## But He Looked Black... Court Rebukes EEOC's Use of "Race Rating" in Systemic Lawsuit

According to the EEOC's draft strategic enforcement plan for 2012 – 2016, the agency's number one enforcement priority is ending systemic discrimination in recruiting and hiring. In *EEOC v. Kaplan Higher Learning Edu. Corp.* (N.D. Ohio 1/28/13) [pdf], the EEOC challenged Kaplan's use of credit reports in its hiring process as having a systemic disparate impact based on race. Yesterday, the court dismissed the lawsuit in its entirety, excluding the EEOC's expert witness and concluding that without that expert, the agency could not prove its case.

To determine the race of a particular applicant considered by Kaplan, the EEOC's expert witness used "race raters." It subpoenaed the applicants' DMV records, and used a panel of five people to determine if the photograph looked "African-American," "Asian," "Hispanic," "White," or "Other." The EEOC's expert required that four out of the five race raters reach consensus to consider that applicant's race.

Kaplan challenged that the judgment of these "race raters" was nothing more than guesswork, resulting in inherently unreliable data. In agreeing with Kaplan and dismissing the lawsuit, the court cited at least four different reasons for excluding the EEOC's expert. It was the last reason, though, that caught my eye:

> Plaintiff also presents no evidence that determining race by visual means is generally accepted in the scientific community. In fact, the EEOC itself discourages employers from visually identifying an individual by race and indicates that visual identification is appropriate "only if an employee refuses to self-identify." ... According to the EEOC, it implemented these guidelines not because of the accuracy of visual identification, but to facilitate and respect "individual dignity." Regardless of the reason supporting the pronouncement, it is clear that the EEOC itself frowns on the very practice it seeks to rely on in this case and offers no evidence that visual means is a method accepted by the scientific community as a means of determining race.

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In other words, the agency charged with ending racial stereotypes in the workplace based its entire case on stereotypical way in which different races "look."

If there's one thing I hate it's intellectual dishonesty. Whether it's the EEOC prosecuting a race discrimination case by using "race spotting," or a [Catholic hospital defending a wrongful death suit by arguing that a fetus is not a person because life begins a birth, not conception](#), intellectual dishonesty is nothing more than the sum of hypocrisy and laziness. I am grateful that we have federal judges in my home district who are willing to call the EEOC on the carpet for this tactic, and I am hopeful that the Sixth Circuit will see things the same way when ruling on the inevitable appeal.