172-73 (discussing why Saad's disparate impact analysis was not supported by the facts and did not comport with the scientific and professional governing Murphy's area of expertise). Also, at least with respect to the second alternate ground, the argument contradicts the premise, as it relies on the exclusion of Murphy's evidence. Regardless, Kaplan's legal arguments can easily be disposed of on their merits.

A. The use of credit history as a selection criterion constitutes a specific employment practice.

Kaplan contends that EEOC's challenge to the use of credit history as a selection criterion fails to meet the specificity requirement of section 703(k)(1)(B)(i) of Title VII. It is hard to contend that the consideration of credit history as a ground for disqualifying an applicant does not constitute a "particular employment practice" under the statute, and Kaplan doesn't really try. Instead, Kaplan attempts to equate *how it applies* this selection criterion, with the criterion itself. Although how credit history is used in the selection process might be relevant to a business necessity defense (an issue not before the Court), any differences in its application are irrelevant to the question of whether its consideration as a factor in making hiring decisions disparately impacts a particular racial group; the latter is determined through the application of basic statistical tests.

Because *how* Kaplan uses credit history in making employment decisions – including who gathers it, what aspects are considered, when, by whom, whether it is assessed subjectively or objectively, levels of review – is irrelevant for purposes of analyzing the impact of the use itself, there is no "decision making process" to separate for analysis under section 703(k)(1)(B)(i). The consideration of credit history in making hiring decisions *is* the employment practice, and that practice is incapable of separation, unlike the manner in which Kaplan evaluates the credit

information. If how a selection criterion is applied is treated by courts as the particular employment practice to be analyzed under the statute, employers will have no difficulty avoiding disparate impact liability regardless of the discreteness of the criterion at issue.

Smith v. City of Jackson, 554 U.S. 84 (2008), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (the latter of course dealing only with application of Rule 23 class certification criteria), cited by Kaplan for a plaintiff's inability to rely on a "generalized policy" in bringing a disparate impact claim, are therefore inapposite as EEOC is challenging a discrete practice, not a "policy" of any kind (assuming that is how Kaplan characterizes the manner in which it uses credit history). (*Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), naturally is not on point as, contrary to Kaplan's assertion (Def. Br. at 54), the selection criterion at issue in the present case is anything but subjective.) Similarly, *Grant v. Metro. Gov't of Nashville and Davidson Cnty. Tennessee*, 446 F. App'x 737 (6th Cir. 2011), and *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), are of no help to Kaplan; because EEOC is not challenging a decision making process, the issue of whether the elements of the "process" could be separated for analysis doesn't arise.

The requirement to identify a specific employment practice is intended to prevent disparate impact liability based solely on disparities in an employer's

workforce composition. *See, e.g., Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988) ("[T]he plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged."). EEOC obviously is not challenging the composition of Kaplan's workforce, but rather a discrete, easily identifiable element of its selection process. Recently, this Court, in rejecting a disparate impact challenge to an employer's entire hiring system, said that the plaintiff "must identify one specific step of [defendant's hiring process] as a particular employment practice." *Davis v. Cintas Corp.*, 717 F.3d 476, 496 (6th Cir. 2013). In describing defendant's multistep hiring process earlier in its opinion, the *Davis* court included "credit-record check" as an element of that process. *Id.* at 481.

B. EEOC controlled for the only relevant variable – credit history.

Remarkably, Kaplan begins its discussion of EEOC's alleged failure to control for relevant nondiscriminatory variables with the acknowledgement that "if blacks are more likely than whites to have lower economic status, then they are likely to have disproportionately more credit issues." Def. Br. at 58. Kaplan then says that "[t]his has nothing to do with race *per se*, but merely reflects the different economic situations of blacks and whites viewed as a whole." Kaplan thus appears to concede just what the Commission alleges in this case – that a credit check

practice like the one Kaplan uses to screen out applicants will disproportionately exclude blacks from hire. EEOC agrees. What Kaplan misperceives, however, as exemplified by its contention that EEOC's expert should have compared only blacks and whites of the same economic status "so that black and white applicants who are *similarly situated* can be compared," *id.* (Kaplan's emphasis), is that this is not a disparate treatment case. Thus, the Commission need not prove that blacks are disadvantaged due to "race *per se*," but rather due to race, *in effect*. In other words, the Commission needs to prove only that Kaplan's use of credit history operated as an unlawful "built-in headwind" to the employment of African-Americans.

Almost all of the cases Kaplan cites in this section of its brief involve disparate treatment claims, and none addresses a factual situation remotely similar to the use of credit history as a selection criterion. EEOC doesn't disagree with the broad statements of law Kaplan pulls from these cases, but these principles are not relevant to the claim EEOC asserts here. Additionally, these cases are not germane to whether the evidence presented by EEOC's expert created a factual issue regarding establishment of a prima facie case on the Commission's impact claim.

Conclusion

For the reasons set forth in the EEOC's opening brief and this reply, the EEOC respectfully asks this Court to reverse summary judgment and remand this

matter for further proceedings.