

# How to Be Your Client's Hero: Recover Its Defense Costs *and* Attorney Fees

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Obtaining an award of attorneys' fees as a prevailing employer in Title VII litigation is a rare and difficult accomplishment. In *Balmer v. Health Care Indemnity, Inc. et al.*, Case No. 04-3:01-1541 (M.D. Tenn.), Chief Judge Robert Echols recently awarded attorneys' fees to a prevailing employer in a lengthy unpublished opinion. Judge Echols' decision is believed to be the first of its kind in the Middle District of Tennessee.

The case was brought as a class action by a sophisticated, well-educated plaintiff (in fact, a lawyer). It seemed clearly calculated to bring maximum pressure and publicity to bear. Plaintiff alleged a widespread pattern of discrimination against female claims representatives both in terms of pay and promotion. Plaintiff also alleged that she had been fired in retaliation for opposing the unlawful conduct.

Plaintiff never attempted to certify a class and none of the purported class members rallied to her side. Plaintiff's assertions ultimately proved to be much sound and fury signifying nothing. The case, while hard-fought, was dismissed on motion for summary judgment.

The facts of *Balmer* are unique and unlikely to be repeated. There are, however, aspects of the case in connec-

tion with the pursuit of attorneys' fees that have broad implications.

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## Know the Standard

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Title VII of the Civil Rights Act of 1964 states:

In any action or proceeding under this subchapter, the Court, in its discretion, may allow the prevailing party . . . a reasonable attorneys' fee.

42 U.S.C. §2000e-5(k).

The statute governs fee awards both to plaintiffs and to defendant employers. Although impossible to justify based on the plain language of the statute, its interpretation varies tremendously depending upon which party seeks a fee award. Despite the identical controlling language, the standard for awarding attorneys' fees to a prevailing defendant is far more stringent than the standard for awarding attorneys' fees to a prevailing plaintiff. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978).

Attorneys' fees are awarded to prevailing plaintiffs as a matter of course. Courts award attorneys' fees to a prevailing employer, however, only where a plaintiff's action is frivolous, unreasonable or without foundation or where the plaintiff continued to litigate after it clearly became so. Attorneys' fees may also be awarded to a prevailing employer where a plaintiff brought or continued a claim in bad faith. These are difficult hurdles to clear.

## Don't Waste the Court's Time

It is the rare case that will even merit an employer's application for attorneys' fees. If the case is strong enough to survive summary judgment, it is difficult to imagine attorneys' fees being awarded. A defense attorney who, as a matter of course, regularly asks for attorneys' fees is unlikely to ever obtain such an award.

It is easy to become too close to a case. Take steps to avoid being swayed by personal bias. Outline all of the reasons why you believe a fee award may be merited. Ask another attorney in your firm, someone with no prior involvement in the case, to evaluate the facts and tell you whether the case is really as unique as you believe it to be.

## Put the Plaintiff on Fair Notice

During the pendency of the case, put the plaintiff on fair notice of the potential for an award of attorneys' fees. If acceptable to the employer, offer the plaintiff the opportunity to dismiss the suit with mutual releases.

From a strategic perspective, it probably makes the most sense to send the letter after discovery is complete but before preparing a dispositive motion. If you send the letter earlier, you may tip your strategy and invite discovery that the plaintiff might otherwise overlook. You probably also need the discovery to be able to explain convincingly why the plaintiff's claims are baseless.

When you send the letter, be spe-

cific. Identify the problems with the plaintiff's case. Provide citations to the record. Clearly set forth the employer's intent to seek an award of attorneys' fees.

### *Don't Be Greedy*

If there are multiple claims, some of which permit an award of attorneys' fees and some of which do not, ask only for the fees that fairly relate to recoverable claims. In addition, the losing plaintiff will likely not be wealthy. While the judge may want to make a point, he or she is unlikely to saddle a plaintiff (and, effectively, his or her dependents) with crushing debt.

The client is more than likely going to take a cut on the fees. Consider whether it is appropriate to ask the court for less on the front end (while making it absolutely clear that the actual amount paid by the employer was substantially higher). Consider requesting fees only for the attorney

or attorneys with primary responsibility. With respect to discrete tasks, consider seeking fees only for one attorney even if two or more attorneys had involvement in those tasks (even when the involvement was substantive and necessary).

### *Go to Florida*

Florida may or may not generate the most baseless Title VII litigation. It certainly appears, however, to have federal court judges that are the most fed up with such litigation. Florida is a great place to start your research if you are looking for cases discussing fee awards to prevailing employers.

Some of those cases have nice juicy quotes that fit in well with just about any motion for fees:

Hoping for a big pay-off, the plaintiff filed a frivolous lawsuit, causing the defendants to spend enormous sums in defense. Then when the meritlessness of the case became

evident . . . and the defendants offered the plaintiff the opportunity to drop the case in return for a waiver of all fees and expenses, the plaintiff . . . answered with a greedy demand[.] Under these circumstances, the defendants are entitled to recover, if not all, at least a significant amount of the money that the plaintiff . . . unfairly caused them to spend.

*Scelta v. Delicatessen Support Services, Inc.*, 203 F. Supp. 2d 1328, 1338 (M.D. Fla. 2002). If that does not sum your case up, you may want to wait until a better opportunity presents itself.

If you would like a copy of the *Balmer v. Health Care Indemnity* fee award opinion, feel free to contact the author via email at [Travis.Parham@wallerlaw.com](mailto:Travis.Parham@wallerlaw.com) or telephone at (615) 244-6380.