

## Another Criminal Background Case, Another Blow To The EEOC

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Gavel

Earlier this week, a divided Sixth Circuit Court of Appeals issued another blow to the Equal Employment Opportunity Commission (EEOC) in its pursuit of discrimination claims against employers and criminal background checks. In a 2-1 decision, the appellate court affirmed the lower court's award of \$751,942 in attorney's fees, expert witness fees and other litigation costs to Peplemark, Inc. after the company produced thousands of documents refuting the allegation that it had a "blanket policy" of denying jobs to individuals with felony records. ( [EEOC v. Peplemark, Inc.](#), No. 11-2582 (Oct. 7, 2013)).

As noted by the majority, the EEOC's race discrimination case against Peplemark "was not groundless when filed" since the agency sued based on statements from the company's associate general counsel, claiming the employer had a blanket policy of not extending employment opportunities to persons with felony convictions. The EEOC claimed that such a "blanket policy" had a disparate impact on African Americans.

However, as the majority noted, the EEOC was obligated to timely have dismissed the complaint after Peplemark produced more than 178,000 documents in discovery, demonstrating that the company had no such blanket policy and that the statements by the associate general counsel were incorrect. Once the EEOC knew or should have known that no such "blanket policy" existed, it was "unreasonable to continue to litigate the Commission's pleaded claim because the claim was based on a companywide policy that did not exist." Instead, despite being aware of such information, the EEOC continued to litigate the case for more than five months before consenting to a dismissal of the claims.

Citing to the U.S. Supreme Court's 1978 decision in *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), the Sixth Circuit upheld the lower court's award of reasonable fees and costs to Peplemark. In *Christiansburg*, the U.S. Supreme stated that a Title VII defendant could be awarded its attorney's fees and costs if the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."

The *Peplemark* decision is a good reminder that in Title VII cases, an employer can pursue reasonable attorney's fees and costs if the plaintiff fails to promptly dismiss his or her claim after the company produces discovery or other information which demonstrates no *prima facie* job discrimination claim can exist.

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