No. 11-2247

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff-Appellant,

v.

TRICORE REFERENCE LABORATORIES,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Mexico

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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March 30, 2012

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council, Chamber of Commerce of the United States of America and National Federation of Independent Business Small Business Legal Center disclose the following:

1. The Equal Employment Advisory Council, Chamber of Commerce of the United States of America and National Federation of Independent Business Small Business Legal Center have no parent corporations and no subsidiary corporations.

2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council, Chamber of Commerce of the United States of America, or National Federation of Independent Business Small Business Legal Center.

Respectfully submitted:

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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.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

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* contingent upon granting of the accompanying motion for leave to file. The brief urges this Court to affirm the decision below, and thus supports the position of Defendant-Appellee TriCore Reference Laboratories.

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 the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 42 U.S.C. 12101 *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). The district court properly dismissed the EEOC's Americans with Disabilities Act (ADA) action on summary judgment on the ground that the agency failed to establish a threshold, *prima facie* case of unlawful discrimination, and was correct in finding the EEOC liable under the circumstances for the prevailing defendant's reasonable attorney's fees.

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, this Court[1], and other federal courts of appeals as *amicus curiae*, many of which have involved ADA questions. Because of their experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of

[1] *See, e.g., Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Tomlinson v. El Paso Corp.*, 653 F.3d 1281 (10th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3476 (2012); *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223 (10th Cir. 2006), *vacated*, 552 U.S. 379 (2008); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (*en banc*).

the business community and the substantial significance of this case to the constituencies they represent.

STATEMENT OF THE CASE

This matter stems from a public enforcement action filed by the U.S. Equal Employment Opportunity Commission (EEOC) on behalf of Rhonda Wagoner-Alison, who worked for Defendant-Appellee TriCore Reference Laboratories (TriCore) as a Clinical Lab Assistant II (CLA II). App. 56, 230-31. Her job duties required her to spend "one-third to two-thirds of her time" walking, standing and sitting, among other things. App. 88, 290. It is undisputed that at least two of those functions – standing and walking – are essential functions of the CLA II position. *Id.*

Wagoner-Alison underwent ankle surgery in May 2007 and was out on medical leave until August 2007, when she was released to return on a light duty basis working no more than 8 hours a day, and limiting her walking or standing to 1-2 hours per day. App. 102, 104, 114-15. She was not to climb, balance, stoop, kneel, crawl, push, pull or lift at all. App. 114-15. TriCore returned Wagoner-Alison to work on a reduced schedule to perform the single function of registering new patients. App. 107-08, 119-120, 275. She was not successful in that job, and after failing to correct her performance deficiencies was removed from that assignment, placed on leave, and encouraged to apply for other open positions.

App. 123, 143. Instead of doing so, Wagoner-Alison applied for Social Security disability benefits, stating among other things that she was unable to stand or walk 15 steps without resting for at least an hour. App. 68, 145-47.

On July 27, 2010, the EEOC filed suit against TriCore in the U.S. District Court for the District of New Mexico, alleging that the company unlawfully discriminated against Wagoner-Alison by failing to provide her with reasonable accommodations and terminating her employment due to her disability, in violation of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101 *et seq.*, as amended. *EEOC v. Tricore Reference Labs.*, 25 A.D. Cas. (BNA) 842, 2011 U.S. Dist. LEXIS 151417, at *1-*2 (D.N.M. Oct. 26, 2011). TriCore asked the district court to dismiss the EEOC's lawsuit, contending among other things that Wagoner-Alison was unable to perform the essential functions of her job as a CLA II even with reasonable accommodation and, as such, the EEOC could not establish even a *prima facie* case of unlawful disability discrimination. *Id.* at *2.

The district court agreed, and dismissed the EEOC's suit in its entirety. *Id.* TriCore subsequently moved for attorney's fees on the ground that the EEOC's action was frivolous, unreasonable or without foundation. *Id.* Applying the standard set forth by the U.S. Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the district court determined that the EEOC's continued litigation of claims that it knew well prior to filing suit were insufficient

to establish a threshold disability discrimination claim was, in fact, frivolous, unreasonable or without foundation. *Id.* at *4.

The district court observed that while the EEOC "suggests that perhaps it should have answered TriCore's request for admissions differently," it found "the better approach would have been to stop litigating as soon as the EEOC realized" it could not prove its case. Furthermore, the EEOC did not dispute that Wagoner-Alison "committed numerous errors in her data entry position during the period that TriCore voluntarily accommodated her disability" and offered no evidence of disparate treatment. The district court therefore concluded that the EEOC's claims were frivolous, unreasonable and without foundation and, in a separate order, ordered the agency to reimburse TriCore its reasonable attorney's fees. 2011 U.S. Dist. LEXIS 151417, at *4-*6 This appeal ensued.

SUMMARY OF ARGUMENT

The district court properly found Plaintiff-Appellant EEOC liable under the ADA for Defendant-Appellant's reasonable attorney's fees. 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 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).

Among the factors courts consider in determining the propriety of such an award are whether or not the plaintiff was able to establish a *prima facie* case of discrimination; whether the defendant made an offer to settle the matter; and whether the plaintiff's claims survived summary judgment. *See Myers v. City of W. Monroe*, 211 F.3d 289, 292 (5th Cir. 2000); *Walker v. NationsBank of Fla. N.A.*, 53 F.3d 1548, 1558 (11th Cir.1995).

Here, the EEOC learned during its administrative charge investigation that the charging party, on whose behalf it eventually brought suit, was unable to perform the essential functions of her position with or without reasonable accommodation, App. 88, 114-15, 290, and therefore was not a "qualified" individual with a disability within the meaning of the ADA. *See* 42 U.S.C. § 12111(8). The EEOC's actions in continuing to litigate even after conceding the absence of a crucial element of its *prima facie* case were frivolous, unreasonable, and without foundation, and sufficient in themselves to justify the district court's award of attorney's fees. In addition, however, the EEOC also failed to engage in meaningful conciliation efforts as required by the ADA prior to filing suit, which resulted in Defendant-Appellant being forced to defend a frivolous claim and, in doing so, incur substantial defense costs.

The EEOC has a statutory duty to attempt to eliminate suspected discriminatory employment practices through voluntary means of "conference,

conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). Indeed, the U.S. Supreme Court has held that the EEOC "whenever possible" must attempt to resolve discrimination charges "before suit is brought in a federal court . . . ." *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 368 (1977).

Defendant-Appellant attempted to resolve the claim through a modest financial settlement – as any similarly-situated employer might do so as to avoid the expenditure of substantial costs and resources necessary to defend a discrimination lawsuit[2] – but the EEOC rebuffed those efforts and pressed on with litigation. Had the agency taken seriously its mandate to attempt to resolve every discrimination charge informally through conciliation, it would have spared itself, Defendant-Appellant, and the federal courts the time, effort, and resources spent on a suit that, from the start, had no merit.

As the agency charged with enforcing the ADA, 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 ADA claims, the EEOC should have known better than to pursue a case in which it could not establish a *prima facie* case of disability discrimination – and which eventually was dismissed on summary judgment. Because it forced Defendant-Appellant to litigate a claim

[2] *See* TriCore's Motion for Order Deeming the EEOC's Claims as Frivolous, Unreasonable, or Without Foundation, at 16-17.

that was meritless from the start, the district court was 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 the ADA 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. Peoplemark, Inc.*, No. 1:08-CV-00907 (W.D. Mich. Oct. 17, 2011) (unpublished, *see* APPENDIX); *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*, 108 Fair Empl. Prac. Cas. (BNA) 809, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010), *vacated*, 114 Fair Empl. Prac. Cas. (BNA) 719, 2012 U.S. App. LEXIS 3485, at *93 (8th Cir. Feb. 22. 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 DISTRICT COURT PROPERLY FOUND THE EEOC LIABLE UNDER THE ADA FOR PREVAILING DEFENDANT TRICORE'S ATTORNEY'S FEES

The district court was correct in awarding attorney's fees to TriCore, the prevailing defendant below, where the plaintiff EEOC rebuffed its good-faith settlement attempts and was unable to make out a *prima facie* case of disability discrimination sufficient to survive summary judgment. Accordingly, the decision below should be affirmed by this Court.

The remedial and procedural scheme of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101 *et seq.*, is patterned after Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e *et seq.*, which contains a fee-shifting provision that permits a court to award a prevailing party reasonable attorney's fees.[3] While Title VII does not define what constitutes a "prevailing

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[3] Specifically, the ADA provides that:

> The powers, remedies, and procedures set forth in sections . . . 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 . . . shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section [12116], concerning employment.

42 U.S.C. § 12117(a). Section 2000e-5(k), in turn, provides that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission … a reasonable attorney's fee … and

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.'" *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989) (citation omitted).

In *Christiansburg Garment Co. v. EEOC*, the Supreme Court ruled that a prevailing defendant may recover attorney's fees 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.

The award of attorney's fees to a prevailing defendant under Title VII is within the sound discretion of the district court, whose determination should not be overturned "unless under all the facts and circumstances it is clearly wrong." *Arnold v. Burger King Corp.*, 719 F.2d 63, 67 (4th Cir. 1983) (quotations and

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the Commission … shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k).

citations omitted); *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, a number of federal courts consider the following three factors: (i) whether the plaintiff established a *prima facie* case; (ii) whether the defendant made a settlement offer; and (iii) whether the case was dismissed on summary judgment. *See Myers v. City of W. Monroe*, 211 F.3d 289, 292 (5th Cir. 2000); *Walker v. NationsBank of Fla. N.A.*, 53 F.3d 1548, 1558 (11th Cir.1995). Although this Court has not spoken, a number of district courts within the Tenth Circuit have applied the three-part test. *See, e.g., Ceballes v. Western Forge Corp.*, 2007 U.S. Dist. LEXIS 58218, at *3-*4 (D. Colo. Aug. 9, 2007) (unpublished).

A. The EEOC's Actions In Continuing To Litigate Even After Conceding The Absence Of A Crucial Element Of Its *Prima Facie* Case Were Frivolous, Unreasonable, And Without Foundation

The employment provisions of the ADA prohibit discrimination "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee

compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

Unlawful discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A); *see also Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178-79 (10th Cir. 1999).

> In order to establish a prima facie case of disability discrimination under the ADA, a plaintiff must demonstrate that he '(1) is a disabled person as defined by the ADA; (2) is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of that disability.'

EEOC v. C.R. England, Inc., 644 F.3d 1028, 1037-38 (10th Cir. 2011) (quoting *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1086 (10th Cir. 2008)).

In this case, the EEOC was aware early on that walking and standing are essential functions of the CLA II position, App. 393, and conceded in its Response to TriCore's Rule 36 Requests for Admission, App. 95-96, that Wagoner-Alison, the individual on whose behalf it sought relief, was unable to perform those

essential functions, even with reasonable accommodation. App. 88, 114-15, 290. Although it knew that Wagoner-Alison is not a qualified individual with a disability entitled to ADA protection – and thus that it could not establish a crucial element of its *prima facie* case – the EEOC nevertheless continued to prosecute its lawsuit.

In its brief, the EEOC argues that the "*Christiansburg* standard is a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorneys fees on the plaintiff." EEOC Br. at 23. Significantly, however, the cases on which the agency relies involve unsuccessful claims brought by private plaintiffs. The EEOC is no ordinary plaintiff, however. Therefore, to the extent that the agency is, and should be, held to a higher standard of litigation conduct, the cases it cites in support of reversal are wholly unpersuasive.

Unlike a lay plaintiff that might not have appreciated the significance of certain case developments – such as, for example, a critical admission of fact – the EEOC, as the agency charged with enforcing the ADA, "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). Its failure to concede defeat prior to causing TriCore to incur substantial litigation fees, even in the face of indisputable evidence undermining its

claim, therefore should weigh heavily in favor of affirming the district court's fees award. 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 Failed In Its Statutory Obligation To Engage In Meaningful Conciliation Prior To Filing Suit

While Title VII – and, by extension, the ADA – authorizes the EEOC to pursue a civil action against a respondent believed to have engaged in unlawful discrimination, 42 U.S.C. § 2000e-5(f), it may do so only after its efforts "to secure from the respondent a conciliation agreement acceptable to the Commission" have failed. 42 U.S.C. § 2000e-5(f)(1); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 64 (1984). Thus, only after the agency is "unable to obtain voluntary compliance . . ." *and* has determined "that further efforts to do so would be futile or nonproductive . . ." may it deem conciliation a failure and so notify the parties. 29 C.F.R. § 1601.25; *see also Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

In establishing the EEOC, Congress "selected '[c]ooperation and voluntary compliance … as the preferred means for achieving' the goal of equality of employment opportunities." *Occidental Life Ins. Co.*, 432 U.S. at 367-68. (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)). The legislative history of the 1972 amendments to Title VII confirms Congress's preference for conciliation as a means of resolving discrimination claims:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as is 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 Supreme Court acknowledged this strong federal public policy favoring conciliation in *Occidental*, ruling that the EEOC "whenever possible" must attempt to resolve discrimination charges "before suit is brought in a federal court . . . ." 432 U.S. at 368. *See also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be the "preferred means of enforcing Title VII") (citation omitted).

The EEOC does not satisfy its administrative duties merely by inviting a respondent to participate in conciliation. In order to fulfill its statutory mandate,

the agency's conciliation efforts both must be meaningful *and* undertaken in good faith. *See, e.g., EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 468 (5th Cir. 2009); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003); *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 294 (7th Cir. 1994); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1042 (7th Cir. 1982); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979).

Permitting the EEOC to neglect its obligation to make a genuine effort to conciliate a charge of discrimination prior to initiating a public enforcement action unquestionably would encourage the agency to pursue costly and time-consuming litigation instead of promoting mutually acceptable resolution of employment disputes in a more informal, less adversarial environment. By making a real effort to conciliate a charge, the EEOC could preserve valuable resources that it otherwise would be required to expend pursuing an action in federal court.

Theoretically, at least, had the EEOC paid any attention to TriCore's requests for further discussion of the facts of the case, it would have reversed its reasonable cause determination and foregone litigation entirely after realizing the underlying charge had no merit. Indeed, as the district court found, the EEOC was put on notice well prior to filing suit that it

would be unable to establish a *prima facie* case of disability discrimination sufficient even to raise a triable issue of fact. One can only surmise that the agency was motivated by something other than the truth in aggressively pursuing litigation in this matter. Given the EEOC's advance knowledge of the baseless claim combined with the agency's decades of experience in assessing the viability of claims, its decision to press forward with litigation is baffling.[4] The fact that the EEOC rejected a modest monetary settlement as well as the opportunity to negotiate nonmonetary components to ensure continued EEO compliance in the future, is even more inexplicable.

Not only is reasonable investigation and good faith conciliation of discrimination charges in the parties' mutual best interest, it also serves the interest of the judiciary in preventing a logjam of employment discrimination suits that, if properly attended to by the EEOC, could be resolved successfully at the

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[4] The EEOC's Compliance Manual also appears to suggest its conduct in this case warranted an award of fees:

> Prevailing defendants in EEOC litigation may be awarded fees and costs, although such claims usually are denied where EEOC found reasonable cause, pursued administrative remedies, and had sufficient evidence to establish a prima facie case. Courts have awarded fees where … EEOC should have realized during discovery that its primary contention … was unfounded and therefore it could not establish a prima facie case.

1 EEOC Compl. Man. *How-to-Use/Overview, EEOC Procedures, Litigation* O:3612, O:3614 (BNA July 2010) (footnotes omitted) (emphasis added).

administrative level. In this case, the EEOC had the opportunity to postpone, if not forgo, federal court litigation simply by allowing TriCore to question the agency about the basis for its findings and proposed conciliation agreement, thereby opening the door to possible settlement (if not proper dismissal) of the charge. Despite the practical advantages in doing so, the EEOC failed to provide TriCore with a meaningful opportunity to resolve the case and instead continued to litigate in federal district court with full knowledge of the problems with its case. The agency's conduct is particularly disturbing since neither the ADA nor Title VII mandates that the EEOC "conclude its conciliation efforts and bring an enforcement suit within any maximum period of time." *Occidental Life Ins.*, 432 U.S. at 360.

Approving the type of inflexibility and unreasonableness exhibited by the EEOC in this case would only promote antagonism between employers and employees, as well as between the EEOC and its own stakeholders, by discouraging voluntary compliance and cooperation in favor of time-consuming and costly litigation.

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

As the Fifth Circuit has observed:

> The EEOC must vigorously enforce the Americans with Disabilities Act and ensure its protections to affected workers, but in doing so, the

> EEOC owes duties to employers as well: a duty reasonably to investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit. In this case, the EEOC abandoned its duties and pursued a groundless action with exorbitant demands.

EEOC v. Agro Distribution, LLC, 555 F.3d 462, 473 (5th Cir. 2009). To the extent that the EEOC has stated an intention to formalize these wholly unreasonable and overly aggressive enforcement tactics, it is now more important than ever that the courts continue to properly penalize the agency for litigation abuses.[5]

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. Peoplemark, Inc.*, No. 1:08-CV-

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[5] Notably, the EEOC recently 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. 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. 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.

00907 (W.D. Mich. Oct. 17, 2011) (unpublished, *see* APPENDIX), for instance, the EEOC was required to reimburse the prevailing defendant nearly $800,000 in attorney's fees and costs for having pursued a lawsuit claiming the defendant maintained a categorical bar on hiring individuals with criminal records even after it became clear that no such policy, in fact, existed. There, the trial court observed that the EEOC knew early on that its case would be very costly to litigate and would involve extensive statistical evidence. 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.

The district court observed that had the EEOC conducted a reasonable investigation or "reviewed the evidence" provided to it, it would have "quickly realized its theory of liability as pled was untenable." And in *EEOC v. Eagle Quick Stop,* "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." 102 Fair Empl. Prac. Cas. (BNA) 493, 2007 U.S. Dist. LEXIS 91811, at *19 (S.D. Miss. Nov. 29, 2007). *See also EEOC v. CRST Van Expedited*, 108 Fair Empl. Prac. Cas. (BNA) 809, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010) (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), *vacated*, 114 Fair Empl. Prac. Cas. (BNA) 719, 2012 U.S. App. LEXIS 3485, at *93 (8th Cir. Feb. 22. 2012) (district court's award of attorneys' fees and expenses vacated *without prejudice*) (emphasis added).

Similarly, in *EEOC v. Cintas Corp.*, 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. (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).

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.

CONCLUSION

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

Respectfully submitted:

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March 30, 2012

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I hereby certify that with respect to the foregoing:

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/s/ Rae T. Vann
Rae T. Vann

March 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2012, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

PEOPLEMARK, INC.,

Defendant.
_____/

CASE NO. 1:08-CV-907

HON. ROBERT J. JONKER

ORDER APPROVING REPORT AND RECOMMENDATION

The Court has reviewed the Magistrate Judge's Order Granting Motion for Attorney Fees (docket #137), Plaintiff's Objections (docket #140), and Defendant's Response (docket #141). After a de novo review of the record, the Court affirms and adopts the Magistrate Judge's Order.

Standard of Review

The Sixth Circuit has held that a post-trial motion for sanctions, fees and costs is a dispositive motion under Fed. R. Civ. P. 72(b). *Massey v. City of Ferndale*, 7 F.3d 506, 509-10 (6th Cir. 1993). A magistrate judge deciding such a motion cannot make a final determination of relief, but rather must provide the district court with a report and recommendation that is subject to de novo review. *Id.* Therefore, the Court considers the Magistrate Judge's Order as a Report and Recommendation, and the Court has a duty "to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

> The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1)(c). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

Analysis

I. The award of attorneys' fees beginning October 1, 2009 was appropriate on this record.

The EEOC objects to the Magistrate Judge's conclusion that the EEOC's "disparate impact case became without foundation on October 1, 2009," and that the EEOC's decision to continue rather than dismiss the case against Peoplemark at that time warranted requiring the EEOC to pay a portion of Peoplemark's attorneys' fees and costs under 42 U.S.C. § 2000e-5(k). (docket #137, at 1, 3.) The EEOC argues that "the Magistrate [Judge] based his ruling on the fact there was no blanket, company-wide policy prohibiting the hire of felons," and that even without such a policy, other evidence provided the foundation necessary for the EEOC to proceed, making an award of attorneys' fees and related costs improper. (*Id.*) To the extent an attorney fee award is appropriate, the EEOC submits that the time frame for such fees should be limited to the period after January 29, 2010, which represents the date the Court denied its fourth requested extension of time for providing its statistician's expert report. (*Id.*)

The Court is not persuaded by the EEOC's arguments. In its September 29, 2008 Complaint, the EEOC unequivocally based its case on Peoplemark's alleged categorical prohibition against the "hiring of any person with a criminal record." (docket #1, at 2.) The EEOC alleged that this

prohibition had a disparate impact on African American applicants. (*Id.*) As the Magistrate Judge noted, however, the evidence Peoplemark provided the EEOC soon revealed that no blanket prohibition against hiring applicants with criminal records existed. (docket #137, at 10-11.) Had the EEOC conducted a reasonable investigation in the years leading up to filing its lawsuit, or had it reviewed the evidence provided to it throughout the course of discovery, it would have quickly realized its theory of liability as pled was untenable. (*Id.*) The EEOC correctly notes that a disparate impact can exist absent a blanket hiring policy, but that is not how the EEOC either pled or pursued its case. To prove their disparate impact theory as pleaded, the EEOC was required to show such a blanket policy existed. It failed to do so, and the Magistrate Judge, construing the facts in a manner that the Court believes gives the EEOC the benefit of the doubt, correctly concluded that the EEOC should have been aware of the fatal flaw in its case no later than October 1, 2009. At that point, the EEOC's disparate impact claim became unreasonable to maintain, making an attorney fee award appropriate. *See Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); *Smith v. Smythe-Kramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985); *see also EEOC v. CRST Van Expedited, Inc.*, No. 07-cv-95, 2010 WL WL 520564 (N.D. Iowa, Feb. 9, 2010) (holding EEOC lacked foundation to proceed based on a failure to reasonably investigate and awarding $4,467,000.00 in attorneys' fees and costs to defendant); *EEOC v. Cintas Corp.*, Nos. 04-40132, 06-12311, 2011 WL 3359622 (E.D. Mich. Aug. 4, 2011) (holding failure to timely identify aggrieved parties and reasonably investigate such claims warranted attorney fee award against the EEOC in the amount of $2,638,443.93).

The Court recognizes that requiring the EEOC to pay a portion of Peoplemark's attorneys' fees and costs is an extraordinary remedy, and does not reach its conclusion to award such fees lightly. However, as the Magistrate Judge aptly noted, "regardless of the merits, it was unreasonable

for the EEOC to continue to litigate (and drive up defendant's costs) once it knew it could not produce an expert and thus could not prove its case." (docket #137, at 9.)

From the beginning of this litigation, the EEOC knew that its case "would rise and fall on statistical and expert testimony." (docket #76-1.) Indeed, the EEOC itself acknowledges that the Sixth Circuit has repeatedly held that statistical analysis is required to make out a prima facie case of disparate impact discrimination. *See, e.g., Isabel v. City of Memphis*, 404 F.3d 404, 411 (6th Cir. 2005) (holding statistical analysis is required to prove prima facie case); *Johnson v. U.S. Dep't of Health & Human Servs.*, 30 F.3d 45, 48 (6th Cir. 1994) (same). In the initial January 9, 2009, Case Management Order, the Court required the parties to name experts no later than June 30, 2009, and disclose the reports of those experts not later than August 31, 2009. (docket #14.) The EEOC filed a motion to extend these deadlines the day before it was required to name its experts. (docket #39.) The Court granted Plaintiff a measure of relief, extending the date for the EEOC to disclose its expert to July 31, 2009, and extending the expert report deadline to September 30, 2009. (docket #44).

Unsatisfied with this relief, the EEOC renewed its motion to extend deadlines (docket #45), including the naming of an expert. In its renewed motion, the EEOC indicated it had yet to identify or hire <u>any</u> expert, despite having litigated the case for ten months, investigated the case for several years, and knowing that it would need an expert from day one. (*Id.*) The Court denied the motion because the EEOC failed to provide any cause that would justify yet another extension of the deadlines. (docket #50.) Although the EEOC disclosed its statistician expert by the July 31, 2009 deadline, its expert never prepared a report, even though the Court provided yet another deadline extension to December 31, 2009, and even though the EEOC's own in-house expert, Mr. Donovan,

stated that such a report reasonably could have been prepared in a three-month time frame. (docket #101, at 9.) That the EEOC wholly failed to provide a statistical expert report at any point during the litigation, despite the admitted absolute necessity of the report, further supports the conclusion that an attorneys' fee award is appropriate.

II. The amount of attorneys' fees awarded is reasonable.

The EEOC objects to the amount of attorneys' fees Peoplemark claims, alleging that Peoplemark's billing practices were so vague as to make it impossible to determine whether time spent was necessary and reasonable. (docket # 140, at 3.) It also objects to the fact that only Peoplemark's lead counsel certified the reasonableness of the submitted fees, when in fact eight attorneys worked on the case. (*Id.*)

After carefully reviewing the attorneys' fees in this case, the Court is satisfied that the fees awarded in the Magistrate Judge's Order were indeed reasonable and were discounted appropriately when the supporting documentation warranted adjustment. The billable hourly rate is reasonable for this District, and the time entries Peoplemark submitted were sufficiently particular to allow the Court to conduct a meaningful review of the time recorded and fees requested in Peoplemark's Motion. (docket #122.) To the extent time entries were redundant or duplicative, the Magistrate Judge adjusted the fee award appropriately. (docket # 137, at 15-19.) In sum, the attorneys' fee award proposed in the Magistrate Judge's Order is reasonable.

The EEOC's argument that the submitted attorneys' fees were not properly supported by affidavits from all eight attorneys on the case is not persuasive. Edward Young, Peoplemark's lead counsel, submitted an affidavit stating that he had knowledge of the work performed by Peoplemark's attorneys and had reviewed their billing statements prior to submitting them to the

Court. (docket #122-10, at 2-3.) This affidavit sufficiently supported Peoplemark's claimed attorneys' fee. There is no reason to preclude the award for lack of support. *See Fharmacy Records v. Nassar*, 729 F.Supp.2d 865, 878 (E.D. Mich. 2010) (holding Local Rule 54.1.2 was satisfied when the party's lead counsel submitted an affidavit in support of attorneys' fees accrued by all attorneys on the case); *FTSS Korea v. First Tech. Safety Sys., Inc.*, 254 F.R.D. 78, 81 (E.D.Mich. 2008).

III. An expert witness fee award for fees accrued during this litigation was appropriate, and the fees accrued by Peoplemark were reasonable.

The EEOC also objects to the award of expert witness fees in favor of Peoplemark for work its expert performed throughout the course of this litigation, arguing that (a) only fees accruing after October 1, 2009 may be awarded and (b) those fees that were awarded lacked the specificity necessary to ascertain what work the expert performed as compared to the fees requested. (docket #140, at 3-4.)

The EEOC's argument on this point lacks merit. As the Magistrate Judge correctly pointed out, "reasonable expert witness fees are the kind of out-of-pocket expenses normally charged to clients by attorneys which are recoverable as part of a statutory award of attorneys' fees under 42 U.S.C. § 2000e-5(k)." (docket # 137, at 19 (citations omitted)). Dr. Cohen's report required analyzing over 200,000 pages of documents, preparing a report, preparing a rebuttal report to the EEOC's expert sociologist's position, and anticipating arguments that would be made if the EEOC's statistical expert ever actually submitted a report as was required (which it failed to do as outlined above). (*Id.*) All of Peoplemark's expert witness fees directly related to the disparate impact theory the EEOC argued throughout this litigation, and were an integral part of Peoplemark's defense.

After a careful review of the record, the Court concludes that the expert fees Peoplemark incurred were reasonable and grants its request for $526,172.00 to be awarded.

IV. The EEOC alleges factual errors in the Magistrate Judge's report that do not materially impact the analysis in the Magistrate Judge's Order.

The EEOC also objects to certain facts noted in the Magistrate Judge's report. Specifically, the EEOC states that the Magistrate Judge provided the wrong filing date for the initial Charge, erroneously suggested the EEOC was investigating Peoplemark prior to the Charge, and stated that work on the EEOC's database did not begin until November 2009. (docket #140, at 3.)

As previously outlined in the Magistrate Judge's December 21, 2009 Order, this matter began when the EEOC received a discrimination complaint from Sherry Scott on November 13, 2005. (docket # 101, at 1.) Evidence supports the Magistrate Judge's conclusion that Peoplemark was being investigated by the EEOC prior to Ms. Scott's charge. (docket #137, at 7 n.3.) The specific date this investigation started–whether November 13, 2005 or sometime earlier, is simply immaterial to the Court's analysis.

As for when the EEOC began constructing its database of Peoplemark's employment information, the Court previously concluded that work on the EEOC's database could not have started any earlier than September 2009, which represented an unwarranted delay completely attributable to the EEOC's own lack of diligence. (docket #101, at 11.) The unwarranted delay is undisputed, and the exact time of the delay is once again immaterial to the Court's analysis regarding attorneys' and expert fees.

Conclusion

The EEOC's conduct in this case warranted the attorneys' fee and expert fee awards proposed in the Magistrate Judge's Order. The EEOC's repeated disregard for the Court's Case Management Order resulted in unnecessary delay, and the EEOC's own ultimate failure to provide expert testimony was fatal to its case. By choosing to litigate, the EEOC consented to complying with the same basic rules that apply to any other litigant, and its conduct warrants imposition of the fees and costs proposed in the Magistrate Judge's Order.

ACCORDINGLY, IT IS ORDERED that the Order Granting Motion for Attorney Fees of the Magistrate Judge, filed March 31, 2011 (docket #137), is approved and adopted as the opinion of this Court.

IT IS FURTHER ORDERED that Peoplemark's Motion for Fees, Costs and Sanctions (docket #122) is **GRANTED IN PART** and **DENIED IN PART**, consistent with the Magistrate Judge's Order, as follows:

(1) The EEOC shall pay Peoplemark attorneys' fees in the amount of $219,350.70;

(2) The EEOC shall pay Peoplemark expert witness fees in the amount of $526,172.00; and

(3) The EEOC shall pay Peoplemark $6,419.78 in other expenses.

(4) The total attorneys' fees and expenses award is $751,942.48, and shall be incorporated into the Final Judgment of this case.

Dated: October 17, 2011

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE