No. 11-2582

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff-Appellant,

v.

PEOPLEMARK, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Michigan

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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June 7, 2012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 11-2582 Case Name: EEOC v. Peoplemark, Inc.

Name of counsel: Rae T. Vann

Pursuant to 6th Cir. R. 26.1, Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center and Chamber of Commerce of the United States of America make the following disclosures:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

CERTIFICATE OF SERVICE

I certify that on June 7, 2012, the foregoing document was filed with the Clerk of the Court. The Court's ECF system will send notification to all parties in the appeal.

s/ Rae T. Vann

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FEDERAL RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, its members or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Respectfully submitted,

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June 7, 2012

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The Equal Employment Advisory Council, Chamber of Commerce of the United States of America and National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges this Court to affirm the decision below, and thus supports the position of Defendant-Appellee Peoplemark, Inc.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 of the nation's largest private sector companies, collectively providing employment to roughly 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct

members and an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Amici's members are employers or representatives of employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, as well as other labor and employment statutes and regulations. They

have a direct and ongoing interest in the issues presented in this appeal regarding the proper standards applicable to discrimination charge investigations and public enforcement actions instituted by the U.S. Equal Employment Opportunity Commission (EEOC). *Amici* seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties.

Amici have participated in hundreds of cases before the United States Supreme Court[1], this Court[2], and other federal courts of appeals as *amicus curiae*, many of which have involved Title VII questions. Because of their experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the substantial significance of this case to the constituencies they represent.

STATEMENT OF THE CASE

Following a three-year investigation during which it "utilized administrative subpoenas in 2006 and 2007 to obtain over 18,000 pages of documents," RE. 137 at 1, the U.S. Equal Employment Opportunity Commission (EEOC) filed an action

[1] *See, e.g., Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011); *Thompson v. N. Am. Stainless, L.P.*, 131 S. Ct. 863 (2011).

[2] *See, e.g., Lewis v. Humboldt Acquisition Corp.*, 2012 U.S. App. LEXIS 10618 (6th Cir. May 25, 2012) (*en banc*); *Dobrowski v. Jay Dee Contractors, Inc.*, 571 F.3d 551 (6th Cir. 2009); *Thompson v. N. Am. Stainless Co., L.P.*, 520 F.3d 644 (6th Cir. 2008), *rev'd*, 131 S. Ct. 863 (2011).

in the U.S. District Court for the Western District of Michigan against Peoplemark, Inc., a temporary staffing company, alleging that the company "maintained a policy 'which denied the hiring or employment of any person with a criminal record.'" *Id.* The EEOC's complaint asserted that Peoplemark's purported criminal records no-hiring policy had a disparate impact on African-Americans, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. *Id.* The EEOC's lawsuit was brought on behalf of an individual charging party who claimed that she was denied employment due to her criminal conviction record, as well as an unidentified class of similarly situated individuals. *Id.* at 1-2.

Peoplemark disclosed detailed information at the EEOC charge investigation stage regarding those who had applied and been selected for placement during the relevant period. *Id.* at 6. In addition, after the EEOC filed its civil complaint, Peoplemark produced a statistical analysis of the data previously provided to the EEOC, which revealed that at least 22% of the 286 applicants the EEOC claimed were aggrieved by the alleged categorical bar were, in fact, hired by the company despite having felony conviction records. *Id.* at 5. For its part, the EEOC failed to produce any statistical evidence of disparate impact based on the alleged hiring policy. RE. 147 at 3-5.

At the close of discovery, Peoplemark moved for summary judgment. RE 137 at 3. The EEOC failed to respond to Peoplemark's summary judgment motion, and instead elected to voluntarily dismiss its lawsuit with prejudice. On March 29, 2010, the parties submitted a Joint Motion to Dismiss, in which they agreed that Peoplemark is the "prevailing party for purposes of determining Peoplemark's entitlement to costs and attorney's fees" under Title VII. *Id.* The trial court granted the motion and dismissed the case on March 29, 2010. *Id.*

Peoplemark subsequently argued that the EEOC's "unreasonable and meritless litigation strategy, in which it deliberately caused Peoplemark unnecessary delay and expense in a very time consuming and complex case," warranted that the agency be ordered to reimburse its attorney's fees and costs. *Id.* The district court agreed, concluding that the EEOC's decision to continue to prosecute the case after it became clear that it had no basis for doing so warranted an award of fees and costs in the amount of $751,942.48. RE 147 at 8. As the magistrate judge, whose recommendations the trial court adopted in full, observed:

> This is one of those cases where the complaint turned out to be without foundation from the beginning. Once the EEOC became aware that its assertion that Peoplemark categorically refused to hire any person with a criminal record was not true, or once the EEOC should have known that, it was unreasonable for the EEOC to continue to litigate on the basis of that claim, thereby driving up defendant's costs, because it knew it would not be able to prove its case.

RE. 137 at 5.

The magistrate judge pointed out that the EEOC knew early on that its case would be very costly to litigate and would involve extensive statistical evidence. RE 137 at 2. And yet after the agency's own statistical case fell apart and it was unable to refute evidence demonstrating that no such categorical bar existed, it continued to litigate. "Had the EEOC conducted a reasonable investigation" or "reviewed the evidence" provided to it, the district court observed, the agency would have "quickly realized its theory of liability as pled was untenable." RE. 147 at 3. This appeal ensued.

SUMMARY OF ARGUMENT

The EEOC's conduct in filing, and prosecuting for far too long, a public enforcement action for unlawful discrimination despite having no evidence to support its theory of liability was plainly unreasonable. The district court therefore properly found it liable for prevailing defendant Peoplemark's reasonable attorney's fees and costs. Accordingly, the decision below should be affirmed by this Court.

In *Christiansburg Garment Co. v. EEOC*, the U.S. Supreme Court ruled that a prevailing defendant may recover attorney's fees under Section 706(k) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-5(k), where the plaintiff's actions are found to have been "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U.S. 412,

422 (1978). One of the factors that courts consider in determining the propriety of such an award is whether or not the plaintiff was able to establish a *prima facie* case of discrimination. *See Balmer v. HCA, Inc.*, 423 F.3d 606, 615-16 (6th Cir. 2005), *abrogated on other grounds*, *Fox v. Vice*, 131 S. Ct. 2205 (2011); *see also Myers v. City of W. Monroe*, 211 F.3d 289, 292 (5th Cir. 2000). The EEOC never had any evidence in hand to establish a *prima facie* case of unlawful disparate impact discrimination, and therefore acted unreasonably in filing its subsequent lawsuit, which claimed that Peoplemark maintained a categorical bar on hiring those with criminal records and that application of the policy had an adverse impact on African-Americans as a group. In fact, no such categorical policy existed, nor did the EEOC offer any evidence that any of the company's employment selection policies as applied to the charging party or to African-Americans as a group had a statistically significant adverse impact, as is required by Title VII.

The EEOC knew it had no statistical data to support a threshold disparate impact discrimination claim and also knew, or reasonably should have known based on information provided during its administrative charge investigation, that Peoplemark regularly hired individuals with criminal conviction records – and therefore could not have maintained a categorical bar on hiring such individuals.

Indeed, had the agency fulfilled its Title VII pre-suit administrative investigation obligations, it presumably would not have pursued litigation at all.

As the agency charged with enforcing Title VII, the EEOC "possesses an abundance of expertise . . ." to help guide its efforts. *EEOC v. Eagle Quick Stop*, 102 Fair Empl. Prac. Cas. (BNA) 493, 2007 U.S. Dist. LEXIS 91811, at *22 (S.D. Miss. Nov. 29, 2007). In light of its experience litigating these matters, the EEOC should have known better than to pursue a case in which it could not establish a *prima facie* case of race discrimination and which it eventually agreed to voluntarily dismiss with prejudice. Because the EEOC forced Peoplemark to litigate a claim that was meritless from the start, the district court acted well within its discretion in awarding attorney's fees.

The unreasonably aggressive enforcement tactics pursued by the EEOC in this case are at odds with the purposes and objectives of Title VII and disadvantage employers and employees alike. These stakeholders look to the agency to take seriously its goal of preventing and correcting *actual* workplace discrimination, not to aimlessly pursue frivolous litigation for the sake of litigating. Indeed, the EEOC recently has been the subject of increasing criticism by the courts – and forced to reimburse prevailing defendants' attorneys fees – for, among other things, pursuing frivolous litigation long after it should have know its claims were meritless. *See, e.g., EEOC v. TriCore Reference Labs.*, 25 Am. Disabilities Cas. (BNA) 842, 2011

U.S. Dist. LEXIS 151417 (D.N.M. Oct. 26, 2011); *EEOC v. Cintas Corp.*, 113 Fair Empl. Prac. Cas. (BNA) 195, 2011 U.S. Dist. LEXIS 86228, at *14 (E.D. Mich. Aug. 4, 2011); *EEOC v. CRST Van Expedited, Inc.*, 108 Fair Empl. Prac. Cas. (BNA) 809, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010), *vacated without prejudice*, 2012 U.S. App. LEXIS 9299 (8th Cir. May 8, 2012); *EEOC v. Eagle Quick Stop*, 102 Fair Empl. Prac. Cas. (BNA) 493, 2007 U.S. Dist. LEXIS 91811, at *19 (S.D. Miss. Nov. 29, 2007).

ARGUMENT

I. THE EEOC'S CONDUCT IN PROSECUTING A CASE THAT WAS WITHOUT MERIT FROM THE OUTSET WAS FRIVOLOUS, UNREASONABLE AND WITHOUT FOUNDATION, THUS JUSTIFYING AN AWARD OF ATTORNEY'S FEES AND COSTS TO PEOPLEMARK, THE PREVAILING DEFENDANT

The district court was correct in awarding attorney's fees to Peoplemark, the prevailing defendant below, based on the EEOC's dogged pursuit of a claim it knew, or reasonably should have known, was completely and utterly baseless. Accordingly, the decision below ordering the EEOC to reimburse Peoplemark's attorney's fees and costs should be affirmed by this Court.

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, contains a fee-shifting provision that permits a court to award a prevailing party reasonable attorney's fees. 42 U.S.C. § 2000e-5(k). While Title VII does not define what constitutes a "prevailing party" for fees and costs

purposes, the U.S. Supreme Court long has held that a plaintiff will be considered a prevailing party if he or she "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit . . . .'" *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989) (citation omitted). It is undisputed that Peoplemark is the prevailing defendant for Title VII purposes.

In *Christiansburg Garment Co. v. EEOC*, the Supreme Court ruled that a prevailing defendant may recover attorney's fees under Title VII where the plaintiff's actions are found to have been "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U.S. 412, 422 (1978). It reasoned that a heightened burden is necessary so as not to discourage plaintiffs from suing for fear of being responsible for a successful defendant's attorney's fees. At the same time, however, it observed that "while Congress wanted to clear the way for suits to be brought under the Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420.

"[I]n light of a district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters," the award of attorney's fees to a prevailing defendant "is entitled to

substantial deference." *Garner v. Cuyahoga Cnty. Juvenile Ct.*, 554 F.3d 624, 634 (6th Cir. 2009) (awarding attorney's fees to prevailing defendant under 42 U.S.C. § 1988(b));[3] *see also EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 517 (4th Cir. 2012) ("The fixing of attorneys' fees is peculiarly within the province of the trial judge, who is on the scene and able to assess the oftentimes minute considerations which weigh in the initiation of a legal action") (citation and internal quotation omitted).

In deciding whether a plaintiff's actions were sufficiently frivolous, unreasonable or without foundation to justify an award of attorney's fees to the prevailing defendant, courts must carefully examine the plaintiff's "basis for bringing suit." *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985). As this Court has observed:

> Awards to prevailing defendants will depend on the factual circumstances of each case. While a showing of bad faith is not required for an award of attorney's fees to a prevailing defendant, such a showing would justify an award of fees. Additionally, courts have awarded attorneys fees to prevailing defendants where no evidence supports the plaintiff's position or the defects in the suit are of such magnitude that the plaintiff's ultimate failure is clearly apparent from the beginning or at some significant point in the proceedings after which the plaintiff continues to litigate.

[3] The standard that applies to awards of attorney's fees to a prevailing defendant under Title VII is the same as applies to claims brought under Section 1988. *See Hughes v. Rowe*, 449 U.S. 5 (1980) (per curiam); *see also Wayne v. Village of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994); *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985).

Id. Among the factors to consider are "(1) whether plaintiff presented sufficient evidence to establish a prima facie case; (2) whether defendant offered to settle the case; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits." *Balmer v. HCA, Inc.*, 423 F.3d 606, 615-16 (6th Cir. 2005), *abrogated on other grounds*, *Fox v. Vice*, 131 S. Ct. 2205 (2011).

A. The EEOC Filed Suit Without Any Evidence In Hand To Support Its Discrimination Claim

In addition to barring intentional discrimination on the basis of race, color, religion, sex or national origin, Title VII also expressly prohibits the application of any policy, practice or procedure that has a statistically significant adverse impact on a protected group, unless the employer can demonstrate that the procedure is job-related and consistent with business necessity:

> An unlawful employment practice based on disparate impact is established under this subchapter *only if*—
>
> (i) ***a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race***, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1)(B)(i) (emphasis added).

"Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses 'a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.'" *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 2673 (2009) (citation omitted). Thus, the first step in establishing an actionable claim of disparate impact discrimination is for the plaintiff to identify a specific employment policy, practice or procedure that when applied has an adverse impact on a protected class of workers to a statistically significant degree.[4] *Id.*

"Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988).

As the Supreme Court pointed out in *Watson*, "Our formulations, which have never been framed in terms of any rigid mathematical formula, have

[4] If and when a plaintiff makes out a prima facie case, the burden shifts to the employer either to refute the plaintiff's statistical analysis or to demonstrate that the challenged employment practice is job-related and consistent with business necessity. The burden then shifts back to the plaintiff to show the existence of some equally effective alternative procedure or practice which if followed would not result in disparate impact. A violation occurs if the plaintiff succeeds in presenting an alternative practice through which an employer could meet its legitimate business needs with significantly less adverse impact than the practice the employer uses and the employer refuses to switch to this alternative practice.

consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Id.* By their very nature, then, disparate impact claims are heavily reliant on statistical proof, which "almost always occupies center stage in a prima facie showing of a disparate impact claim." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 160 (2d Cir. 2001).

This the EEOC well knows. In its *Compliance Manual*, which instructs agency staff on how to properly investigate and resolve discrimination charges, the EEOC states:

> Proving unlawful disparate impact under Title VII ***first requires a statistical demonstration that the employer has an employment policy or practice that causes a significant disparate impact based on race*** (or another protected trait). ***The particular policy or practice causing the impact must be identified***, unless the elements of the employer's decision-making process cannot be separated for analysis, in which case the decision-making process can be analyzed as one employment practice.

EEOC Compl. Man., Section 15: Race and Color Discrimination, § 15-V(B) Racial Disparate Impact (2006 & Supp. 2012) (emphasis added).[5] A different section of the *Compliance Manual* further explains:

> A determination of reasonable cause is a finding that it is more likely than not that the charging party, aggrieved persons, and/or members of a class were discriminated against because of a basis prohibited by the statutes enforced by EEOC. ***The likelihood that discrimination occurred is assessed based upon evidence that establishes, under the***

[5] *Available at* http://www.eeoc.gov/policy/docs/race-color.html#N_76_ (last visited June 7, 2012).

> ***appropriate legal theory, a prima facie case*** and, if the respondent has provided a viable defense, evidence of pretext.

EEOC Compl. Man., Section 40: Issuance of Cause Determinations, § 40.2 Reasonable Cause Standard (1997 & Supp. 2012) (emphasis added).

Here, the EEOC essentially manufactured the existence of a specific employment policy – Peoplemark's purported categorical bar on hiring those with criminal records – and claimed application of the invented policy had an adverse impact on African-Americans, yet failed to provide any concrete evidence, much less statistical proof, of actual adverse impact. That the EEOC would go so far as to commence a public enforcement action on behalf of a class of alleged victims in the face of information (if not actual knowledge) in its possession that Peoplemark did not maintain any policy, practice, or custom that categorically excludes from employment individuals with prior convictions defies comprehension – and is unreasonable on its face.

It bears repeating that the EEOC's entire case was premised on the existence of a policy that categorically excluded from employment anyone with a criminal conviction record. The EEOC alleged in its complaint that "defendant Peoplemark maintains a policy that denies hiring or employment of any person with a criminal record, and this policy has a disparate impact on African American [sic] applicants." Brief of Appellant at 2 (emphasis added). Since no such policy

existed, there was no policy on which the EEOC could conduct a statistical analysis to determine adverse impact.

Even assuming the agency's complaint had challenged, more generally, the manner in which Peoplemark assesses a candidate's suitability for employment in light of a criminal conviction record, it still would not have been able to demonstrate statistical adverse impact, as 22% of the African-American candidates it claimed had been affected by the company's practices was selected for employment, despite having criminal conviction records.[6] Indeed, the agency judged its efforts so futile that in lieu of responding to Peoplemark's Motion for Summary Judgment, it attempted to persuade the company to settle out-of-court and, when those efforts failed, moved to voluntarily dismiss its action with prejudice. Plainly, there was no question even in the EEOC's mind as to the futility of continuing to prosecute the case, so much so that it went as far as to agree to treat Peoplemark as the prevailing defendant for Title VII fees and costs purposes.

[6] In its brief, the EEOC argues that on October 23, 2009 – over a year after it filed the complaint – it represented in its "supplemental brief in support of motion to extend expert report deadline" that "it no longer contends that defendant's application of its practice is 'categorical.'" Brief of Appellant at 12, 41. As the magistrate observed, the EEOC *never* amended its complaint to reflect any new theory of liability. Inexplicably, it continued to pursue its now-repudiated claims for another several months.

The EEOC never would have been able to establish a prima facie case on these facts. Thus, one can only surmise that its objective in proceeding to court either was to pressure Peoplemark into settling the case – which the agency then could publicize as a litigation "victory"– or to use discovery to "fish" for plausible, as-yet-undiscovered discrimination claims, s*ee* Brief of Appellant at 12-13 ("After learning that some ex-felons were referred for employment by some managers, the Commission continued seeking to obtain applications and workforce documents and records from Peoplemark," as "there is still a need to review data from all … Peoplemark locations [and to] conduct an adverse impact analysis to determine whether the manner in which convictions are used … has a disparate impact on [black] applicants"), which plainly is an abuse of the discovery process. *See, e.g.*, *EEOC v. CRST Van Expedited, Inc.*, 2012 U.S. App. LEXIS 9299 (8th Cir. May 8, 2012).

The EEOC's failure to retreat, in the face of certain failure, prior to causing Peoplemark to incur substantial litigation fees therefore should weigh heavily in favor of affirming the district court's award of attorney's fees and costs. Unlike a lay plaintiff that might not fully appreciate the significance of certain case developments, the EEOC, as the agency charged with enforcing the Title VII, "possesses an abundance of expertise" to help guide its efforts. *EEOC v. Eagle*

Quick Stop, 102 Fair Empl. Prac. Cas. (BNA) 493, 2007 U.S. Dist. LEXIS 91811, at *22 (S.D. Miss. Nov. 29, 2007).[7] As the court in *Eagle Quick Stop* observed:

> While a regular plaintiff might be unsure how the documents produced in this case impact their claim, the EEOC can plead no such ignorance. As such, there is a significant distinction in how the Court can and does view the reasonableness of the EEOC's litigation efforts compared with those of a less sophisticated litigant, while the standard of frivolity remains unchanged.

Id. (noting, in awarding fees to the prevailing defendant, "Whether a result of negligence, incompetence, or the force of bureaucratic momentum, the EEOC continued to litigate while missing evidence necessary [to] lay a foundational element of its case," *id.* at *19).

B. The EEOC's Failure To Fulfill Its Title VII Pre-Suit Administrative Investigation Obligations Is Further Evidence Of The Agency's Unreasonable Litigation Conduct

The EEOC's litigation missteps in this case highlight the importance of Title VII's well-established administrative charge investigation procedures, to which the

[7] Nor is the EEOC a novice regarding the potential discriminatory effects of the use of criminal records in the employment selection process. Earlier this year, after years of study and debate, the agency published revised enforcement guidance on the subject. *See* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. §§ 2000e *et seq.* (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (last visited June 7, 2012).

EEOC must adhere in order to ensure the policy aims and objectives of the statute are satisfied.

Title VII sets forth "'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). Upon the filing of a charge, the statute requires that the agency "serve a notice of the charge … within ten days, and shall make an investigation thereof." 42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination through this administrative framework of charge investigations and, where appropriate, informal conciliation. Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Pub. L. No. 92-261, 86 Stat. 103 (1972).

Even in granting EEOC the authority to litigate, however, Congress retained the statute's administrative enforcement scheme as a prerequisite to suit. 42 U.S.C. § 2000e-5(f)(1). The legislative history of the 1972 amendments confirms

Congress's preference for the administrative process as the primary vehicle for enforcing Title VII:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as required by existing law. Only if conciliation proves to be *impossible* do we expect the Commission to bring action in federal district court to seek enforcement.

118 Cong. Rec. H1861 (Mar. 8, 1972), *quoted in EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) (emphasis added). The U.S. Supreme Court similarly observed:

> Congress created the EEOC and established an administrative procedure whereby the EEOC 'would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.' . . . Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act.

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 368 (1977) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

The EEOC's procedural regulations also reflect this Congressional mandate, providing that "[t]he investigation of a charge *shall* be made by the Commission . . . ." 29 C.F.R. § 1601.15(a) (emphasis added). Whenever the agency "completes its investigation" and finds "no[] reasonable cause to believe that an unlawful employment practice has occurred . . . , the Commission shall issue a letter of determination" to that effect. 29 C.F.R. § 1601.19(a). Where the EEOC does find

reason to believe discrimination occurred, the EEOC may issue a determination "based on, and limited to, evidence obtained by the Commission" during the investigation. 29 C.F.R. § 1601.21(a). Only when the EEOC is "unable to obtain voluntary compliance," 29 C.F.R. § 1601.25, through "informal methods of conference, conciliation and persuasion" may it initiate a public enforcement action. 29 C.F.R. § 1601.24(a).

"The clearly stated rule in this Circuit is that the EEOC's complaint is 'limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination.'" *EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977) (citations omitted).[8] The rule exists in part to enable the EEOC to investigate claims that, while not detailed in the underlying charge, should be reasonably foreseeable to the respondent given the particular facts.

Here, since Peoplemark did not employ a categorical bar on hiring ex-offenders (and such a claim was never alleged by the charging party), the EEOC's subsequent, out-of-the-blue claim in litigation was neither foreseeable nor based on a reasonable charge investigation. Indeed, the EEOC's failure to fully investigate

[8] Thus, the EEOC's contention in its brief that "the conduct of the Commission's investigation is not relevant to the litigation of a Title VII lawsuit," Brief of Appellant at 7 n.3, is unpersuasive.

prior to filing suit in this case is inexplicable, especially given the wide range of tools at its disposal for this purpose.[9]

Furthermore, whether or not the manner in which the underlying investigation was conducted is relevant to the matters the agency decides to pursue in litigation, it is *directly* relevant to the question of reasonableness for purposes of assessing attorney's fees and costs owed to a prevailing defendant under Title VII. Had the EEOC conducted any measure of meaningful investigation prior to filing suit, including a statistical analysis of Peoplemark's applicant and hire data, it would have understood that its theory of liability was irreparably flawed.

The agency then presumably could have avoided the time and expense of litigating a baseless claim and reserved its limited resources to uncover and correct actual workplace discrimination. Its failure to do so was unreasonable on its face, and directly resulted in the filing of a frivolous lawsuit. The district court therefore was correct in awarding Peoplemark, as the undisputed prevailing defendant, its fees and costs.

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[9] The agency's investigatory authority is broad and includes the ability to access and copy evidence "relevant to the charge under investigation" and to compel the production of such evidence, including witness testimony, through the issuance of administrative subpoenas. 42 U.S.C. § 2000e-8(a); *see also* 42 U.S.C. § 2000e-9; 29 U.S.C. § 161; *Shell Oil*, 466 U.S. at 64. The agency can (and frequently does) perform investigations "on-site" at the employer's facility and holds "fact-finding conferences" at its own offices to facilitate the gathering of testimony and other evidence. EEOC Compl. Man., Section 25 On Site Investigation, § 25.1 General (1997 & Supp. 2012); 29 C.F.R. § 1601.15(c).

Unlike private litigants, the EEOC is statutorily required to carefully evaluate the merits of every case *before* undertaking costly and resource-intensive litigation. As the Supreme Court explained in *Occidental Life Insurance Co. v. EEOC*:

> [T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. *Unlike the typical litigant . . . , the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties*.

432 U.S. 355, 368 (1977) (emphasis added).

During the investigation of this case, the EEOC requested (and the company went to considerable trouble to produce) extensive applicant and hire data pertaining to the impact on African-Americans of Peoplemark's alleged categorical bar on hiring individuals with criminal conviction records. While the EEOC could have conducted extensive statistical analyses of the data and/or contacted all of these individuals as part of its charge investigation, it simply failed to do so, in direct contravention of its statutory obligations. That it would "file a lawsuit under such circumstances is astonishing." *EEOC v. E.J. Sacco, Inc.*, 102 F. Supp. 2d 413, 419 (E.D. Mich. 2000). Indeed, as the district court in *E.J. Sacco* observed:

> The EEOC is granted broad administrative authority to conduct extensive pre-litigation discovery precisely so that it can ably determine how the agency's resources can be best utilized to fight the scourge of unlawful discrimination. After conducting the

> administrative investigation, the EEOC has multiple options: It can refrain from taking further action; it can attempt an informal settlement through conciliation; and it can institute formal legal proceedings where there exists credible evidence that discrimination has occurred that cannot be remedied by less onerous methods. Here, there was but one reasonable course of action for the EEOC to take upon completion of its initial investigation, and that was to dismiss [the] discrimination charge[] as without support, and to drop the matter against defendant.

Id.

When the EEOC flagrantly disregards the pre-suit administrative process to conduct its inquiries through litigation, as it has done here, employers are deprived of fundamental "due process guarantees." *EEOC v. Bailey Co.*, 563 F.2d at 450 (citation omitted). Notice of the charge allegations, a genuine investigation, and an opportunity to participate in meaningful conciliation discussions all serve the important goal of obtaining voluntary compliance with Title VII. To permit the EEOC to circumvent these steps would result in "undue violence to the legal process that Congress established" and encourage costly and time-consuming litigation at great expense to employers, the judiciary, and taxpayers. *Id.* at 448.

II. THE TYPE OF UNREASONABLY AGGRESSIVE ENFORCEMENT TACTICS PURSUED BY THE EEOC IN THIS CASE ARE AT ODDS WITH THE PURPOSES AND OBJECTIVES OF TITLE VII AND DISADVANTAGE EMPLOYERS AND EMPLOYEES ALIKE

If *Christiansburg* is construed so narrowly as to preclude an award of attorney's fees to Peoplemark under these circumstances, it will stand as no

impediment at all to similarly unreasonable EEOC enforcement tactics, the frequency of which has increased dramatically in recent years. To the extent that the EEOC has stated an intention to formalize these types of questionable enforcement methods, it is now more important than ever that the courts continue to properly penalize the agency for litigation abuses.[10]

Indeed, the EEOC has been the subject of increasing criticism by the courts for, among other things, pursuing frivolous litigation long after it should have known its claims were meritless. In *EEOC v. Cintas Corp.*, for instance, the agency was required to pay the prevailing employer $2.6 million in attorney's fees and costs for its "egregious and unreasonable" conduct. 113 Fair Empl. Prac. Cas.

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[10] Notably, the EEOC earlier this year approved a five-year "Strategic Plan" that sets out to, among other things, "use administrative and litigation mechanisms to identify and attack discriminatory policies and other instances of systemic discrimination." U.S. Equal Employment Opportunity Comm'n, Strategic Plan for Fiscal Years 2012-2016, Strategic Plan Diagram, at 11, *available at* http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf (last visited June 7, 2012). As part of its aim, the agency plans to establish an as-yet-unspecified minimum percentage goal for agency litigation involving claims of systemic discrimination. "This performance measure will provide an incentive for the EEOC to conduct systemic investigations when it finds evidence of potential widespread discriminatory practices." *Id.* at 19.

At the same time, in Fiscal Year 2011, the EEOC received nearly 100,000 discrimination charges, a record high. U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1997 Through FY 2011, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited June 7, 2012). The agency repeatedly has acknowledged its difficulty in being able to timely meet its statutory investigative obligations, given the increase in charge activity and limited staff and financial resources.

(BNA) 195, 2011 U.S. Dist. LEXIS 86228, at *14 (E.D. Mich. Aug. 4, 2011). There, the trial court found that an award of reasonable attorney's fees to the prevailing defendant "is necessary to guarantee that Title VII's procedures are observed in a manner that maximizes the potential for ending discriminatory practices without litigation in federal court." *Id.* at *16 (citation and internal quotation omitted). Similarly, in *EEOC v. Eagle Quick Stop,* the district court granted the prevailing defendant's motion for costs and fees, noting that the EEOC made "no attempt to explain [its] investigative or decision making processes, or to give the Court any guidance as to how [it] investigated and determined whether [its] claim … was valid." 102 Fair Empl. Prac. Cas. (BNA) 493, 2007 U.S. Dist. LEXIS 91811 (S.D. Miss. Nov. 29, 2007). It concluded that "whether a result of negligence, incompetence, or the force of bureaucratic momentum, the EEOC continued to litigate while missing evidence necessary [to] lay a foundational element of its case." *Id.* at *19. And in *EEOC v. CRST Van Expedited*, the EEOC was ordered to reimburse the defendant $4.5 million in attorney's fees for, among other things, having failed to conduct *any* investigation prior to filing a pattern-or-practice discrimination lawsuit. 108 Fair Empl. Prac. Cas. (BNA) 809, 2010 U.S. Dist. LEXIS 11125, at *57 (N.D. Iowa Feb. 9, 2010), *vacated without prejudice*, 2012 U.S. App. LEXIS 9299 (8th Cir. May 8. 2012). *See also EEOC v. Port Authority*, 2012 U.S. Dist. LEXIS 69307, at *19-*20 (S.D.N.Y. May 17, 2012)

(granting defendant's motion to dismiss based on EEOC's failure "despite a three-year investigation – to state an EPA claim upon which relief may be granted . . .").

To be sure, there are times when litigation is unavoidable. In most instances, however, the EEOC's aim – and society's goal – of eradicating unlawful discrimination can be achieved quite effectively through reasonable charge investigation, proper conciliation, and other voluntary means. When the EEOC expends significant resources to pursue fruitless litigation such as this, it only frustrates that goal by leaving even fewer resources for truly meaningful enforcement activities. "The United States and its agencies with superior time, money and manpower should not be able to subject defendants, even corporate defendants, to unnecessary and wasteful depletion of resources in order to pursue an untenable position." *EEOC v. E.J.Sacco,* 102 F. Supp. 2d at 419 (citation omitted).

CONCLUSION

For the foregoing reasons, the district court ruling below should be affirmed.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I, Rae T. Vann, hereby certify that this Brief *Amici Curiae* of the Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and National Federation of Independent Business Small Business Legal Center in Support of Defendant-Appellee and in Support of Affirmance complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). This brief is written in Times New Roman fourteen-point typeface using MS Word 2003 word processing software and contains 6,564 words.

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I hereby certify that on this 7th day of June, 2012, I electronically filed the Brief *Amici Curiae* of the Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and National Federation of Independent Business Small Business Legal Center in Support of Defendant-Appellee and in Support of Affirmance with the Clerk of the Court. Pursuant to 6th Cir. Local Rule 25, the Court's ECF system will send notification to, which constitutes service of, such filing to the following:

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