

# PUBLICATION

---

## Summary Judgment Award for Attorneys' Fees Against the EEOC

July 1, 2011

A recent magistrate judge's decision in the Western District of Michigan awarded \$751,942.48 in attorneys' fees against the EEOC in a Title VII of the Civil Rights Act of 1964 action handled by Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. The *EEOC v. Peplemark* opinion highlights the burden the EEOC can place on private employers in defending baseless claims.

On September 29, 2008, the EEOC filed a lawsuit against Peplemark, a temporary staffing company that hires people for light industrial, clerical and receptionist positions. In the complaint, the EEOC alleged that Peplemark maintained a policy "which denied the hiring or employment of any person with a criminal record," resulting in a disparate impact on African Americans. The EEOC sought relief for Sherri Scott, an African American applicant with two felony convictions, and other similarly situated but unidentified African Americans.

The magistrate judge described this case as one "where the complaint turned out to be without foundation from the beginning." Peplemark's expert report showed that 22 percent of the 286 alleged victims of this blanket policy were hired despite having felony records. Prior to the initiation of the lawsuit, the EEOC completed years of administrative investigations on Peplemark. Additionally, the EEOC gained access to virtually all of their personnel documents by the end of August 2009. The EEOC possessed the information to show that Peplemark did not have the blanket discriminatory policy the EEOC complained of, yet made no effort to halt the litigation until the end of March 2010.

Since the beginning of the suit, the EEOC recognized the case would come with a "major price tag" for both sides, involving expansive discovery of voluminous records, data collection and organization from numerous databases, and expert statistical analysis. Nonetheless, the EEOC did not identify a key expert until July 31, 2009 and did not hire that expert until well after the expert's report was to have been completed. The EEOC was granted a continuance for four months to provide the expert's report, but still could not produce it within the extended deadline. Without this report, it would be nearly impossible for the EEOC to prevail since the expert testimony was essential to proving its disparate impact claim.

Instead of conducting preliminary investigations or recognizing defeat once it could not provide an expert, the EEOC forced Peplemark to expend considerable amounts of money on defense costs for nearly two years on a frivolous and unnecessary lawsuit. On March 29, 2010, the two parties submitted a joint motion to dismiss, naming Peplemark as the prevailing party for the purposes of determining Peplemark's entitlement to costs and attorneys' fees. Thereafter, Peplemark submitted a motion for fees, costs and sanctions, seeking compensation for the unnecessary delay and expense of defending a "very time consuming and complex case" due to the EEOC's "unreasonable and meritless litigation strategy." The magistrate judge based his decision on the EEOC's persistence in belaboring a meritless claim and its failure to produce an expert report. The district court recognized the unnecessary burden imposed on Peplemark and ordered the EEOC to pay \$219,350.70 in attorneys' fees, \$526,172 in expert witness fees and \$6,419.78 in other expenses.

The dismissal of this case and the award of attorneys' fees against the EEOC deserve celebration, but a great concern for private employers looms in the background. Many could find themselves in the same position as Peplemark, forced to defend a meritless claim against the EEOC. The problem for private employers is that the EEOC lacks incentives to resolve cases like normal private businesses. Cost of litigation does not concern

the EEOC, given the amount of resources it has at its disposal. EEOC litigation can essentially grind a defense to the ground by continuing to pursue a claim even when it becomes clear there is none. While private employers may pursue costs and fees if they are the prevailing party in a frivolous suit under Title VII, this remedy comes only after months or even years of burdensome discovery requests and the stress of having to defend against a meritless claim.

*Mr. Young is an attorney in our Memphis office.*