UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

Case No. 1:08-cv-907

v.

Hon. Robert J. Jonker

PEOPLEMARK, INC.,

Defendant.
_____/

ORDER GRANTING MOTION FOR ATTORNEY FEES

I. Background

As described by the plaintiff Equal Employment Opportunity Commission (EEOC) in the Joint Status Report (JSR) filed prior to the Rule 16 Conference, "[t[his is a large, multi-state disparate impact case," initiated pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Defendant is Peoplemark, Inc. (Peoplemark), a temporary staffing company which hires people to perform in light industrial, clerical and receptionist positions.

Following a three-year investigation of Peoplemark, during which it utilized administrative subpoenas in 2006 and 2007 to obtain over 18,000 pages of documents from defendant, the EEOC filed a complaint in this court on May 29, 2008, in which it alleged that Peoplemark maintained a policy "which denied the hiring or employment of any person with a criminal record," Complaint at 1 (emphasis added), and that this policy adversely affected African-Americans in violation of Title VII. Plaintiff sought relief on behalf of Sherri Scott, a two-time

felon with convictions for housebreaking and larceny, and similarly situated but unidentified African-Americans. In the JSR, plaintiff reiterated its position that "[d]efendant maintains a policy which categorically denies hire to any individual with a criminal record." (emphasis added) JSR at ¶ (5)(a) (docket no. 11). EEOC Commissioner Ishimaru also took the opportunity to highlight this case at the Commissioner's public meeting on November 20, 2008, stating that, "Just this past September, the Commission unanimously approved the filing of a case in the Western District of Michigan against Peoplemark, alleging that a class of African-Americans were discriminated against due to its policy that denies the hiring or employment of any person with a criminal record." (emphasis added) Plaintiff never amended its complaint to change its allegation that Peoplemark had such a blanket policy.

The EEOC has always known this case would be an expensive statistical one 'rising or falling' on its expert testimony. *See*, e.g., Transcript of August 6, 2009 hearing at 25, 40 (docket no. 51). First, the EEOC saw this case from the beginning as one which would "involve protracted discovery, complex and special issues of proof, which will rely upon data collection and organization, establishment of databases, and expert analysis." JSR, *supra*, at ¶ (7)(a)(ii). "The Commission will need to inquire about and seek production of voluminous records from defendant, . . . [which] will therefore require many hours of lay and expert manpower to organize, analyze and generate expert reports." *Id.*, ¶ (8)(a).

Second, the Commission also clearly knew this case would carry a major price tag for both sides. Having made no secret that it was undertaking major litigation against the defendant company, the EEOC would have had to expect that defendant would incur considerable costs in

defending. The EEOC would have had to have known defendant's costs would include substantial expert fees.

After months of tumultuous litigation, Peoplemark filed a motion for summary judgment on February 25, 2010, seeking denial of the complaint with prejudice and fees and expenses as a sanction. The EEOC was, by its own admission, not in a position to respond, "having no statistical expert to rebut defendant's expert." EEOC Brief at 8, 16 (May 14, 2010) (docket no. 126) at 8, 16. On March 29, 2010, the parties submitted a joint motion to dismiss in which the parties agreed that "Peoplemark is a prevailing party for purposes of determining Peoplemark's entitlement to costs and attorney fees [.]" The court entered an Order of Dismissal on March 29, 2010 (docket no. 120).

II. Peoplemark's Motion for Fees, Costs and Sanctions

Peoplemark subsequently filed the present Motion for Fees, Costs and Sanctions (docket no. 122) alleging that "[d]ue to 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, the agency should be required to compensate Peoplemark for all fees and expenses incurred."[1] Specifically, Peoplemark seeks $749,598.00 in attorney fees, $526,172.00 in expert witness fees, and $51,248.48 in costs, for a total of $1,327,018.48. The EEOC responds that Peoplemark is not entitled to attorneys' fees nor to expert fees, which it contends are only recoverable as part of the attorneys' fees, but if it is, Peoplemark's demands should be substantially

[1]This motion does not pertain to the statutory costs Peoplemark is entitled to as a prevailing party under 28 U.S.C. § 1920. *See*, Peoplemark's Memorandum at 6, fn. 13 ("Peoplemark views its statutory costs and sanction awards as totally separate from the issues addressed in this motion") (docket no. 122-2).

reduced. The court must first decide whether an award of attorneys' fees is appropriate before deciding the amount of any award.

A. Peoplemark is entitled to fees as a prevailing defendant

Both parties rely upon the unanimous decision of the Supreme Court in *Christiansburg Garment Co. v EEOC,* 434 U.S. 412 (1978) as the standard for determining a prevailing defendant's Title VII attorney fees, if any. Title VII provides in pertinent part that

> "the court, in its discretion, may allow the prevailing party, other than the Commissioner or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

42 U.S.C. § 2000e-5(k). Where prevailing defendants are concerned, the court provided this guidance: "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation even though not brought in subjective bad faith." *Christiansburg Garment Co.*, 434 U.S. at 421. Noting the sparse legislative history on this provision, the court stated that, "if anything can be gleaned from these fragments of legislative history, it is 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. "Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422. The court also added that "needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense," *id.*, because "it has long been established that even under

the American common-law rule, attorney's fees may be awarded against a party who has proceeded in bad faith (citation omitted)." *Id.* at 419.

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. "[C]ourts have awarded attorneys fees to prevailing defendants where no evidence supports the plaintiff's' position where 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." *Smith v. Smythe-Kramer Co.*, 754 F.2d 180, 183 (6th Cir. 1985).

The report of Peoplemark's expert shows that 22% of the 286 so-called victims of defendant's purported policy had in fact been hired despite having felony records. Assuming this to be true, it means that the EEOC's 'blanket rejection of all felons' claim upon which it chose to premise its disparate impact lawsuit was not well grounded. The question here is when the EEOC should have realized its claim of a blanket policy by Peoplemark had no foundation. The defendant's expert report was not available to the EEOC until February 2010, but the EEOC had the 286 names upon which it relied during the administrative investigation, before the lawsuit even began.

The Commission argues that it could not have determined that African-American applicants with felony convictions had been placed by Peoplemark until September 2009, when it had received all of the defendant's records. That, of course, does not address why it was not doing

its own independent investigation from the middle of 2005 until September 2009. It certainly had the resources. It appears the EEOC was basing its whole case on some early statements made by an officer of the company coupled with the fact that Sherri Smith had not been hired, and did little independent follow-up. The court is left with the impression that plaintiff's counsel were content to simply place the matter in the hands of their experts and let them run with it. The EEOC notes in its brief that the first time Peoplemark clearly denied having a blanket 'no-felony conviction' rule was not until April 7, 2009, in response to the Commission's request for admissions. If it had not done so before, one might think that this response would have caused the EEOC to start conducting its own investigation.

Arguably, the EEOC should have dismissed its action much sooner than September 2009. On February 4, 2009, Peoplemark, in a single interrogatory to the EEOC, asked it to identify every individual based on its previous investigation who had been injured by Peoplemark's allegedly discriminatory practice. The only answer the EEOC gave was to identify Sherri Scott, who had already been named in the complaint. Ms. Scott applied to Peoplemark one month after her release from prison.[2] The EEOC did not name any other "similarly situated African-Americans who were adversely affected by such practices." Complaint at 1. Defendant then filed a motion to compel a response to its interrogatory, and on April 21, 2009, the court ordered the EEOC to fully answer the interrogatory. Within ten days the EEOC filed an amended response identifying by name and address 286 individuals it maintained had been discriminated against by the practice complained of in the complaint (i.e., the policy of not hiring any person with a criminal record). The EEOC had had these names since the administrative investigation. Defendant's expert was then able to

[2]She is currently back in prison as the result of a new conviction for felonious assault, having been sentenced on September 21, 2009.

determine that 22% of these people who had felony convictions were in fact hired by Peoplemark, a fact the EEOC must have been, or should have been, aware of prior to bringing this action and certainly prior to furnishing the names in response to an interrogatory. It is difficult to understand how the EEOC could continue to maintain for the next eleven months that its claim against Peoplemark in its complaint was valid. Peoplemark deposed two of these persons and they admitted in their depositions to disclosing their felony convictions to Peoplemark and still being hired. And again, even assuming the EEOC had not done its own investigation of these people after all this time, as it should have done, virtually the entire universe of Peoplemark's personnel documents had been furnished to the EEOC on August 24, 2009. It was from this information, of course, that defendant's expert (once plaintiff identified its 286 names) was able to complete his analysis. If this was the extent of the evidence that plaintiff was relying upon to prove that Peoplemark had a policy of not hiring any person with a felony record, after investigating and litigating this matter for 3 1/2 years, it was certainly unreasonable to continue this burdensome litigation beyond this point. *Christiansburg*, *supra*, at 420-422.[3]

[3]The court had earlier been under the impression that the EEOC's investigation began on November 13, 2005, when it received a discrimination claim from convicted felon Sherri Scott, and that the EEOC had investigated the matter over the next 2 1/2 years before issuing a "Determination" on September 6, 2007 that it had significant evidence to support a finding that her rights had been violated. The lawsuit was filed on September 29, 2008. In retrospect, it appears that the EEOC's interest in Peoplemark dates back prior to July 1, 2005, when an officer of that company stated that its "customers will not accept for assignment any employee who has a felony criminal conviction because of safety and security concerns." The Peoplemark officer reiterated that statement in letters dated October 31, 2005; June 12, 2006; and December 1, 2006. These statements, of course, gave the EEOC reason to look further. Clearly, Sherri Scott's appearance on the EEOC's doorstep on November 13, 2005, a month after she got out of prison, was fortuitous since the Commission was already focusing on Peoplemark and Ms. Scott provided them with an actual victim. There is no evidence before the court that she was one of the testers referred to by the defendant's other expert, Dr. Devah Pager, in her report, although this would not have necessarily been improper. Dr. Pager was closely associated with the Commission, having appeared as a panelist on this issue at the Commission's meeting on November 20, 2008.

In this respect, this case is remarkably similar to the decision in *EEOC v. Boot*, No. 07-cv-95-LRR, 2010 WL 520564 (N.D. Iowa, Feb. 9, 2010). In that case, the EEOC filed suit on behalf of several hundred women it contended had been subjected to sex discrimination by the defendant company in violation of Title VII. The court eventually dismissed the EEOC's complaint because the EEOC had wholly abandoned its statutory duties by failing "to conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it [sought] relief at trial before it filed" its complaint. *Id.* at II.A. Nor had the Commission issued a reasonable cause determination as to those allegations or conciliate them. The court concluded that the EEOC's failure to investigate the claims of the aggrieved women deprived the defendant of a meaningful opportunity to engage in conciliation and foreclosed the possibility that the parties might settle the matter without the expense of a federal lawsuit. *Id.* The court found the defendant corporation to be the prevailing party and awarded it attorneys' fees of $4,467,000.00. Likewise, in the present case, there is no indication the EEOC conducted any investigation of the specific allegations of the 286 people it belatedly named as victims in this matter nor issued a reasonable cause determination as to those allegations prior to filing its complaint. However, the present case was litigated on other grounds. Had this case been dismissed on the basis that it was not properly investigated before it was brought, the attorneys' fees would be far greater.

In its brief opposing defendant's motion, the EEOC also tries to play down the significance of its claim in this lawsuit: "Moreover, whether or not Peoplemark had a blanket policy is irrelevant to the merits of the Commission's case." EEOC's Brief at 13. Yet two sentences later it states: "In this case, it is undisputed that Peoplemark had a 'no-felony' hiring policy that it applies in whole, or in part, depending on the location." *Id.* at 13. Thus, on one hand the EEOC argues that

the very gravamen of its claim (that Peoplemark had a blanket policy) is irrelevant, and a moment later argues that the existence of that policy is undisputed. Of course, the existence of such a policy, whether it was applicable to the entire company or in any given location, certainly was disputed. *See, e.g.*, Memorandum in Support of Defendant Peoplemark's Motion for Summary Judgment (docket no. 112) at 5 ("Peoplemark's expert, Malcolm S. Cohen, Ph.D., found that in his analysis of Peoplemark's data there was evidence in every current office that Peoplemark hired 'ex-offenders'").

Moreover, the claim that defendant had this policy cannot be considered irrelevant when plaintiff goes on to say, "The issue then is whether Peoplemark's application of this policy has a disparate impact on African-American applicants." (Emphasis added.) EEOC Brief at 13. Obviously, whether Peoplemark had a blanket policy was not only relevant to the EEOC's argument, it was crucial, and the EEOC never amended its complaint to assert otherwise. A good investigation would probably have shown that the EEOC could not make this case even prior to the filing of the lawsuit, but that certainly became evident when all of the evidence submitted by the other side was available even if the EEOC had not conducted its own independent investigation.

But apart from that, this was a case where, 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. On this basis, plaintiff should have folded its tent no later than the end of 2009 when it was foreclosed from using its expert because she had not provided a timely report, and where plaintiff absolutely needed the expert to prevail. As the various hearings and orders throughout this matter document, the EEOC failed to adequately manage the prosecution of this case from the beginning. Finally, after nearly two years, it was forced to

dismiss its case when it was not in a position to file a response to defendant's motion for summary judgment because it did not have an expert. Unfortunately, defendant had to spend considerable sums of money to defend itself prior to this decision.

Notwithstanding that the EEOC knew from the time of its administrative investigation that it would need expert testimony to make its disparate impact case, *see* Trans. of August 6, 2009 hearing at 40, it did not identify its key expert until July 31, 2009, and only then in response to pressure by the court. And it did not hire this expert until September 2009 (or the very end of August at the earliest), which was after the date originally scheduled by the court for this expert's report to have been completed. *See,* Case Management Order (docket no. 14). Thereafter, after having already received several continuances, the EEOC sought a further continuance of over one-third of a year to provide the expert's report. *See* Order of December 21, 2009, for a more detailed discussion of plaintiff's failure to timely obtain this expert (docket no. 101).[4]

The court finds that an award of attorneys' fees is appropriate because of the unnecessary burden imposed on defendant. It is now incumbent upon the court to determine the amount of those fees.

B. Attorneys' Fees

In its motion, Peoplemark seeks attorney's fees in the amount of $749,598.00. *See* Edward R. Young Aff. at ¶¶ 10-11 (docket no. 122-10). As previously discussed, the EEOC had

[4]The complete timesheets of plaintiff's experts were supplied in opposition to this motion. They reveal that, despite plaintiff having all of defendant's records by the end of August 2009, the Valora people doing plaintiff's data entry did not begin their work until November 2009, two months later. Valora completed its work the same month. Valora's work was the predicate to the analysis of Dr. Madden, plaintiff's expert. During the period from November 1, 2009 through the end of the year, Dr. Madden did only one and one-quarter hour of work. She and her staff together did a total of only 63.26 hours on this project in all of 2009 (from August 28, 2009 to December 31, 2009). Aff. of Dr. Madden (docket no. 126). Managing the work in this manner explains why plaintiff could not produce Dr. Madden's report in a timely fashion.

virtually all of Peoplemark's personnel documents by August 24, 2009. After reviewing these documents, many of which it had been gathering over several years, it should have become clear to the EEOC within a month that it could not prevail on its claim of a blanket policy. Given this reality, the EEOC should have acted to terminate the lawsuit promptly. It did not. Instead, it continued to let it drag on. Accordingly, the court determines that Peoplemark is entitled to an award of its fees and costs incurred from October 1, 2009 until the dismissal of the action on March 29, 2010.

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court set forth the "lodestar" procedure for recovering reasonable attorney fees by a prevailing party:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.
>
> The district court also should exclude from this initial fee calculation hours that were not reasonably expended. Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. In the private sector, billing judgment is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.

Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983) (internal citations and quotation marks omitted) (emphasis in original).

The Sixth Circuit has developed the following methodology for the determination of a reasonable attorney's fee using the "lodestar" calculation explained in *Hensley*:

> The starting point for determining the amount of a reasonable attorney fee is the "lodestar" amount, which is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933. Where the party seeking the attorney fees has established that the number of hours and the rate claimed are reasonable, the lodestar is presumed to be the reasonable fee to which counsel is entitled. *Pennsylvania v. Del. Valley Citizens Council for Clean Air*, 478 U.S. 546, 564, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986). An award based on the total number of hours reasonably expended on the litigation might, however, result in an excessive amount if the claimant has achieved only partial success. *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933. In such cases, we must address two issues: (1) whether the claims on which the plaintiff failed to prevail were or were not related to the claims on which he or she succeeded, and (2) whether the plaintiff achieved a sufficient degree of success to render the hours reasonably expended a satisfactory basis for awarding attorney fees. *Id.* at 434, 103 S.Ct. 1933.

Imwalle v. Reliance Medical Products, Inc., 515 F.3d 531, 551 -552 (6th Cir. 2008).[5]

In determining a reasonable number of hours expended on the case, "the district court must conclude that the party seeking the award has sufficiently documented its claim." *Imwalle*, 515 F.3d at 552, quoting *United Slate, Local 307 v. G & M Roofing & Sheet Metal Company, Inc.*, 732 F.2d 495, 502 (6th Cir. 1984). An attorney seeking a fee award from the court has an obligation to maintain billing time records that are sufficiently detailed to enable court to review the reasonableness of the hours expended on the case. *Imwalle*, 515 F.3d at 552. Furthermore, the party applying for an award of fees should exercise billing judgment with respect to the hours expended. *Id.*, citing *Hensley*, 461 U.S. at 437.

[5]In *Perdue v. Kenny A. ex rel. Winn*, -- U.S. --, 130 S. Ct. 1662, 1673 (2010), the Supreme Court observed that the lodestar figure includes most, if not all, of the relevant factors constituting a reasonable attorney's fee and that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. Nevertheless, enhancements may be awarded in rare and exceptional circumstances. The court does not understand Peoplemark to be seeking such an enhancement in the present action and none is apparent. In addition, it appears that the Supreme Court's decision in *Perdue* does not view the factor test in *Johnson v. Georgia Highway Express, Inc.*, 488 Fed. 714, 717-19 (5th Cir. 1974) as applicable. *Perdue*, 130 S.Ct. at 1672 (noting that the 12 factors "gave very little guidance to district courts," quoting *Delaware Valley Citizens Council for Clean Air*, 478 U.S. at 563).

"To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *B & G Mining, Inc. v. Director, Office of Workers' Compensation Programs*, 522 F.3d 657, 663 (6th Cir. 2008), quoting *Gonter v. Hunt Valve Company, Inc.*, 510 F.3d 610, 618 (6th Cir. 2007). The Supreme Court has construed attorneys' fees provision in a federal fee-shifting statute to include the fees of paralegals as well as attorneys. *See Richlin Security Service Company v. Chertoff*, 553 U.S. 571, 580-81(2008) (construing attorneys' fee provision under the Equal Access to Justice Act as including paralegal fees). Finally, there is no reason to reduce the attorney fee award based on partial success, because Peoplemark achieved complete success obtaining the dismissal of the entire EEOC action. *See, Imwalle*, 515 F.3d at 552.

During this time period, eight attorneys worked for Peoplemark on this matter. These attorneys, along with the number of hours worked, their hourly rate,[6] and the resulting fees are listed below:

Name	**Position**	**Hourly Rate**	**Hours**	**Total Fee**
Edward Young	Shareholder	$360	228.20	$82,152.00
Robert Williams	Shareholder	$345	246.50	$88,492.00
David Harvey	Associate	$260	36.50	$ 9,464.00
Jay Ebelhar	Associate	$250	18.90	$ 4,725.00
Imad Abdullah	Associate	$200	222.80	$44,560.00

[6]Some the attorneys charged more than one hourly rate during this time. Peoplemark's billing records did not break down the attorneys' time charges by each hourly rate. The billing record in this case extends for approximately six months. Given that short period of time, the court has determined to calculate the attorneys' fees at the billing rate as it existed for each attorney on the operative date of October 1, 2009.

Gabriel McGaha	Associate	$175	5.10	$ 892.50
Joann Coston-Holloway	Associate	$175	54.70	$ 9,572.50
Julia Kavanagh	Associate	$175	25.00	$ 4,250.00

The total amount of the time charged by the attorneys is $ 244,108.00.

In addition, Peoplemark's counsel included billings for five paralegals and a "litigation support specialist":

Name	**Position**	**Hourly Rate**	**Hours**	**Total Fee**
Margaret Carr	Paralegal	$170	3.0	$ 525.00
Kathy Hughes	Paralegal	$150	2.0	$ 300.00
William Ferrell	Lit. Sup. Spec.	$145	0.5	$ 72.50
Marcie Waites	Paralegal	$135	55.8	$ 7,553.00
Annitta Pryor	Paralegal	$135	6.0	$ 810.00
Angela Morris	Paralegal	$130	40.4	$ 5,252.00

The total amount of the time charged by the paralegal and litigation support specialist was $ 14,512.50. Combined, Peoplemark seeks fees for its attorneys, paralegals and litigation support specialist in the amount of $258,620.50.

The court finds that the hourly rates charged by defendants' attorneys and paralegals are within the range of hourly rates charged by attorneys and paralegals, with similar experience, in the Grand Rapids area. *See* Edward Bardelli Aff. (docket no. 122-19); *Economics of Law Practice Survey in Michigan*, Mich. Bar Journal (February 2011) at Exhibit 7. The hourly rates do not appear to be contested.

The EEOC has raised various objections to the number of hours billed as excessive, redundant or inadequately documented.

1. The court has reviewed the EEOC's numerous objections to "block billing," a practice which combines multiple tasks into a single time charge. After reviewing the EEOC's objections, the court concludes that the block billing submitted by Peoplemark is sufficiently specific to determine the work performed. Accordingly, those objections are overruled.[7]

2. The EEOC objects to 6 hours charged by Attorney Kavanagh for an internal memorandum regarding cost shifting and document production prepared on October 30, November 1 and November 2, 2009, as excessive. *See* docket no. 126-21 at p. 285. The court agrees and will reduce these charges by 3 hours ($ 525.00).

3. The EEOC objects to 3.5 hours charged by paralegal Waites on Novermber 5, 6, 9, 10, 2009 for office work that could be performed by a law firm's support staff. *Id.* at pp. 290, 293-94. The court agrees and will remove these charges ($ 472.50). The EEOC also objects to charges by Ms. Waites on March 31, 2010. *Id.* at p. 393. However, this objection is overruled because Peoplemark did not submit this charge in its motion. *See* docket no. 122-14 at p.14.

4. The EEOC objects to 3.1 hours charged by paralegal Pryor on November 16, 17 and 30, 2009, on the basis that the work could be performed by a law firm's support staff. *See* docket no. 126-21 at pp. 297 and 300. The court agrees and will remove these charges ($ 418.50).

5. The EEOC objects to work performed by Mr. Ferrell, a member of the litigation support staff on February 16, 2010, related to preparation of CD's. *Id.* at p. 374. The court agrees and will remove this charge ($72.50).

[7]The court notes that the EEOC did not challenge numerous billings which were "gutted" by redacted information of purported privileged matter.

6. The EEOC objects to 1.1 hours charged by paralegal Morris on November 24, 2009 and February 25, 2010, for work that could be performed by a law firm's support staff. *Id.* at pp. 312 and 382. The court agrees and will remove these charges ($143.00).

7. The EEOC objects to a number of instances involving duplicative billing, in which two or three attorneys performed a task which could have been performed by a single attorney. The court will not grant multiple attorneys' fees on matters which could have been performed by a single attorney. For this reason, the court will reduce the requested attorneys' fees by $ 12,414.00 as follows:

a. On December 10, 2009, both Attorneys Young and Abdullah charged for preparation of the Patterson deposition. The court will remove the charges by the junior attorney of the two, Abdullah (5.3 hours x $200 =$ 1,060.00). *See* docket no. 126-21 at pp. 331-32.

b. On December 14, 2009, both Attorneys Young and Abdullah charged for preparation of Patterson. Again, the court will remove the charges by the junior attorney, Abdullah (5 hours x $200 = $ 1,000.00). *Id.* at pp. 338-39.

c. On December 15, 2009, both Attorneys Young and Abdullah charged to attend the Patterson deposition and prepare for the Duff deposition. The court will remove the charges by the junior attorney, Abdullah (8 hours x $200 =$ 1,600.00). *Id.* at pp. 341-42.

d. On December 16, 2009, Attorneys Young, Williams and Abdullah charged to attend the Osten deposition. The court will remove the charges by the less senior attorneys, Williams (5.3 hours x $345 = $ 1,828.50) and Abdullah (2 hours x $200 = $400.00). *Id.* at pp. 343-44.

e. On December 17, 2009, Attorneys Young and Williams attended the Thomas and Brown depositions. The court will remove the charges by the junior attorney, Williams (4.3 hours x $345 = $1,483.50). *Id.* at pp. 345-46.

f. On December 28, 2009, Attorneys Young, Williams and Abdullah prepared a witness, Cady. The court will remove the charges by the junior attorneys, Williams (3.8 hours x $345 = $ 1,311.00) and Abdullah (5.3 hours x $200 = $ 1,060.00). *Id.* at p. 352.

g. On December 31, 2009, Attorneys Young, Williams and Abdullah had office conferences regarding the EEOC's appeal of the Magistrate Judge's Order and reviewed case law. The three attorneys collectively charged 12.6 hours on this issue. The court will remove the charges by the junior attorneys, Williams (3.8 hours x $345 = $ 1,311.00) and Abdullah (6.8 hours x $200 = $ 1,360.00). *Id.* at pp. 356-57.

8. The EEOC objects to an apparent duplicative charge by Attorney Young on February 5, 2010 (.8 hours x $360 = $ 288.00), a vague charge by Attorney Young on February 16, 2010 (.5 hours x $360 = $ 180.00), a vague charge by Attorney Williams on February 18, 2010 (.8 hours x $345 = $ 276.00), and a charge by Attorney Williams on November 10, 2009 for work that could be performed by support staff. *See* docket no. 126-21 at pp. 292, 305, 369 and 375. The court agrees and will remove these charges ($744.00).

9. The EEOC objects to a charge of 3.3 hours by Attorney Williams on November 10, 2009, on the basis that the work could be performed by support staff. *Id.* at p. 294. The court disagrees with the EEOC. The charge involved issues related to the on-going litigation.

10. The EEOC objects to a charge of 1 hour by Attorney Young on November 9, 2009, on the basis that the billing was not necessary to defend the lawsuit. *Id.* at p. 292. This

charge involved Attorney Young's review of contracts with "various clients," including St. Jude and the Seminole County School Board. Dr. Cohen's report of February 22, 2010, however, indicates that St. Jude and the Seminole County School Board were major clients of Peoplemark referenced in that report. *See* docket no. 112-2. As such, these contracts would be relevant to the issues raised in this lawsuit. Accordingly, Peoplemark's fee request will not be reduced in this instance.

11. The EEOC objects to a charge of .3 hours by Attorney Young on November 19, 2009 on the basis that the work could be performed by support staff. *Id.* at p. 305. This charge involved the calendaring of deposition dates. The court agrees and Peoplemark did not oppose the objection. Accordingly, Peoplemark's fee request will be reduced in the amount of this charge (.3 hour x $360 = $ 108.00).

For the reasons as set forth in ¶ 1-11, the court will reduce the requested attorney fee award by $14,897.50.

In addition, the court notes that in his affidavit, Attorney Young stated that "[a]ll time recorded by BDBCB [Peoplemark's law firm] on this matter reflects increments of one-fourth (1/4) of an hour." Young Aff. at ¶ 9. This appears incorrect. There are no charges made in increments of one-fourth (.25) of an hour in the BDBCB billing records. Rather, the billing records frequently reflect a minimum increment of .3 of an hour for attorneys. If quarter-hour increments of work are billed at .3, this would appear to inflate the result, but this may not always be the case. Having found no practical way to reconcile Attorney Young's statement regarding the law firm's billing increments with the voluminous billing records filed in this action, the court will address this inconsistency by reducing the final attorney fee award by 10%.

For the reasons stated, the court will reduce the requested attorney fee award of $258,620.50 by $14,897.50, resulting in an attorney fee award of $ 243,723.00. The court will further reduce this award by 10% ($24,372.30), for a total attorney fee award of $ 219,350.70.

C. Expenses

1. Expert witness

Defendant seeks $526,172.00 in expert witness fees for the work its expert, Dr. Cohen, who was required to perform sufficient analysis to meet the anticipated arguments of plaintiff's two experts at trial. *See* Cohen Aff. (docket no. 122-20). This expert's report was also the key ingredient in defendant's motion for summary judgment which ultimately led to the dismissal of this action. The expert's fees have been paid by Peoplemark. Affidavit of Garth C. Leviton at ¶ 6.

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). *See EEOC v. Boot, supra* at ¶ V.B (and the cases cited therein).

The expert witness fees will be granted in full. Dr. Cohen had to prepare a rebuttal report to one of the EEOC expert reports (Dr. Pager), and had to prepare a response for another anticipated EEOC expert report (Dr. Madden) which was never completed or filed. Dr. Cohen's report required the compilation, data entry and analysis of over 200,000 pages of documents from Peoplemark related to job applicants from 2004 through 2009, as well as Peoplemark's payroll records and six depositions. Because the EEOC did not provide an expert report related to the Peoplemark documents, Dr. Cohen had to anticipate various theories that the EEOC's expert might raise. *See* Cohen Aff. (docket no. 122-20); Cohen Expert Report (docket no. 112-2). Furthermore,

as previously noted, Dr. Cohen's report was instrumental in obtaining the dismissal of this action.

Plaintiff attempts to refute the expert fees charged by defendant's expert, Dr. Cohen, by submitting the affidavit of its own expert, Dr. Madden. Dr. Madden's evaluation of Dr. Cohen's charges is speculative at best. She states in her affidavit that, "Even after reviewing Dr. Cohen's declaration, the bills from Employment Research Corporation, and Dr. Cohen's reply to Professor Pager's report, I cannot determine the basis for the amounts billed." Dr. Madden's Aff. at ¶ 5 (docket no. 126).

In fact, comparing the work of the two experts is somewhat like comparing apples and oranges. Dr. Cohen completed his work and Dr. Madden did not, and any attempt to reconcile the two is simply not productive. Dr. Madden, for example, hired Valora Technologies for almost $100,000 to do her data entry. Dr. Cohen did all of his work in-house. While both experts used staff in-house, Dr. Cohen was much more hands-on. During the entire project, he billed for 123.55 hours, and Dr. Madden, by contrast, billed for only 23.26 hours, less than three 8-hour days (most of which was done after the deadline for her report). He prepared a report; she did not. Indeed, during the first two months after she was hired (August 28 through October 31, 2009), she put in only 9.75 hours, or the equivalent of one long day. Over the next two months (November 1st through December 31st), she put in little more than one hour of work (1.26 hour).

Further, since the defendant's expert was not able to respond to the plaintiff's expert's report (because it was never furnished), he did not know what theories she would advance and had to prepare to respond to several possible approaches. Indeed, Dr. Madden was not the only expert Dr. Cohen had to face. He also had to be prepared to respond to plaintiff's other expert, Dr. Devah Pager. He reviewed depositions and had to prepare to be deposed. Dr. Madden apparently

did neither. Also, in addition to crunching statistics, it is evident that defendant's expert undertook to determine how many of the 286 victims plaintiff put forth actually had been hired. It is unclear whether plaintiff's experts pursued this line of inquiry.[8]

The court has reviewed the time spent by Dr. Cohen and his firm in preparing the Peoplemark expert report. Given the conceded necessity of an expert witness witness to organize and analyze a voluminous amount of material in this admittedly complex case, *see* JSR, *supra*, at ¶¶ 7, 8, and the expert's need to prepare a report to meet the anticipated theories of plaintiff's two experts, the court finds that Dr. Cohen's fee was reasonable. Accordingly, the requested expert witness fee of $526,172.00 will be granted.

2. Other expenses

Like the expert fees, there are other out-of-pocket expenses normally charged to a client which, if reasonable, may be included as part of an award of attorneys' fees if not recoverable as 28 U.S.C. § 1920 costs. The record reflects that from October 1, 2009 through March 29, 2010, defendant incurred other expenses totaling $9,610.79. As previously discussed, defendant does not seek costs available under § 1920, which allows the court to tax as costs: "(1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and

[8]Plaintiff's final argument, relevant to its failure to produce its expert's report, is that, "further, the court obviously cannot require a party to present expert testimony (or any other type of evidence), and thus could hardly sanction a party for failure to do so." Plaintiff's Brief In Opposition (docket no. 126) at 23. Under the circumstances of this case, this argument falls between frivolous and insulting and hardly needs to be addressed, except to say that if plaintiff sought and obtained delays in this case on the basis that its experts needed more time, when in fact it did not intend to call the experts, it would certainly make the court's decision to impose sanctions much easier.

the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." Under § 1920, defendant would be entitled to recover costs incurred since the EEOC filed this lawsuit in 2008. Because defendant can presumably collect these costs, the court will deduct from the $9,610.79 all of defendant's § 1920 costs incurred between October 1, 2009 and March 29, 2010 (i.e., photocopies ($914.80), witness fees ($295.00), and fees for deposition transcripts ($1,981.21)). When these costs are excluded, the court is left with telephone charges, travel expenses, postage and miscellaneous litigation expenses in the amount of $6,419.78. These kinds of costs may be included as part of a reasonable attorneys' fee award.

The only expenses to which the EEOC objected are counsel's internal photocopying charges. To the extent that these charges are not included as costs under § 1920, the court agrees with the EEOC that plaintiff's summary of the expenses is too vaguely documented to assess whether they are reasonable and necessary expenses in this case. Defendant will be allowed expenses in the amount of $6,419.78.

III. Conclusion

The motion (docket no. 122) is **GRANTED in part** and **DENIED in part** as follows:

1) The EEOC shall pay Peoplemark, Inc. $219,350.70 as attorneys' fees, and

2) The EEOC shall pay Peoplemark, Inc.$526,172.00 as expert witness fees and

$6,419.78 in other expenses, for a total attorneys' fees award of $751,942.48.

IT IS SO ORDERED.

Dated: March 31, 2011

/s/ Hugh W. Brenneman, Jr.
HUGH W. BRENNEMAN, JR.
United States Magistrate Judge