

Akin Gump Wins Hefty Fees in EEOC Background-Check Case

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Cementing a high-profile loss for the U.S. Equal Employment Opportunity Commission, a Maryland federal judge has awarded close to \$1 million in fees to the agency's adversaries, Akin Gump Strauss Hauer & Feld and client Freeman Co.

After chiding the agency for bungling its case, U.S. District Judge Roger Titus in Greenbelt, Maryland, on Friday ordered the EEOC to cover nearly \$939,000 in Akin Gump's fees. The EEOC had sued Freeman in 2009 as part of a broader push to scrutinize hiring policies that rely on criminal record checks. The lawsuit accused the Dallas-based event-planning company of using background checks in a way that disproportionately screened out black job applicants, thus violating Title VII of the Civil Rights Act of 1964.

Akin Gump's Donald Livingston, who led Freeman's defense, said Tuesday that it remains rare for an attorney fees award to be entered against the EEOC in Title VII litigation. Friday's ruling shows just how far the agency overreached, he said.

"What the judge has said is that when you, as a plaintiff, know that you have lost ... that you have an obligation to stop litigating," said Livingston, who formerly served as the EEOC's general counsel.

The litigation, like some of the agency's other recent efforts in court, has long been a losing struggle for the EEOC. In 2013, Titus dismissed the EEOC's claims against Freeman after ruling that the agency's expert witness had made a "mind-boggling" amount of mistakes in his analysis of whether Freeman's background checks had a disparate impact on minority job applicants. The U.S. Court of Appeals for the Fourth Circuit in February affirmed Titus and similarly blasted the expert's work, ruling that the witness' errors made it "impossible to rely on any of his conclusions."

On Friday, Titus piled on attorney fees, issuing a 33-page ruling that quoted the Kenny Rogers country song "The Gambler—"You've got to know when to hold 'em; know when to fold 'em"—and again criticized the EEOC's approach to the litigation.

"In the Title VII context, the plaintiff who wishes to avoid paying a defendant's attorneys' fees must fold 'em once its case becomes so groundless that continuing to litigate is unreasonable," Titus wrote. "Yet, instead of folding, the EEOC went all in and defended its expert through extensive briefing in this court and on appeal."

The judge largely approved an array of fees Akin Gump had requested—including for its efforts coordinating with amicus filers during the Fourth Circuit appeal and for the time the firm spent preparing its fee petition.

But Titus did reject a few of the firm's requests, such as an attempt to have Akin Gump counsel Hyland Hunt compensated at a rate of \$480 per hour. The judge noted that Hunt's hourly rate was the same as the rate suggested for senior counsel Randolph



U.S. Equal Employment Opportunity Commission (EEOC) building in Washington, D.C.

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Teslik, who also worked on the case but has been practicing law for at least three decades longer than Hunt.

Titus knocked Hunt's hourly rate down to \$380, and separately refused to award fees that Akin Gump racked up prior to Dec. 18, 2012, the date when it first moved to exclude the EEOC's expert report from the case. Ultimately, Titus' award is about \$645,000 less than the \$1.58 million the firm asked for.

The ruling follows a string of recent cases in which the EEOC has been ordered to cover a defendant's costs. In 2013, an Iowa federal judge ordered the agency to pay more than \$4.5 million to Jenner & Block, which defended trucking giant CRST Van Expedited Inc. against sexual harassment claims. The CRST award was later overturned on appeal, although smaller fee amounts awarded to other EEOC defendants, Peplemark Inc. and Propak Logistics Inc., were both upheld by appeals courts in 2013 and 2014, respectively.

The EEOC said in a statement Tuesday that it was disappointed with Titus' decision and reviewing its options. The agency also noted that the ruling stems from an earlier decision on the "technical admissibility of the commission's expert report," rather than the merits of the discrimination claims.

Separately, the agency on Tuesday submitted a consent decree in another background-check case against BMW Manufacturing Co. LLC in South Carolina federal court. Under that settlement, BMW would pay \$1.6 million to 56 employees who had filed claims with the agency.