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Denial of Attorney's Fees for Claims of Sexual Harassment Resolved Through Informal Dispute Resolution: A Shield for Employers, a Sword Against Women

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DENIAL OF ATTORNEY'S FEES FOR CLAIMS OF SEXUAL HARASSMENT RESOLVED THROUGH INFORMAL DISPUTE RESOLUTION: A SHIELD FOR EMPLOYERS, A SWORD AGAINST WOMEN[1]

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INTRODUCTION

Working nine to five
What a way a to make a living
Barely getting by
It's all taking and no giving
They just use your mind
And they never give you credit
It's enough to drive you crazy if you let it

Nine to five
For service and devotion
You would think that I
Would deserve a fair promotion
Want to move ahead
But the boss won't seem to let me
I swear sometimes that man is out to get me[2]

The problems particular to working women have been popularized in the mass media,[3] written about by legal scholars,[4] acted upon by

1. This Note focuses on paradigmatic sexual harassment cases involving the harassment of women by men. *See* Ellen Bravo & Ellen Cassedy, The 9to5 Guide to Combating Sexual Harassment: Candid Advice from 9to5, the National Association of Working Women 64 (1992) (noting that research reveals that an estimated 90% of workplace sexual harassment cases arise from men harassing women; 9% is same-sex harassment; and 1% is women harassing men); Barbara Gutek, *Understanding Sexual Harassment at Work*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 335, 343-45 (1992) (concluding that "[o]n the basis of the set of studies done so far, it seems likely that overall, from one-third to one-half of all women have been sexually harassed at some time in their working lives, although frequency rates in some types of work may be higher").

To reflect this reality of women as those subject to sexual harassment, the pronoun "she" is used throughout this Note to refer to the harassed individual.

2. Dolly Parton, *9 to 5, on* 9 to 5 and Odd Jobs (RCA Records 1980).

3. *See, e.g.*, Anita Hills' Charge of Sexual Harassment Against Clarence Thomas, 1991: Hearings on the Confirmation of Clarence Thomas to the Supreme Court of the United States before the Senate Judiciary, 102 Cong., 1st Sess. (1991) (televised hearings on sexual harassment that received extensive media attention); Dolly Parton, *supra* note 2 (sound track to the motion picture 9 to 5); 9 to 5 (Disney 1980) (motion picture in which three female employees fight sexual harassment by holding their harassing boss hostage, and instituting policies to ameliorate the conditions of the workplace for women, such as flexible work hours and a day-care center).

4. *See* Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job (1978); Catharine A. MacKinnon, Sexual Harassment of Working Women (1979); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasona-*

Congress through the establishment of Title VII of the Civil Rights Act of 1964,[5] and construed by the federal courts to recognize a cause of action for sexual harassment.[6] In the movies, female employees can combat sexual harassment by holding their male boss hostage while instituting work conditions favorable to women.[7] In reality, women have too few alternatives. Specifically, women may try to remedy the harassment on their own or seek redress under Title VII through administrative proceedings followed by judicial proceedings.[8] Often the most favorable option is a combination of both: resolving the problem within the company, while retaining a right to sue if settlement is not reached. Informal dispute resolution provides the forum for this goal.

To enforce the statutory right to be free from employment discrimination, Title VII implements various dispute resolution mechanisms.[9] In addition, Congress, by incorporating an attorney fee-shifting provision, section 706(k), into Title VII,[10] created an exception to the American rule that parties to a lawsuit pay their own attorney's fees.[11] Section 706(k) enables an aggrieved employee to recover attorney's fees if her claim is successful.[12]

The statutory scheme of Title VII requires an aggrieved employee to file with the Equal Employment Opportunity Commission.[13] If the EEOC determines that the charge is based upon reasonable cause, it

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bleness in Sexual Harassment Law, 99 Yale L.J. 1177 (1990); Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813 (1991); Deborah L. Rhode, *The 'No-Problem' Problem: Feminist Challenges and Cultural Change*, 100 Yale L.J. 1731 (1990).

5. 42 U.S.C. §§ 2000e-2000e17 (1988 & Supp. IV 1992). Title VII provides: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a).

Title VII covers private employers with 15 or more employees, as well as unions with 15 or more members, educational institutions, state and local governments, and parts of the federal government. 42 U.S.C. §§ 2000e(a),(b),(e), and 16(a).

6. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (holding that Title VII prohibits sexual harassment).

7. 9 to 5 (Disney 1980).

8. The statutory scheme of Title VII requires an aggrieved employee to exhaust her administrative remedies before she can institute a lawsuit in federal court. 42 U.S.C. § 2000e(f)(1); *see infra* notes 70-71 and accompanying text.

9. *See* Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 Geo. Wash. L. Rev. 482, 508-19 (1987) (discussing alternatives ranging from litigation to mediation).

10. Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k) (1988 & Supp. IV 1992)).

11. Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 Tex. L. Rev. 291, 297 (1990) (citing Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967)).

12. 42 U.S.C. § 2000e-5(k) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fee[s] . . . ."

13. *See infra* notes 70-71 and accompanying text.

will take informal steps to reach conciliation between the aggrieved employee and her employer.[14] This conciliatory stage usually triggers the company's internal grievance procedures.[15]

Title VII does not require the complainant to hire an attorney to file the charge, but often the services of an attorney are important.[16] Section 706(k) gives the court the discretion to award reasonable attorney's fees to the prevailing party "[i]n any action or proceeding under this subchapter."[17] The statute is unclear what types of proceedings qualify for a prevailing party to recover attorney's fees. Consequently, lower courts disagree regarding whether attorney fee-shifting applies to informal proceedings. The trend, however, is to deny such fees.

This Note explores the importance of both informal dispute resolution and the subsequent recovery of attorney's fees under Title VII in sexual harassment cases. Part I tracks the divergent interests of women and employers in informal dispute resolution in resolving claims of sexual harassment. This part argues that the potential for conflicting concerns of women and employers points to the necessity of providing women with an economically viable means of vindicating their right to be free from sexual harassment, specifically through attorney fee-shifting pursuant to Title VII. Part II reviews the statutory scheme of Title VII, focusing on attorney fee-shifting and the role of informal dispute resolution. Part III examines the statutory policies behind section 706(k) and the judicial interpretation of these policies, analyzes the rationales underlying the denial of awarding attorney's fees for these proceedings, and highlights the deficiencies of this position. Part IV proposes amending Title VII explicitly to provide for attorney's fees for informal dispute resolution and sets up guidelines for such awards. This Note concludes that attorney fee-shifting for informal dispute resolution is necessary to provide complete relief for victims of employment discrimination, as Congress envisioned through the enactment of section 706(k) of Title VII.

I. SEXUAL HARASSMENT IN THE WORKPLACE

The divergent interests of employers and women in resolving claims of sexual harassment through informal dispute resolution leads to the conclusion that women, like their employers, should have the option to be represented by counsel.

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14. 42 U.S.C. § 2000e-(5)(b).

15. The informal conciliatory process utilizes the company's informal dispute resolution procedures, unless the company refuses to participate, which leaves it open to even greater liability if the aggrieved employee wins in court. *See* discussion *infra* part I.A.

16. *See infra* notes 121-26 and accompanying text.

17. 42 U.S.C. § 2000e-5(k).

A. *Employers' Interests in Informal Dispute Resolution*

Employers have a great interest in resolving complaints of sexual harassment through informal dispute resolution, namely internal grievance procedures. Employers lose money if they fail to remedy sexual harassment.[18] In addition, concerns about employee morale and employers' reputations also weigh in favor of early resolution of sexual harassment claims.[19] Most importantly, internal grievance procedures may not only result in a quick resolution of the dispute, but also shield companies from liability.

Effective internal grievance procedures can help employers lessen or avoid liability even in the most egregious sexual harassment scenarios.[20] Courts determine an employer's liability based on agency principles.[21] For example, in quid pro quo cases,[22] courts hold employers

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18. A 1988 survey of 160 manufacturing and service companies revealed that the typical Fortune 500 company (having about 23,750 employees) loses $6.7 million a year, not including the cost of lawsuits, because of sexual harassment. *See* Bravo & Cassedy, *supra* note 1, at 49 (citing a *Working Woman* magazine study). These losses are comprised of absenteeism, lower productivity, and employee replacement (rehiring and retraining). *Id.*

19. *Id.* at 50.

20. *See, e.g.*, Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10 (5th Cir. 1987) (finding no employer liability when employer told the harassed individual to finish the last day of a three-day trip and she would no longer have to work with the co-worker, who touched her breasts and other body parts, and "playfully choked" her during the first two days of the trip); Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988) (finding no employer liability when employer threatened to fire both the harasser and the harassed, who was regularly bullied, called a "bitch" and a "whore," and receive verbal threats that she would be undressed).

21. Agency principles guide courts in determining employer liability in sexual harassment cases. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986). The EEOC guidelines indicate that discriminatory acts by agents or supervisors are attributable to an employer, regardless of the employer's knowledge or authorization of the unlawful conduct. 29 C.F.R. § 1604.11(c) (1990) provides:

> Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

Id. The Supreme Court in *Meritor* declined "to issue a definitive rule on employer liability," but did agree with the EEOC that employer liability rests on agency principles. 477 U.S. at 72.

22. Quid pro quo cases involve an employer offering a tangible job benefit or detriment based on the victim's sexual submission or rejection, respectively. 29 C.F.R. § 1604.11(a)(1) and (2). For example, quid pro quo harassment arises if a supervisor demands or implies that the woman must submit to his sexual demands or she will be fired, demoted, denied a raise, promotion, or job assignment. *See* Bravo & Cassedy, *supra* note 1, at 24.

strictly liable.[23] The harasser in these cases has power over the terms of employment of the individual subject to the harassment,[24] therefore, the harasser is typically a supervisor or in a supervisory position.[25] Although internal grievance procedures will not completely shield this employer from liability,[26] there is still an incentive for employers to implement effective internal grievance procedures because these procedures may lead to an early settlement or, if there is litigation, less liability because the court probably will not award punitive and compensatory damages.

Employers have an even stronger interest in providing effective grievance procedures in hostile work environment cases[27] because employers are not held strictly liable.[28] For example, in cases involving harassment by supervisory and non-supervisory co-workers, courts require the employer to have at least constructive knowledge of the harassment before attaching liability.[29] Specifically, the court must determine if the employer knew or should have known about the har-

23. *See* Karibian v. Columbia Univ., 63 Fair Empl. Prac. Cas. (BNA) 1038, 1042 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994); Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 777 (1st Cir. 1990); Debra L. Raskin, *Sexual Harassment in Employment*, C902 A.L.I.-A.B.A. Course of Study 589, 595 (1994).

24. *See* Raskin, *supra* note 23, at 595.

25. *E.g.*, Dias v. Sky Chefs, Inc., 919 F.2d 1370, 1375-76 (9th Cir. 1990) (holding the employer liable for sexual harassment by an employee acting within the scope of his administrative duties), *cert. denied*, 112 S. Ct. 1294 (1992); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1564 (11th Cir. 1987) (holding the employer directly liable, without proof of respondeat superior, for a harasser who was plaintiff's supervisor); Horn v. Duke Homes, 755 F.2d 599, 604-05 (7th Cir. 1985) (holding the employer liable, without actual or constructive knowledge, for harassment by a supervisor); Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (holding that respondeat superior applies to conduct by a supervisor authorized "to hire, fire, discipline, or promote"); *cf.* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 70-71 (1986) ("The courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions.").

26. *See* Raskin, *supra* note 23, at 595-96.

27. Hostile environment cases occur when the conduct of an employer, supervisor, or co-worker unreasonably interferes with another employee's work performance or creates an intimidating, hostile or offensive working environment, even if sexual compliance is not made contingent upon a term of employment. 29 C.F.R. § 1604.11(a)(3); *Meritor*, 477 U.S at 65. Such conduct may range from sexual innuendos to abusive and vulgar language to physical sexual contact, but it must be sufficiently pervasive to alter the work environment. *Meritor*, 477 U.S at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

28. *See* Janet Hugie Smith, C893 A.L.I.-A.B.A. Course of Study 141, 151 (1994).

29. *See* Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464-65 (7th Cir. 1990); Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1344 (10th Cir. 1990); Hall v. Gus Constr. Co., 842 F.2d 1010, 1015-16 (8th Cir. 1988); Kirkland v. Brinias, 741 F. Supp. 692, 694 (E.D. Tenn. 1989); Hunter v. Countryside Ass'n for the Handicapped, Inc., 723 F. Supp. 1277, 1278-79 (N.D. Ill. 1989); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983); *See* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 Vand. L. Rev. 1229, 1238 (1991).

assment and failed to take corrective action.[30] Under these circumstances, an employer may be able to defend a claim by showing that the employee failed to utilize the company's internal grievance procedures.[31] This defense is not automatic; the EEOC will examine the company's procedure to determine its effectiveness.[32] Therefore, effective grievance procedures are of primary importance to the employer who wants to avoid liability.

Moreover, employers can avoid liability altogether for hostile work environment claims by taking prompt corrective action.[33] Therefore, it is in the best interest of companies to implement both effective grievance procedures and remedial measures to deal with complaints of sexual harassment.

Avoiding liability through promoting internal grievance procedures is a recent legal development. Until 1991, if an employer disregarded a complaint of sexual harassment and subsequently lost at the administrative or court level, its liability was limited to equitable relief for the plaintiff, such as backpay, injunctions, and attorney's fees.[34] After the enactment of the Civil Rights Act of 1991,[35] however, Congress expanded the remedies available under Title VII to include compensatory and punitive damages.[36] Now the stakes are higher for employers to respond and resolve sexual harassment complaints as early as possible to avoid costly litigation awards.

Finally, informal dispute resolution has taken on a greater role as it has become easier for aggrieved employees to establish a cause of ac-

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30. *See* Phillips, *supra* note 29, at 1238.

31. 29 C.F.R. §§ 1604.11(c) and (d); *see* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72-73 (1986) (finding that employer's antidiscrimination policy did not insulate employer from liability because it did not specifically address sexual harassment, and it required the employee to report the harassment to the defendant, her supervisor); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989) (holding that plaintiff's failure to use employer's internal grievance procedures did not insulate the employer from liability because the employer did not explicitly ban sexual harassment and, it required a preliminary report to the supervisor who engaged in or condoned the harassment); Yates v. Avco Corp., 819 F.2d 630, 635 (6th Cir. 1987) (holding the employer's anti-harassment policy did not shield the employer from liability because it required supervisors, who may be harassers, to be in charge of reporting and correcting the harassment).

32. *See* Bravo & Cassedy, *supra* note 1, at 26. For example, the EEOC may consider whether the employees know about the procedure, how they use it, and whether they feel comfortable using it.

33. *See Hacienda Hotel*, 881 F.2d at 1515-16; Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10 (5th Cir. 1987); Hunter v. Countryside Ass'n for the Handicapped, Inc., 723 F. Supp. 1277, 1279 (N.D. Ill. 1989); Silverstein v. Metroplex Communications, Inc., 678 F. Supp. 863, 870 (S.D. Fla. 1988).

34. *See* United States v. Burke, 112 S. Ct. 1867, 1873 (1992) ("Title VII does not allow awards for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions, and other equitable relief.").

35. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

36. 42 U.S.C. § 1981(A) (1991).

tion. For example, the Supreme Court in *Harris v. Forklift Systems, Inc.*[37] recently held that psychological injury was no longer part of a *prima facie* case of sexual harassment in hostile environment cases.[38] Moreover, courts are now more receptive to upholding claims of sexual harassment than in the past.[39] Companies may not want to risk litigation, considering the increased likelihood the court will uphold claims of sexual harassment. Consequently, as case law and statutes dismantle the barriers to establishing a cause of action and collecting a favorable remedy, employers are more likely to try to resolve sexual harassment claims in-house.

B. *Women's Interests in Informal Dispute Resolution*

Informal dispute resolution is especially important for women trying to resolve sexual harassment complaints. Sexual harassment is different from other types of discrimination precisely because sexuality is at its core.[40] Women, employers, and society in general consider sexuality to be within the private domain. As a result, and not surprisingly, women often do not report sexual harassment.[41] In addition, women tend to avoid formal complaints because of the psychological and economic effects of sexual harassment, as well as the inadequate

37. 114 S. Ct. 367 (1993).

38. *Id.*

39. Despite its prevalence, sexual harassment is a recent legal phenomenon. While sex discrimination became illegal with the enactment of the Civil Rights Act of 1964, the courts were slower to recognize sexual harassment as a cause of action. The first time a federal court upheld a claim of sexual harassment was in 1976. *See* Catharine MacKinnon, *Sexual Harassment: Its First Decade in Court (1986), in* Feminism Unmodified 103 (citing Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), followed by Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)). Almost 10 years later, the Supreme Court in *Meritor Savings Bank v. Vinson* agreed that sexual harassment was a legally cognizable claim. 477 U.S. 57 (1986).

40. *See* Estrich, *supra* note 4, at 820 ("What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than other forms of discrimination is precisely the fact that it is sexual.").

41. *See* Bravo & Cassedy, *supra* note 1, at 52-53 (citing a 1980 survey in which of the 42% of female federal employees who experienced sexual harassment, only two percent reported it; and citing a 1987 follow-up survey in which the incidence of harassment remained the same and only five percent reported it); *see also* MacKinnon, *supra* note 4, at 26 (citing numerous surveys including Clair Safron, *What Men Do to Women on the Job: Shocking Look at Sexual Harassment*, Redbook, Nov. 1976) (finding that 90% of the 9,000 women who responded to the survey reported experiencing sexual harassment)). The underreporting of sexual harassment also can be inferred from the large number of women who respond to studies stating that they are victims of sexual harassment versus the number of cases that are adjudicated, even considering that not all reports of sexual harassment are legally actionable. *Compare* Barbara A. Gutek, Sex and the Workplace 46 (1985) (reporting that 53% of women surveyed responded that they were victims of sexual harassment) *with* Silver, *supra* note 9, at 510 n.179 (citing Office of Pub. Affairs, EEOC, *EEOC Litigation Activities 1978-1984* (1984)). The EEOC reports the number of Title VII cases (encompassing all areas of discrimination under Title VII) filed by the EEOC, as well as those filed under all of its jurisdictional bases, for each year: 326 cases in 1980; 368 in 1981; 164 in 1982; 195 in 1983; 310 in 1984). *Id.*

social and legal responses to the harassment. These factors not only suggest why women do not report sexual harassment, but also illustrate why women, if they are going to report the harassment, will try to resolve it in the most informal manner, namely through their companies' internal grievance procedures. A closer examination of these considerations emphasizes the strong interest women have in pursuing informal dispute resolution.

One of the primary reasons why sexual harassment is underreported is that women traditionally do not report crimes of a sexual nature.[42] Like rape, women's experiences of sexual harassment often are violative on an extremely personal level. Another major reason for underreporting is loss of privacy.[43] As the investigation into the allegation of sexual harassment gets underway, and the harasser and co-workers are questioned, the loss of privacy increases. Administrative and judicial proceedings only prolong this invasion. In formalizing the conflict, women "know they will have to endure repeated verbalizations of the specific sexual abuse they complain about."[44] Finally, women fear that their harasser will retaliate if they report the conduct.[45] Studies reveal that women fail to report sexual harassment because of their vulnerability in the workplace, especially with regard to their fear of retribution from superiors.[46] This fear extends to both the personal and professional level.[47]

Even when women do report sexual harassment, they are not likely to pursue their charges beyond the informal stage of internal grievance procedures and are more likely to settle. Reasons such as "[the] fear of being laughed at, ostracized, vilified, humiliated, or retaliated against by friends, co-workers, bosses, lawyers, judges, and juries"[48] contribute to women's preference for informal proceedings. These fears are critical to understanding why informal resolution is so important. As Professor Catharine MacKinnon notes, "[l]ike women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry."[49] She also points out that "the specific injury of sexual harassment arises from the nexus between a sexual demand and the workplace."[50] Consequently, women are apprehensive about reporting sexual harassment due to

42. *See* Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1157-61 (1986) ("Rape is the most underreported crime in America and the conviction rate is notably low.").

43. *See* Bravo & Cassedy, *supra* note 1, at 53 (Dr. Mary Rowe, an expert on sexual harassment from Massachusetts Institute of Technology, finds that "[f]ear [of] retaliation and a loss of privacy" are two primary responses to sexual harassment.).

44. *See* MacKinnon, *supra* note 39, at 114.

45. *Id.*

46. *See* Gutek, *supra* note 41, at 72 (survey indicates that 60% of women did not report sexual harassment because of fear they would be blamed).

47. *See* Bravo & Cassedy, *supra* note 1, at 40-49.

48. Bravo & Cassedy, *supra* note 1, at 54.

49. MacKinnon, *supra* note 4, at 47.

50. *Id.* at 31.

both the anticipated and established range of reactions to their complaints, from ignoring,[51] disbelieving,[52] or trivializing them,[53] to the perception of the woman as blameworthy[54] or unprofessional.[55]

The interplay of intimacy, sexuality, and economics also influences women's preference to deal with sexual harassment through non-adversarial means. The economic dependency of women on their employers silences many victims.[56] This problem arises because of women's historic and current economic subordination in the marketplace, which exposes them to sexual abuse and restricts their capacity to combat such abuse. Professor MacKinnon notes that sexual harassment "deprives women of material security and independence which could help make resistance to unreasonable job pressures practical."[57]

Inequities built into sexual harassment case law also deter women from fully engaging in the adversarial system. The law's response to sexual harassment is best understood by comparing it to how the law treats other sexual violations, such as rape, which are overwhelmingly perpetrated by men against women. Professor Susan Estrich finds that the legal doctrines that shape rape laws effectively re-victimize the rape victim.[58] Because the legal doctrines shaping sexual harassment law are similar to rape law, women can be re-victimized, and thus are unlikely to report the violation.[59]

In order to demonstrate how the legal doctrines that form the law deter formal complaints, a comparison of harassment and date rape case law illustrates the developing concerns of silencing the victim. Both sexual harassment and date rape are relatively recent social and legal conceptions, whose acceptance has been marked by heightened skepticism due to both the sexual nature of the claim and the familiarity of the victim and the perpetrator. Sexual harassment, like date

51. *See* Bravo & Cassedy, *supra* note 1, at 57-58 (discussing instances of company superiors ignoring women's complaints of sexual harassment).

52. *E.g.*, Robinson v. E. I. Du Pont de Nemours & Co., 33 Fair Empl. Prac. Cas. (BNA) 880, 881 (D. Del. 1979) (concluding that the plaintiff "irrationally misconstrued" a series of sexual intimations).

53. *E.g.*, Sand v. George P. Johnson Co., 33 Fair Empl. Prac. Cas. (BNA) 716, 727 (E.D. Mich. 1982) (holding defendant's conduct not actionable because it was only a flirtation).

54. *E.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986) (stating that "complainant's sexually provocative speech or dress is [not] irrelevant as a matter of law" and approving examination of her "sexual fantasies" in determining whether harassment occurred).

55. Women in traditionally male-dominated occupations become "special targets" and are particularly vulnerable to sexual harassment. Bravo & Cassedy, *supra* note 1, at 63.

56. *See* MacKinnon, *supra* note 4, at 9.

57. *Id.*

58. *See* Estrich, *supra* note 4, at 814-15.

59. *See* Estrich, *supra* note 42, at 1161-63; *see also* B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. Rev. 1 (1993) (proposing that courts redress sexual harassment to the same extent they remedy other Title VII violations).

rape, lacks the legal redress of other non-sexual transgressions. For example, the victim's behavior, not the harasser's, may become the focal point of inquiry. Specifically, the Supreme Court has ruled that courts may consider a plaintiff's past behavior, including dress and sexual fantasies, in making a determination of sexual harassment.[60]

Personal considerations, societal prejudices, and legal biases, therefore, hinder women's ability to deal with sexual harassment in a confrontational fashion. Informal dispute resolution provides women with a less adversarial forum in which they and their employers can attempt to redress the harassment. Generally, women can get the maximum out of informal dispute resolution if their interests are protected by counsel.

C. *Resolving the Divergent Interests of Women and Employers: Advocacy at the Informal Level*

Although women and their employers may have different interests in seeking informal dispute resolution for sexual harassment claims, their concerns suggest that in-house procedures are the optimal forum for these disputes. In order to assure the fairness and effectiveness of these proceedings, however, both sides must have access to legal counsel. The imperative of having an attorney at this informal level is especially strong for women. For those subject to sexual harassment, retaining an attorney increases the likelihood of obtaining a positive result—both in terms of settlement or subsequent litigation.[61] For instance, an attorney facilitates the process of collecting evidence and presenting it in such a way to demonstrate that her client has a strong case,[62] thus encouraging settlement.

The attorney for the aggrieved employee also functions to keep the informal dispute resolution procedures neutral. A company's internal grievance procedures, by definition, are conducted by the company. Both the fact-finding procedures and the adjudication may appear to be neutral, but the position of the fact-finders and adjudicators within

60. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 61 (1986).

61. *See* Mark D. Laponsky, *Procedural Problems and Considerations in Representing Federal Employees in Equal Employment Opportunity Disputes*, 29 How. L.J. 503 (1986). Mark Laponsky advises that:

> [T]he employee's contentions should be made and formulated into clear and precise allegation for presentation to the [EEO] counselor . . . . [T]he attorney's active involvement during this period [is] advisable to ensure that the counselor's inquiry is complete and that all matters to be complained about have been raised. . . . Counsel should always prepare the client for this interview [with the EEOC] in the same way they would prepare the client for a deposition or a hearing. . . . Counsel may aid the investigator by focusing on the salient issues and facts. Counsel may identify witnesses for the investigator to interview, suggest questions to be asked, or identify the types of documents to be located and the statistics to be evaluated.

Id. at 510-16.

62. *Id.*

the company calls into question their impartiality. An attorney helps ensure the fairness of the procedures, and consequently the equity of the settlement.

The presence of an attorney also serves to achieve the most favorable settlement for the aggrieved employee. Alternatively, if the parties do not reach settlement, the attorney is necessary to preserve the cause of action for later litigation. The assistance of an attorney at this stage, therefore, is crucial in developing and maintaining the cause of action.

Another important function of an attorney is to foster an aggrieved employee's bargaining power. This role is especially important because the employee faces specific obstacles in bringing charges of sexual harassment. For example, the aggrieved employee is at a disadvantage because of the unequal bargaining power inherent in the employer/employee relationship.[63] This is compounded for women, who are relatively weak economic actors.[64]

A final and critical reason for women to obtain legal counsel at this level is the presence of the employers' attorneys. Employers normally consult attorneys when setting up internal dispute resolution procedures and conducting these procedures for a specific claim. Likewise, women should be able to afford counsel in informal proceedings, as Congress provided through the passage of section 706(k) of Title VII.[65]

Title VII's attorney fee-shifting provision is the vehicle to effectuate meaningful representation for aggrieved employees to assist them in obtaining relief through informal dispute resolution.[66] The denial of attorney's fees amounts to informal proceedings functioning not only

63. *See* Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984).

64. For example, men earn 59% more than women. Bureau of Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States*, tbl. 737 (1990). In addition, women are under-represented in positions of influence in the government. *See* Center for American Women & Politics, *Women in Elective Office 1989: Fact Sheet* (1989) (reporting that in 1989, women were represented in 5% of federal elective offices, 14% of state executive elective offices, 17% of state legislative seats, and 9% of county governing board positions). Likewise, women generally do not hold high-paying executive management positions. *See* U.S. Dep't of Labor, A Report on the Glass Ceiling (1991). A survey of 92 of America's top corporations found that women comprise 6.6% of executive management, 16.9% of management, and 37.2% of employees. *Id.* In contrast, women are over-represented in lower-paying service and administrative jobs. *See* The American Woman 1992-93, 153-55 (Paula Ries & Anne J. Stone eds., 1992). In 1990, 46% of women who worked were employed in such jobs as secretaries, waitresses, and health aides. *Id.* Notably, men who were employed in these same positions had higher median weekly wages. For example, the female/male weekly salary for a secretary is $341/$387 and for a wait staff is $194/$266. *Id.*

65. *See* discussion *infra* part III.A.

66. Providing for the shifting of attorney's fees will not remedy every ill, but it may alleviate some of the economic burdens involved in bringing a claim. Because women occupy the lower echelon of the workforce, their ability to afford an attorney is of great importance. *See* sources cited *supra* note 64.

as a shield for employers, but also a sword against women, who cannot afford to retain private counsel to protect their civil rights. Congress, recognizing this economic barrier to obtaining counsel, has incorporated attorney fee-shifting as an integral aspect Title VII.

II. An Overview of Title VII Procedures

Procedural devices including informal dispute resolution,[67] administrative proceedings,[68] and court actions[69] are the basic mechanisms utilized to enforce compliance with Title VII. When an aggrieved employee has a grievance, she must file her charge with the EEOC before she can institute a lawsuit.[70] If this filing occurs before exhaustion of remedies in the available state or local Fair Employment Practice Agencies, the EEOC refers the charge to the appropriate agency.[71] If the EEOC finds no discrimination, it will dismiss the charge and issue a notice of a right to sue, which enables the aggrieved employee to initiate civil proceedings on her own.[72] If the EEOC finds reasonable cause to believe that employment discrimination occurred, it assists the aggrieved employee in vindicating her right to be free from sexual harassment.[73]

Title VII encourages informal dispute resolution.[74] The statute mandates that the EEOC "*shall* make an investigation" after a charge

67. Title VII incorporates informal dispute resolution procedures by requiring the EEOC to engage in "informal methods of conference, conciliation, and persuasion" in order to resolve discrimination complaints. 42 U.S.C. § 2000e-5(b). Informal dispute resolution includes a company's internal grievance procedures.

68. Title VII requires administrative proceedings before an aggrieved employee can institute a federal court action. 42 U.S.C. § 2000e-5(e)(f)(1).

69. A court action is the final step to remedying employment discrimination, and only can be instituted after the aggrieved employee files her complaint with the EEOC, attempts conciliation with her employer, and finishes her administrative proceedings. 42 U.S.C. § 2000e-5(c).

70. 42 U.S.C. § 2000e-5(f)(1); *see generally* Mack A. Player, Employment Discrimination Law §§ 5.71-5.73(a) (1988) (discussing the general filing requirements for filing discrimination claims).

71. *Id.* "[N]o charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law . . . ." The EEOC refers and defers charges to agencies called "FEP Agencies." 29 C.F.R. § 1601.70(a).

72. 42 U.S.C. § 2000e-5(f)(1) (stating that 180 days after filing with the EEOC, a charging party has the right to receive a notice of the right to sue from the EEOC if the agency's conciliatory efforts fail and the EEOC (or the Attorney General if it is a governmental entity) has not filed a civil suit).

73. *Id.*

74. Informal dispute resolution includes a company's internal grievance procedures, which vary in formality. To define informal dispute resolution in the negative, it is any type of proceedings which courts do not consider mandatory—proceedings other than federal or state administrative proceedings, *see, e.g.*, New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 71 (1980) (holding administrative proceedings are a proceeding under section 706(k)), or court proceedings. Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978) (awarding petitioner attorney's fees for work done at the administrative level); Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) (affirming award of

is filed.[75] In addition, the EEOC "*shall* endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[76] Title VII, therefore, grants the EEOC investigative powers as well as the authority to redress the harassment through informal dispute resolution.

To encourage enforcement of Title VII, the statute contains section 706(k), granting courts the discretionary power to award reasonable attorney's fees to a "prevailing party"[77] "[i]n any action or proceeding."[78] Title VII, however, fails to specify what types of proceedings are within the meaning of section 706(k)'s "action or proceeding," which would permit a court to award attorney's fees to a prevailing party. The EEOC regulations provide that the prevailing party may recover "reasonable attorney's fees or costs incurred in the processing of the complaint."[79] The regulation specifies that:

> Attorney's fees shall be paid only for services performed after the filing of the complaint required . . . and after the complainant has notified the agency that he or she is represented by an attorney, except that fees are allowable for a reasonable period of time prior

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attorney's fees under Title VII for services rendered during administrative proceedings); Foster v. Boorstin, 561 F.2d 340 (D.C. Cir. 1977) (awarding attorney's fees which include compensation for services rendered at administrative level); Johnson v. United States, 554 F.2d 632 (4th Cir. 1977) (petitioner awarded attorney's fees under Title VII after bringing court action challenging adverse administrative decision).

75. 42 U.S.C. § 2000e-5(b) (emphasis added).

76. *Id.* (emphasis added).

77. 42 U.S.C. § 2000e-5(k). The statutory language does not provide an explicit definition of what types of proceedings qualify an aggrieved employee as a "prevailing party." The Supreme Court, however, interprets "prevailing party" to include one who serves as a catalyst to enforce her substantive rights. *See, e.g.*, Dover v. Rose, 709 F.2d 436, 439 (6th Cir. 1983) (defining prevailing party as one who obtains a settlement, or whose "lawsuit acts as a 'catalyst' which causes the defendant to make significant changes in its past practices"); Sullivan v. Pennsylvania Dep't of Labor and Industry, 663 F.2d 443, 448 (3d Cir. 1981) (awarding fees for a union arbitration which "acted as a 'catalyst' for the vindication of [the aggrieved party's] constitutional rights"), *cert. denied*, 455 U.S. 1020 (1982); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429 (8th Cir. 1970) (basing fee recovery for plaintiff's lawsuit, which "acted as a catalyst which prompted [the defendant] to take action" to remedy the discrimination). In addition, a complainant can be a "prevailing party" through settlement. *See* Maher v. Gagne, 448 U.S. 122, 129 (1980) (holding that the parallel attorney fee-shifting provision 42 U.S.C. § 1988 is not conditioned upon "full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated").

78. 42 U.S.C. § 2000e-5(k) ("In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fee[s] . . . .").

Although the award of attorney's fees is discretionary according to the statute, case law dictates that for a prevailing plaintiff, a court should deny attorney's fee only under "special circumstances." Christiansburg Garment Co. v. EEOC, 434 U.S 412, 417 (1978). The same is not true for a prevailing defendant, who must meet a higher standard to recover attorney's fees. The plaintiff's claim must be "frivolous, unreasonable, or groundless;" merely winning the case is not sufficient. *Id.* at 422.

79. 29 C.F.R. § 1613.271(d).

> to the notification of representation for any services performed in reaching a determination to represent the complainant.[80]

Despite the EEOC regulations, courts disagree as to when and for which proceedings fee awards under section 706(k) are appropriate. The Supreme Court has construed section 706(k) as incorporating state administrative proceedings; thus, fee awards are proper at the state administrative level.[81] Although the Court has yet to determine whether the attorney fee-shifting provision applies to informal dispute resolution, the current trend in the lower courts is to deny recovery of attorney's fees for work performed during this process.[82]

III. The Legislative Intent and Judicial Interpretation of Section 706(k)

Courts analyze the limited legislative history of section 706(k) in determining whether to award attorney's fees for informal dispute resolution. The current trend is to deny such fees, which creates inequities for aggrieved employees.

A. *The Legislative History of Section 706(k)*

The legislative history of section 706(k), although "sparse," indicates a liberal view of shifting attorney's fees.[83] In 1964, Senator Humphrey stated that the attorney fee-shifting provision would "make it easier for a plaintiff of limited means to bring a meritorious suit,"[84] and in 1987, the Supreme Court emphasized that "it is clear that [this is] one of Congress' primary purposes in enacting [section 706(k)]."[85]

Moreover, the language of section 706(k)—permitting the shifting of fees for a prevailing party "[i]n any action or proceeding"[86]—indicates that Congress envisioned a proceeding as something separate from a court action, so that "or proceeding" is not "mere surplusage."[87] For example, Title II only permits fees for "actions," not proceedings.[88] The Civil Rights Attorney's Fees Awards Act of 1976

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80. *Id.* at 1613.271(d)(iv).

81. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

82. *See infra* parts III.B.

83. 110 Cong. Rec. 12,724 (1964) (remarks of Sen. Humphrey); *see also* S. Rep. No. 1011, 94th Cong., 2d Sess. 3 (1976) ("In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies [including attorney's fee awards] available to achieve the goals of our civil rights laws.").

84. 110 Cong. Rec. 12,724 (1964) (remarks of Sen. Humphrey).

85. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420 (1978) (quoting 110 Cong. Rec. 12,724 (1964) (remarks of Sen. Humphrey)).

86. 42 U.S.C. § 2000e-5(k).

87. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 61 (1980).

88. 42 U.S.C. § 2000a-3(b) (1988).

("section 1988"),[89] an analogous fee-shifting statute, also encompasses an "action or proceeding;" a proposed amendment to the act to cover only an "action" was rejected.[90]

Because 706(k) was the model for section 1988,[91] the two provisions are not only similar,[92] but also share the same goals.[93] The legislative history of section 1988 more fully explains the goals of the fee-shifting statute. In enacting fee-shifting statutes, such as section 1988, Congress clearly acknowledged the importance of awarding attorney's fees to vindicate civil rights:

> The effective enforcement of federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate a court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees [section 1988] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to the law.[94]

Similarly, the goal of section 706(k) is to encourage attorneys to represent civil rights litigants; attorneys are less likely to do so if they

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89. Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified as amended 42 U.S.C. § 1988 (1988 & Supp. III 1992)).

90. 122 Cong. Rec. 32,933 (1976) (Senator Helms proposed a written amendment to section 1988 deleting the words "or proceeding," which was rejected by a large majority).

91. 42 U.S.C. § 1988 (1989 & Supp. IV 1992). S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) states that "[i]t is intended that the standards for awarding fees [under section 1988] be generally the same as under the fee provisions of the 1964 Civil Rights Act."

92. In relevant part, Title VII provides:

> In any action or proceeding under this subchapter [42 U.S.C. § 2000e] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) 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).

In relevant part, the Civil Rights Attorney's Fees Awards Act of 1976 provides:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. § 2000d], or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

42 U.S.C. § 1988.

93. 122 Cong. Rec. 35,122 (1976) (remarks of Rep. Fish that the legislative intent of section 1988 is to "give the federal courts discretion to award attorney's fees . . . to remedy anomalous gaps in our civil rights laws . . . and to achieve consistency").

94. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).

do not know at the outset whether their fees can be recovered. The same rationale of providing access to the courts by financially enabling aggrieved parties to assert their civil rights should apply to informal dispute resolution. Otherwise, parties of limited means must forgo this informal level or pay attorney's fees they cannot afford.

Congress stated that Title VII's procedures and remedies should "mes[h] nicely, logically, and coherently with the State and city legislation."[95] Similarly, the Supreme Court recognized that state agencies have "a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary resort to federal relief by victims of the discrimination."[96] Informal dispute resolution, specifically internal grievance procedures, can fill this void. Thus, while the statutory scheme of Title VII encourages informal dispute resolution,[97] denial of attorney's fees at this level creates an economic barrier to the use of informal proceedings, and ultimately the enforcement of civil rights.[98]

Denying attorney's fees for informal dispute resolution undercuts Congress' goal to provide alternative means of redressing employment discrimination. The integral role of informal dispute resolution in Title VII should be preserved.[99] Therefore, to give Title VII teeth and fulfill legislative intent, section 706(k) should apply to provide for the shifting of attorney's fees at every level where a violation of employment discrimination is redressed. The case law, however, has largely ignored these underlying considerations in interpreting section 706(k).

B. *Case Law Regarding Fee-Shifting under Section 706(k)*

When section 706(k) is applied to informal dispute resolution procedures, the case law suggests a trend to deny awarding attorney's fees. Ultimately, however, the rationales behind this trend are flawed because they fail to take into account the significance of informal dispute resolution.

1. Section 706(k) Supreme Court Litigation

The legislative history of Title VII offers limited guidance in determining whether an aggrieved employee, who obtains relief through informal dispute resolution, may benefit from section 706(k). Lower courts, therefore, heavily rely on the Supreme Court's analysis of sec-

95. 110 Cong. Rec. 7,205 (1964) (remarks of Sen. Clark).
96. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979).
97. *See supra* notes 74-76 and accompanying text.
98. *See* sources cited *supra* note 64 (discussing the economic status of women as victims of sexual harassment).
99. Title VII dictates that under the auspices of the EEOC, the aggrieved employee and her employer must seek to resolve the complaint through "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b).

tion 706(k) in *New York Gaslight Club, Inc. v. Carey*.[100] In *Carey*, the plaintiff instituted a federal suit to collect attorney's fees incurred during state administrative proceedings. Before this federal court action, the plaintiff filed an employment discrimination complaint with the EEOC alleging that her employer, New York Gaslight Club, refused to hire her because of her race.[101] Although the plaintiff was successful at the state administrative level, she received only an offer of employment and backpay, not attorney's fees.[102]

The district court in *Carey* denied the request for attorney's fees under 706(k).[103] The court reasoned that because state law provided a meritorious complainant with a division attorney, the plaintiff did not need to hire a private attorney and incur legal expenses.[104]

The Court of Appeals reversed, noting several important factors.[105] In particular, the court noted that fees should be awarded for the following reasons: to encourage the complainant to retain private counsel because a division attorney assists the complainant only at certain points during the state proceedings;[106] to avoid promoting "needless litigation;"[107] to further the congressional intent behind Title VII's scheme which promotes the role of state agencies;[108] and to help provided for the complete development of the administrative record.[109] The Supreme Court also examined these factors in affirming the Court of Appeals,[110] and held that attorney fee-shifting under Title VII encompasses these state administrative proceedings.[111]

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100. 447 U.S. 54 (1980).

101. *Id.* at 56. As required under Title VII, 42 U.S.C. § 2000e(f)(1), the EEOC deferred the complaint to the appropriate New York administrative agency. *Id.* at 56-57.

102. At this point, the EEOC issued to respondent a notice of a right to sue. The respondent then filed a federal claim to recover attorney's fees for the work done in state administrative proceedings. *Id.* at 58.

103. Carey v. New York Gaslight Club, Inc., 458 F. Supp. 79, 80-81 (S.D.N.Y. 1978).

104. *Id.* at 81.

105. Carey v. New York Gaslight Club, Inc., 598 F.2d 1253, 1259-60 (2d Cir. 1979).

106. *Id.* at 1258-59.

107. *Id.* at 1259.

108. *Id.*

109. *Id.* at 1259-60.

110. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 60 (1980).

111. *Id.* The Supreme Court rejected the three main arguments presented by the company against awarding attorney's fees. *Id.* at 66-67. First, the Court repudiated the argument that there is a violation of the Tenth Amendment when a federal court orders an award of attorney's fees when the State (here, New York) does not permit such an award by noting that the power given to Congress by the Fourteenth Amendment, § 5 outweighs any interest the State may have in denying fee awards. *Id.* Second, the Court countered the argument that awarding attorney's fees pre-empts state law, which surpasses Congressional intent, by explaining that Title VII's attorney fee-shifting provision does not "supplant" state law, but rather "supplement[s]" it. *Id.* at 67-68 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974)). Third, the Court denied the argument that the District Court should use its discretion to deny attorney's fees because, while the Congressional grant to deny fees is discretion-

In *Carey*, the Supreme Court pronounced that "the language and history of the statute, the nature of the proceedings in which respondent participated, and the relationship of those proceedings to Title VII's enforcement mechanisms, together persuade us that Congress clearly intended to authorize awards of attorney's fees to persons in respondent's situation."[112] The Court found that Congress' use of "the broadly inclusive disjunctive phrase 'action or proceeding' " includes "[administrative] proceedings" that are not necessarily court actions.[113] To hold otherwise, the Court stated, the phrase "or proceeding" would be "mere surplusage."[114]

In addition, although the word "proceeding" in the statute arguably refers only to federal administrative proceedings, the Court did not believe that Congress intended to make this distinction.[115] Instead, the Court noted that "other provisions of the statute that interact with 706(k); the purpose of 706(k); the humanitarian remedial policies of Title VII; and the statute's structure of cooperation between federal and state enforcement authorities" suggest that Congress intended to permit recovery of attorney's fees for state administrative proceedings.[116]

Carey also discussed the mandatory nature of state administrative proceedings as the reason why attorney fee-shifting is appropriate under Title VII,[117] although the Court's analysis was not exclusively

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ary, the court should not exercise it unless there are "special circumstances," which were absent here. *Id.* at 68 (citations omitted).

112. *Id.* at 61.

113. *Id.* Furthermore, other civil rights attorney fee-shifting provisions, such as Title II, omit the word "proceeding" and only include an "action." *Id.* (discussing Title II, § 204(b), which was enacted contemporaneously with Title VII's attorney fee-shifting provision and permits an award only for "any action commenced pursuant to this title").

114. *Id.* at 63.

115. *Id.* at 62.

116. *Id.* The Court stated more broadly that "[o]ne aspect of complete relief [of employment discrimination] is an award of attorney's fees, which Congress considered necessary for the fulfillment of federal goals." *Id.* at 67-68. Permitting fee awards upholds "Congress' intent to encourage full use of state remedies." *Id.* at 66 n.6.

117. Justice Blackmun, writing for the majority of the Court, carefully worded the decision to hold that recovery of attorney's fees is appropriate for "state proceedings to which the complainant was referred pursuant to the provisions of Title VII." *Id.* at 71. Justice Stevens' concurrence emphasized that an award of attorney's fees was proper in this case because petitioner filed a federal court action on the merits underlying the dispute, not solely to recover attorney's fees. *Id.* The majority, however, pronounced that attorney fee awards "[s]hould not depend upon whether the complaint ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees." *Id.* at 66. Justices White and Rehnquist, in dissent, agreed with the reasoning in the dissent of Judge Mulligan of the Court of Appeals for the Second Circuit. *Id.* at 71. Judge Mulligan contended that permitting a party to file a federal action to recover attorney's fees incurred during state administrative actions would encourage these types of federal suits. Carey v. New York Gaslight Club, Inc., 598 F.2d 1253, 1260 (2d Cir. 1979) (Mulligan, J., dissenting).

premised on this. For example, the *Carey* Court pronounced, "It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level."[118] In addition, the Court concluded that to deny fee awards at the state administrative level would create "an incentive to get into federal court."[119]

Finally, *Carey* discussed the role of the private attorney in obtaining relief for the aggrieved employee. Contrary to the district court,[120] the Supreme Court found that:

> It is thus obvious that the assistance provided a complainant by the Division attorney is not fully adequate, and that the attorney has no obligation to the complainant as a client. In fact, at times the position of the Division may be detrimental to the interests of the complainant and to enforcement of federal rights.[121]

The Court highlighted the fact that state law does not provide a division attorney to investigate the complaint,[122] to help with preliminary settlements,[123] or necessarily to take the client's position if there is an appeal.[124] Therefore, unless the aggrieved employee hires her own counsel, she will be unrepresented at the preliminary stages of adjudication, specifically informal dispute resolution, because an attorney is assigned only when the conciliatory efforts fail and a hearing is scheduled.[125] The Court succinctly summed up that "[r]etention of private counsel will help assure that federal rights are not compromised in the conciliation process."[126]

The Supreme Court reaffirmed *Carey* in 1982 in *White v. New Hampshire Department of Employment Security*.[127] The Court, quoting *Carey*, held that a party who prevails at the administrative level may then file "solely to obtain an award of attorney's fees for legal

118. 447 U.S. at 66.
119. *Id.* at 66 n.6.
120. *See supra* note 104 and accompanying text.
121. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 (1980).
122. *Id.* ("Representation by a private attorney thus assures development of a complete factual record at the investigative stage and at the administrative hearing.").
123. *Id.* ("A Division [attorney] cannot act as the complainant's attorney for purposes of advising him whether to accept a settlement.").
124. *Id.* ("The Division attorney is authorized only to support the order entered by the Division or the Appeal Board.").
125. *Id.*
126. *Id.*
127. 455 U.S. 445, 451-52 n.13 (1982).

work done in state and local proceedings."[128] In 1986, however, the Court declared that the original language from *Carey* was dictum.[129]

While the Supreme Court has not expressly overruled *Carey*, its later rulings on analogous fee-shifting statutes, notably section 1988, indicate the Court's increasingly restrictive view towards fee awards. The Court has yet to address the issue of whether courts, in an independent action, can award attorney's fees for other types of proceedings under Title VII.

2. Analogous Supreme Court Litigation

The Supreme Court's decision in *Carey* seemed to signal a trend in favor of allowing recovery of attorney's fees for informal proceedings. By 1985, however, the tide again shifted as the Supreme Court handed down several decisions regarding fee-shifting in analogous civil rights statutes.

The first case to take a more restrictive view of *Carey* was in 1985 in *Webb v. County Board of Education*.[130] The *Webb* Court held that the district court was "well within the range of reasonable discretion" to deny recovery of attorney's fees incurred in a nonmandatory state administrative action for a party who later prevailed in a section 1983 federal court action.[131]

The plaintiff Webb, an elementary school teacher, alleged that his dismissal was racially motivated, and unsuccessfully challenged it under state law, which entitled him to a hearing.[132] Webb then filed a section 1983 action in federal court that was settled by a consent order, which reserved for the future the issue of attorney's fees.[133]

The district court held that Webb was not entitled to recover attorney's fees for the School Board hearings.[134] The Sixth Circuit and the Supreme Court affirmed.[135] The Supreme Court disregarded plaintiff's reliance on *Carey*, finding it inapplicable because section 1983

128. *Id.* (stating that "a claimed entitlement to attorney's fees is sufficiently independent of the merits action under Title VII to support a federal suit 'solely to obtain an award of attorney's fees for legal work done in state and local proceedings' ") (quoting *Carey*, 447 U.S. at 66).

129. North Carolina Dep't of Transp. v. Crest St. Community Council, Inc., 479 U.S. 6, 13-14 (1986) (citing *Carey*, 447 U.S. at 66).

130. 471 U.S. 234 (1985).

131. *Id.* at 244.

132. *Id.* Tenn. Code Ann. § 49-5-511(a) (1983) provides that a teacher cannot be dismissed without cause, and if the teacher contests the grounds of dismal, he is entitled to a hearing pursuant to § 49-5-512. The School Board conducted a series of hearings, but reaffirmed his dismissal. *Webb*, 471 U.S. at 236-37.

133. *Id.* at 237.

134. *Id.* at 239.

135. Webb v. County Bd. of Educ., 715 F.2d 254 (6th Cir. 1983), *aff'd*, 471 U.S. 234 (1985).

does not require exhaustion of administrative remedies as does Title VII.[136]

In 1986, a year after *Webb*, the Supreme Court in *North Carolina Department of Transportation v. Crest Street Community Council*[137] held that fee-shifting is impermissible under section 1988 for a party who prevails in federal administrative proceedings and subsequently files a suit to recover attorney's fees.[138] The petitioner, Crest Street Community Council, Inc., filed a complaint with the United States Department of Transportation against the North Carolina Department of Transportation's proposed extension of a federally funded highway through a predominantly black neighborhood in Durham.[139]

The federal Department of Transportation determined that probable cause existed to substantiate the claim and encouraged the department to negotiate with Crest.[140] Two years later, Crest, the state department, and the City of Durham reached a preliminary agreement, and after six months, the state department moved to dissolve the previous injunction.[141]

In the district court, Crest then moved to intervene in the action involving the injunction and submitted a proposed complaint. Crest's petition was pending when the district court entered into a consent judgment favorable to Crest that included dissolving the injunction and dismissing Crest's complaint.[142]

The consent judgment did not resolve the issue of attorney's fees for the five years of work amounting to over 12,000 hours for services rendered. Crest instituted another action solely to recover fees incurred for the investigation and negotiation of the dispute.[143] The district court held that section 1988 did not permit a fee award in this situation, and therefore granted summary judgment for the federal Department of Transportation.[144]

The Fourth Circuit unanimously reversed.[145] Relying on *Carey*, the court concluded that this federal administrative proceeding was a

136. *Webb*, 471 U.S. at 240. The Court further stated that the only kind of "action or proceeding" that qualifies a prevailing party for recovery of attorney's fees are those that are necessary to enforce section 1983, which the School Board proceedings were not. *Id.* at 241. The Court emphasized that "[a]dministrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce section 1983." *Id.*

137. 479 U.S. 6 (1986).

138. *Id.* at 15.

139. *Id.* at 9. There was already an injunction issued in a separate action against the construction of the highway extension.

140. *Id.*

141. *Id.* at 10.

142. *Id.*

143. *Id.*

144. Crest St. Community Council, Inc. v. North Carolina Dep't of Transp., 598 F. Supp. 258 (M.D.N.C. 1984), *rev'd*, 769 F.2d 1025 (4th Cir. 1985), *rev'd*, 479 U.S. 6 (1986).

145. 769 F.2d 1025, 1028-29 (4th Cir. 1985), *rev'd*, 479 U.S. 6 (1986).

"proceeding to enforce . . . title VI," and thus recovery of attorney's fees was proper.[146] In addition, the court emphasized that "Congress' expressed policy of uniformity among the fee statutes [would] be furthered by adopting the same construction of the same language."[147] Specifically, under *Carey*, attorney's fees are available under section 706(k), and should likewise be available under section 1988.

Although the Supreme Court in *Crest* characterized the attorneys' work as "substantial and concrete,"[148] it reversed and remanded.[149] The Court insisted on a narrow reading of the statute in which administrative proceedings were included in the "plain language" of section 1988[150] and its legislative history.[151] The *Crest* court regarded as dictum the language in *Carey* that Title VII creates "authorization of a civil suit in federal court encompass[ing] a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings."[152] The Court limited *Carey* to Justice Stevens' concurrence, which focused on the fact that the filing of the Title VII action occurred while the administrative proceedings were pending.[153] *Crest* distinguished the party filing an independent action to recover attorney's fees (i.e., subsequent to the successful resolution of administrative proceedings), who cannot recover fees, from the party filing a federal suit prior to obtaining a successful resolution at the administrative level, who can recover fees.[154]

The rationale behind *Crest*, which creates a different standard for awarding attorney's fees where the aggrieved party files a federal suit before or after resolution of the administrative proceedings, is that section 1988 does not explicitly refer to fee awards for administrative proceedings or subsequent suits to obtain fee awards. The Court justified its denial of fees on that basis by stating that "[t]he short answer is that Congress did not write the statute that way."[155]

The *Crest* Court resolved the potential problem raised in *Carey*—the escalation in the number of civil rights suits filed in federal court to ensure obtaining attorney fee awards[156]—by noting that the client's needs, not the counsel's need to receive payment, will motivate com-

146. *Id.* at 1028-29 (quoting 42 U.S.C. § 1988).
147. *Id.* at 1029.
148. 479 U.S. 6, 10 (1986).
149. *Id.*
150. *Id.* at 11-12, 16.
151. *Id.* at 12-13 (citing S. Rep. No. 1011, 94th Cong., 2d Sess. 3 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976)).
152. *Id.* at 13-14 (citing *Carey*, 447 U.S. at 66).
153. *Id.* (Stevens, J., concurring) (citing *Carey*, 447 U.S. at 71).
154. *Id.*
155. *Id.* (citing Garcia v. United States, 469 U.S. 70, 79 (1984). "[T]he legislative history clearly envisions that attorney's fees would be awarded for proceedings only when those proceedings are part of or followed by a lawsuit." *Id.* (quoting *Garcia*, 469 U.S. at 79).
156. *Carey*, 447 U.S. at 66 n.6.

petent counsel.[157] Specifically, the Court would not presume that "an attorney will advise the client to forgo an available avenue of relief solely because § 1988 does not provide for attorney's fees."[158]

The *Carey*, *Webb*, *Crest* trilogy influenced lower court decisions regarding whether fees are available for the successful resolution of a Title VII claim through informal procedures. The post-*Carey*/pre-*Webb* and pre-*Crest* Title VII cases fall in favor of permitting fee awards for informal dispute resolution, while the post-*Webb* and post-*Crest* cases come out against awarding such fees. Thus, section 1988 litigation influenced section 706(k) litigation to the extent that the emerging trend is to disallow attorney's fees for services rendered for informal dispute resolution under Title VII.

3. Lower Courts Permitting Recovery of Attorney's Fees

Post-*Carey* and pre-*Webb* and pre-*Crest* courts favor recovery of attorney's fees for informal procedures. Relying on *New York Gaslight Club, Inc. v. Carey*,[159] these courts stress the *Carey* Court's reasoning rather than its language, which speaks of mandatory proceedings. They do not interpret the Supreme Court's references to mandatory proceedings as a guideline for determining what proceedings fall within the meaning of section 706(k), but consider the language as descriptive of the type of proceedings at issue in *Carey*.

For example, in *Chrapliwy v. Uniroyal, Inc.*,[160] plaintiffs, female workers at a plastics plant, filed a Title VII class action alleging employment discrimination. The result was a settlement in plaintiffs' favor, providing for an award of attorneys' fees, the amount of which was left to the determination of the district court.[161] The district court subsequently awarded fees to the plaintiffs, but held that under *Carey*, fees were not recoverable for the time the attorneys spent persuading the federal government to debar the defendant from its federal contracts (because of defendant's discriminatory practices).[162]

The district court in *Chrapliwy* found that the attorneys' efforts of persuasion were not "mandatory procedures."[163] Specifically, the district court interpreted the language of section 706(k), regarding attorney fee awards "[i]n any action or proceeding under this subchapter,"[164] as limiting awards to when "the attorney's time and

157. *Crest*, 479 U.S. at 14-15 (citing Webb v. County Bd. of Educ., 471 U.S. 234, 241 n.15 (1985)).

158. *Id.* (quoting *Webb*, 471 U.S. at 241, n.15).

159. 447 U.S. 54 (1980).

160. 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983).

161. *Id.* at 762. The settlement provided the class with $9,318,000.00, pension benefits, reinstatement with seniority for 296 terminated class members, and attorneys' fees which were to be determined by the district court. *Id.*

162. Chrapliwy v. Uniroyal, Inc., 509 F. Supp. 442 (N.D. Ind. 1981).

163. *Id.* at 452.

164. 42 U.S.C. § 2000e-5(k).

efforts [are] mandated by the Title VII statute, or by related and required procedures . . . . [T]he attorney's time must be within the Title VII procedure."[165]

On appeal, the Seventh Circuit reversed, explaining that the attorneys' efforts to persuade the government to debar the defendant led directly to the settlement of the pending Title VII action.[166] These efforts "contributed to the ultimate termination of the Title VII action, and in that sense [were] within the Title VII action."[167] The court concluded that "[s]ection 706(k) should be interpreted as allowing attorneys' fees to the prevailing plaintiffs for services which contribute to the ultimate termination of the Title VII action."[168]

The court, therefore, awarded the attorneys' fees and observed that "[i]f *Carey* has any application to the particular question before us, it is in indicating that [Title VII] should be liberally rather than restrictively interpreted with respect to fees for services not performed, in the ordinary sense, in proceedings before the Title VII court."[169] Moreover, the court noted that the *Carey* Court supported awarding attorney's fees because the Congressional rationale behind the enactment of section 706(k) was to make "it easier for a plaintiff of limited means to bring a meritorious suit."[170]

Although *Chrapliwy* awarded attorneys' fees, its holding may be limited to circumstances in which counsel rendered services after the Title VII action was filed. The Northern District Court of California in *Moreno v. City and County of San Francisco*[171] addressed the issue of whether to award attorney's fees for services the attorney rendered before the filing of a Title VII action.[172] In *Moreno*, an aggrieved employee first filed a complaint of discrimination with the San Francisco Civil Service Commission (CSC) and then with the FEP agency.[173] The FEP Agency suspended their proceedings pending the completion of the CSC proceedings.[174] When the CSC provided injunctive and monetary relief, the Agency withdrew its charges against the defendant employer.[175] The CSC award did not include of attorney's fees,[176] therefore the complainant filed a Title VII action to recover the fees incurred during the CSC proceedings.

165. 509 F. Supp. at 451.
166. Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, *aff'd in part and rev'd in part*, 766 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983).
167. *Id.* at 767.
168. *Id.*
169. *Id.* at 766-67.
170. *Id.* at 767 (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420 (1978) (quoting 110 Cong. Rec. 12,724 (1964) (remarks of Sen. Humphrey))).
171. 567 F. Supp. 458 (N.D. Cal. 1983).
172. *Id.*
173. *Id.* at 459.
174. *Id.*
175. *Id.*
176. *Id.*

While the defendant argued that the CSC proceedings were "collateral," and thus not requisite Title VII proceedings for which the court could award attorney's fees, the *Moreno* court, relying on *Carey*, rejected this argument.[177] It interpreted *Carey* as permitting attorney fee awards for informal dispute resolution because it is "Congress' intent that federal policies be vindicated in nonfederal forums."[178] *Moreno* focused on the language in *Carey* that Title VII provides "authorization of a civil suit solely to obtain an award of attorney's fees for legal work done in state or local proceedings."[179]

Moreno relied on the reasoning in *Carey* that to deny fee awards on the local level would create an "incentive to get into federal court."[180] It thus repudiated the proposition that the proceedings at issue must be "required" in order to award attorney's fees.[181] The court explained that even though the EEOC would not have referred the complaint to the CSC, because the FEP agency did just that, "[f]or practical purposes, the CSC was thus incorporated into the Title VII scheme."[182] Thus the court held that the underlying reasoning of *Carey* supported awards of attorney's fees.[183]

4. Lower Courts Disallowing Recovery of Attorney's Fees

After the *Webb* and *Crest* decisions, courts began to disfavor awarding attorney's fees for informal procedures. While courts still follow *Carey*, they emphasize the language in *Carey* regarding the mandatory nature of the proceedings. For example, in *Manders v. Oklahoma ex rel. Department of Mental Health*,[184] female state hospital workers charged their supervisor with sexual harassment and brought actions against their supervisor, their employer, and the state agency seeking money damages under Title VII and section 1983.[185]

In *Manders*, the district court[186] and the Court of Appeals for the Tenth Circuit[187] dismissed the plaintiffs' sexual harassment claim and denied plaintiffs' recovery of attorney's fees for services resulting in a

177. *Id.* at 459-60.
178. *Id.* at 459.
179. *Id.* (quoting New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 66 (1980)).
180. *Id.* at 459-60 (quoting *Carey*, 447 U.S. at 66).
181. *Id.* at 460.
182. *Id.*
183. *Id.* at 459-60.
184. 875 F.2d 263 (10th Cir. 1989).
185. *Id.*
186. The Northern District of Oklahoma granted summary judgment in favor of the supervisor in his individual capacity on plaintiffs' § 1983 claims; dismissed on 12(b)(6) grounds employees' Title VII sexual harassment claim as to all defendants; and, dismissed on 12(b)(6) grounds recovery of attorney's fees for the employees. *Id.* at 264 (the district court case is unpublished).
187. 875 F.2d 263 (1989) (O'Connor, J., sitting by designation).

favorable outcome in internal grievance procedures.[188] The Tenth Circuit held that plaintiffs could not recover fees incurred in "optional internal grievance procedures."[189]

The *Manders* court distinguished the administrative proceedings in *Carey* from the internal grievance procedures at issue by characterizing the former as mandatory and the latter as optional.[190] The *Carey* administrative proceedings were "required or mandated procedures" and "an integral part of the Title VII scheme," while the *Manders* proceedings, provided as part of Oklahoma State law,[191] were "optional."[192]

Manders stated that it followed *Carey*'s reasoning and public policy with respect to "encouraging employers to provide informal resolutions to discrimination in the work environment."[193] Plaintiffs could have filed their charge with the appropriate FEP agency[194] instead of engaging in internal grievance procedures "had they known that attorneys' fees would be unavailable for the services performed in connection with the optional proceedings."[195] The *Manders* court also stated that requiring companies to pay for attorneys' fees, if the aggrieved employee prevails, creates a disincentive for companies to implement internal grievance procedures.[196]

Most recently, in 1993 the Wisconsin Supreme Court in *Duello v. Board of Regents*[197] held that Title VII does not provide for awards of attorney's fees for "optional" internal grievance procedures.[198] In *Duello*, the plaintiff, an assistant professor, claimed that the University of Wisconsin did not renew her employment contract due to sex

188. The internal grievance procedures did not lead to the supervisor's termination, as requested by the aggrieved employees, but did result in the supervisor's demotion and transferral (which was subsequently vacated after he filed a grievance of his own). *Id.* at 266.

189. *Id.*

190. *Id.*

191. Okla. Stat. tit. 74, § 841.9 (1987 & Supp. 1989).

192. 875 F.2d at 266-67. *Manders* also contends that internal grievance procedures are neither mandated nor required based on Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986), which finds that liability may attach even if a complainant fails to follow an employer's grievance procedure. 875 F.2d at 267. This argument fails to acknowledge that there is a preliminary mandatory period during which the EEOC is supposed to seek conciliation between the aggrieved employee and her employer, so that informal dispute resolution is a practical requirement of Title VII. *See infra* notes 226-228 and accompanying text.

193. 875 F.2d at 267.

194. Here, the appropriate FEP agency was the Oklahoma Human Rights Commission. *Id.*

195. *Id.*

196. *Id.* (permitting attorney fee awards "would tend to discourage private employers, as well as public employers like the defendants in this case, from instituting such potentially ameliorative procedures").

197. 501 N.W.2d 38, 43 (Wis. 1993).

198. *Id.*

discrimination.[199] She was represented by counsel in proceedings before the University of Wisconsin-Madison's Committee on Faculty Rights and Responsibilities (CFRR). These proceedings resulted in a settlement in her favor.[200] The professor in *Duello* then sued in state court under section 706(k) of Title VII to recover attorney's fees for the CFRR proceedings.[201] The court held that because the CFRR proceedings were "optional" under Title VII, the plaintiff was not entitled to recover attorney's fees.[202]

The *Duello* court, relying on *Carey*, held that attorney's fees cannot be shifted for internal grievance proceedings, such as the CFRR proceedings.[203] The court interpreted Title VII's attorney fee-shifting provision in accord with the language in *Carey* that "proceedings [are] the state and local remedies to which complainants are *required to resort*"[204] and that complainant should not have to "bear the costs of *mandatory* state and local proceedings."[205] In addition, the court examined analogous Supreme Court civil rights decisions[206] in *Crest* and *Webb* that awarded attorney's fees only for mandatory actions.[207] The *Duello* court found that the CFRR proceedings "were an optional review process which [plaintiff] was not required to invoke pursuant to Title VII."[208]

The plaintiff, however, also filed a claim with the EEOC, which referred her complaint to the state Personnel Commission. The Commission placed plaintiff's complaint on "hold" pending the outcome of the CFRR proceedings,[209] thus precluding the plaintiff from maintaining a federal court action pursuant to Title VII until she completed the

199. *Id.* at 39.

200. *Id.* Prior to the CFRR proceedings, the professor filed a complaint with the University's office of Affirmative Action and Compliance, which investigated the complaint and concluded that she had been subjected to an "offensive and hostile environment." *Id.* Despite this, the department declined to renew the professor's contract. She filed a petition with the CFRR. *Id.* at 40. The settlement reached provided the professor with a full-time probationary faculty appointment as an assistant professor. *Id.* at 41.

201. There is no explanation why the plaintiff filed this action in state court rather than federal court. She did, however, reserve the right to sue to recover attorney's fees. *Id.*

202. *Id.* at 39.

203. *Id.* at 42 (citing New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)).

204. *Id.* at 43 (quoting *Carey*, 447 U.S. at 62) (emphasis in *Duello*).

205. *Id.* (quoting *Carey*, 447 U.S. at 63) (emphasis added).

206. North Carolina Dep't of Transp. v. Crest St. Community Council, Inc., 479 U.S. 6 (1986) (holding that only a court in an action to enforce civil rights laws may award attorney's fees under § 1988); Webb v. County Bd. of Educ., 471 U.S. 234 (1985) (denying recovery of attorney's fees under 42 U.S.C. § 1983 for attorney's fees incurred during optional administrative proceedings).

207. Duello v. Board of Regents, 501 N.W.2d 38, 45-46 (Wis. 1993) (citing *Crest*, 479 U.S. at 11; *Webb*, 471 U.S. at 240).

208. *Id.* at 47.

209. *Id.* at 40.

CFRR proceedings.[210] Thus, the court ignored that, in a practical sense, the CFRR proceedings were mandatory for this plaintiff.

According to *Duello*, plaintiff's denial of recovery of attorney's fees was a result of her attempt to resolve her dispute through the employer's internal review mechanism rather than immediately filing her claim with a FEP agency.[211] The court contended that its ruling would not discourage an aggrieved employee from invoking the employer's internal grievance procedures because of the probability that she would not recover her attorney's fees.[212] Instead, the court argued that an employee's attorney would not advise her client to forgo proceedings because of the absence of attorney's fees.[213] Finally, the *Duello* court, like the *Manders* court, believed that it was "good public policy" to deny attorney's fees for internal grievance procedures because otherwise employers would be less likely to implement such procedures.[214]

5. Analysis of Case Law

The *Carey*, *Webb*, *Crest* trilogy has influenced lower court decisions to deny fee awards for informal dispute resolution. Consequently, fees are only recoverable if the aggrieved employee reaches the level of administrative proceedings. The denial of attorney fee awards frustrates the goals behind Title VII, which provides for a comprehensive remedial scheme incorporating informal dispute resolution.[215] The result is that the aggrieved employee who vindicates her civil rights through informal methods bears the cost of attorney's fees, while the more litigious, though not necessarily more meritorious, employee recovers attorney's fees if she is the prevailing party. For women unable

210. 42 U.S.C. § 2000e-5(e) requires an aggrieved employee to file a claim with the EEOC and complete administrative proceedings before filing a court action. In addition, the EEOC must refer the charge to state or local FEP agencies, if they exist, before the EEOC conducts its investigation. *Id.*; 29 C.F.R. § 1691.10(a).

The dissent in *Duello* contended that the CFRR review was not optional, but "was indeed a proceeding under Title VII . . . . " 501 N.W.2d at 38 (Ceci, J., dissenting). The lower court in *Duello* also maintained that fees could be awarded for internal grievance proceedings. Duello v. University Bd. of Regents, 487 N.W.2d 56 (1992). Oddly, the majority in *Duello* acknowledged that an FEP agency can hold its judgment in abeyance by deferring to an alternate form of proceedings, which would make the later proceedings "[f]or practical purposes, . . . incorporated into the Title VII scheme." *Duello*, 501 N.W.2d at 44 (discussing Moreno v. San Francisco 567 F. Supp. 458 (N.D. Cal. 1983)). The majority, however, was not persuaded by *Moreno* and therefore did not find that the CFRR proceedings were required in order for a fee award to be proper.

211. *Id.* at 45 (stating that "if claimants do not want to bear the costs of fees, they can pursue their claims before a FEP agency").

212. *Id.* at 47.

213. *Id.*

214. *Id.* at 46 (citing *Manders v. Oklahoma ex rel. Dep't of Mental Health*, 875 F.2d 263, 267 (10th Cir. 1989)).

215. *See supra* notes 74-76 and accompanying text.

to bear these costs, the denial of attorney's fees for informal dispute resolution creates a barrier to resolving claims of sexual harassment in a more private fashion.[216]

The case law since the *Webb* and *Crest* decisions fails to adequately provide for the fair resolution of sexual harassment claims through informal means for two primary reasons. First the pre-*Crest* and pre-*Webb* cases, *Chrapliwy v. Uniroyal, Inc.*[217] and *Moreno v. City and County of San Francisco*,[218] have more persuasive rationales for awarding attorney's fees than cases holding to the contrary. Both courts recognized that the legislative intent of Title VII and the Supreme Court's interpretation of this intent in *Carey* indicate that attorney's fees should be awarded for successful informal dispute resolution. In contrast, the reasoning in the post-*Webb* and post-*Crest* cases, *Manders v. Oklahoma ex rel. Department of Mental Health*[219] and *Duello v. Board of Regents*,[220] undermines the purpose of section 706(k): to provide the meritorious employee with the means to enforce her civil rights through various remedial measures, including informal dispute resolution.[221]

The second major deficiency of the recent case law is the focus on mandatory proceedings. After *Carey*, *Webb*, and *Crest*, courts such as *Manders* and *Duello* analyzed whether the proceedings are mandatory or optional under Title VII, holding that attorney's fees are only available for mandatory proceedings.[222] The focus on the mandatory rather than the optional nature of the proceedings is misplaced. Congress intended to promote equal access to vindicate civil rights when it enacted section 706(k).[223] The Court, therefore, should not take a superficial reading of Title VII to deny attorney's fees for informal dispute resolution because Congress failed to specify what type of "proceeding" was within the ambit of section 706(k). Instead, courts should focus on the purpose of section 706(k) and implement this provision to provide for the recovery of attorney's fees for informal dispute resolution.[224] Courts also should recognize that the exhaustion requirement, which creates mandatory proceedings, expresses Congress' preference for pre-litigation procedures, including informal dispute resolution.[225]

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216. *See* discussion *supra* part I.B.
217. 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983).
218. 567 F. Supp. 458 (N.D. Cal. 1983).
219. 875 F.2d 263 (10th Cir. 1989).
220. 501 N.W.2d 38 (Wis. 1993).
221. *See supra* notes 74-76 and accompanying text.
222. *Manders*, 875 F.2d at 266; *Duello*, 501 N.W.2d at 42.
223. Marjorie A. Silver, *Evening the Odds: The Case for Attorneys' Fee Awards for Administrative Resolution of Title VI and Title VII Disputes*, 67 N.C. L. Rev. 379, 397 (1989).
224. *Id.* at 399. Professor Silver, however, does not include internal grievance procedures as part of informal dispute resolution.
225. *Id.* at 417.

The distinction between mandatory and optional proceedings is also a fallacy given "Title VII's requirements concerning submission of a complaint to agency processes and the realities of EEOC practices and procedures."[226] The plaintiff has a preliminary waiting period of 180 days after the charge is filed with the EEOC, or 240 days if the charge is referred to an FEP agency, before she can file suit in federal court.[227] Under the mandatory/optional rationale employed by the courts, this 180 or 240 day time period is clearly mandatory under Title VII. Yet, under this rationale, it does not make sense to only award fees for this initial period of conciliation, and not for the settlement achieved through informal dispute resolution, which may take longer than the preliminary period. The other illogical result of applying the mandatory/optional distinction is stopping the accrual of attorney's fees after this initial period and recommencing the accrual of fees when the aggrieved employee engages in mandatory administrative proceedings or litigation.[228] Limiting fee awards to a narrow interpretation of "mandatory" proceedings does not recognize the significance of informal dispute resolution. This reasoning ignores both the integral role that preliminary conciliation plays[229] and the purpose of assisting impecunious civil rights victims to vindicate their rights.[230]

The consequence of not awarding attorney's fees for informal dispute resolution creates two mutually exclusive outcomes. First, this denial of fees creates a perfunctory period of "conciliation," in which the aggrieved employee forgoes as soon as possible (after the 180 or 240 day period) in order to file a protective lawsuit to recover attorney's fees. Second, if the conciliation is meaningful and results in a favorable result for the aggrieved party, it is a pyrrhic victory because she must pay attorney's fees. Ideally, a third outcome is possible: conciliation occurs within this short time period and perhaps the complainant recovers attorney's fees.[231]

Some courts argue that when recovery of attorney's fees is available, there is no incentive to litigate a claim to a "mandatory" level because competent counsel will not advise the client against pursuing informal dispute resolution.[232] These courts, however, fail to ac-

226. *Id.* at 418.

227. 42 U.S.C. § 2000e-f(5).

228. *See* Silver, *supra* note 223, at 418 (discussing the role of administrative proceedings).

229. *See supra* notes 74-76 and accompanying text.

230. *See* discussion *supra* part III.A.

231. Research has not revealed any cases in which an aggrieved party recovered attorney's fees for this preliminary period. Perhaps, court actions are not filed to recover attorney's fees for this short period because the cost of these fees is not large and the chance of recovering both the original fees incurred and the additional fees for filing the suit to recover all of the fees is slim.

232. *See* Duello v. Board of Regents, 501 N.W.2d 38, 47 (Wis. 1993); *cf.* North Carolina Dep't of Transp. v. Crest St. Community Council, Inc., 479 U.S. 6, 14-15 (1986)

knowledge that while competent counsel will advise the client regarding the best avenues of relief, including informal dispute resolution, only the client knows what remedies she can afford. Once the client, especially one of limited means, finds out that her success at the administrative level comes with a price tag, she may not want to pursue such a bittersweet victory.

The Supreme Court in *Carey* also recognized the importance of hiring private counsel for administrative proceedings.[233] For informal dispute resolution, the need for a private attorney is greater at this preliminary stage of a Title VII claim because the law does not provide the complainant with counsel. The need increases in light of the often crucial investigation and bargaining that occurs at this initial level.[234]

Some courts also propose that permitting attorney fee awards for internal grievance procedures inhibit a company from implementing such procedures.[235] This rationale, however, is unconvincing and generally obsolete given the current law of employer liability for sexual harassment.[236] Effective internal grievance procedures usually shield companies from liability, which is one of the main reasons companies implement these procedures.[237] On the other hand, the employee who participates in internal grievance procedures without an attorney is less likely to prevail.[238] Yet, if an employee refuses to participate in internal dispute resolution, she may prolong her harassment, as well as subject herself to pressure by the EEOC to engage in conciliation.[239] Thus, the employer suffers no detriment by refusing to pay attorney's fees at this level, while the employee does.

Under the current trend in the law to deny attorney's fees for informal dispute resolution, the options for the employee are not favorable: pay for an attorney she cannot afford; forgo obtaining an attorney and perhaps suffer an unfavorable resolution of the dispute; be uncooperative and also likely suffer the negative consequences; or seek administrative or other judicial relief although she would rather

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(discussing competent counsel for section 1988 claims); Webb v. County Bd. of Educ., 471 U.S. 234, 241 n.15 (1985) (same).

233. 447 U.S. 54, 70 (1980).

234. *See supra* notes 61-62 and accompanying text.

235. *See* Manders v. Oklahoma *ex rel.* Dep't of Mental Health, 875 F.2d 263, 267 (10th Cir. 1989); Duello v. Board of Regents, 501 N.W.2d 38, 46 (Wis. 1993).

236. *See* discussion *supra* part I.A.

237. *Id.*

238. *See supra* notes 61-64 and accompanying text.

239. 42 U.S.C. § 2000e-4(g)(1) provides:

> The Commission shall have power . . . upon request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuation the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title . . . .

Id.

keep the charges more private. Courts should protect the interests of women subject to sexual harassment, as Congress intended the courts to do when it enacted Title VII and section 706(k), and make attorney's fees available to the employee who vindicates her right to be free from sexual harassment through informal dispute resolution.

IV. Proposed Guidelines for Awarding Attorney's Fees

To provide a meaningful avenue to uphold the employee's civil rights, section 706(k) of Title VII should cover not only claims that are litigated in administrative proceedings and court actions, but also claims resolved through informal dispute resolution. As the Second Circuit in *Carey* summed up, "the question is whether section 706(k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court."[240] Because informal dispute resolution obviates the need to litigate in administrative or judicial proceedings, fees should be available. Moreover, courts should follow *Moreno* and award attorney's fees for proceedings that occurred before the filing of a Title VII action, if such proceedings ultimately lead to the resolution of the Title VII action in favor of the plaintiff.[241] Fees also should be available for the complainant who avoids the need to engage in a court action or an administrative proceeding because the employer has redressed the discrimination through informal procedures.

Beyond allowing recovery for attorney's fees, a clearer framework should be in place for addressing due process concerns because employers may not be on notice that they have to pay a complainant's attorney's fees. Adequate notice can be based on filing with the EEOC or the appropriate state or local FEP agency. By law, these Title VII agencies must inform employers of the filed charges against them within ten days.[242] A complainant, however, should still be able to recover attorney's fees for a "reasonable period of time prior to the notification of representation," in accordance with the current EEOC guidelines.[243] In addition, adequate notice also can come directly

240. Carey v. New York Gaslight Club, Inc., 598 F.2d 1253, 1257 (2d Cir. 1979).

241. 567 F. Supp. 458 (N.D. Cal. 1983).

242. 42 U.S.C. 2000e-5(b) provides that after a charge is filed, the EEOC must "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" within ten days.

243. C.F.R. 1613.271(d)(iv) provides:

> Attorney's fees shall be paid only for services performed after the filing of the complaint required . . . and after the complainant has notified the agency that he or she is represented by an attorney, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant.

Id.

from the employee who informs the employer that she has retained an attorney to assist her with remedying the sexual harassment.

Providing for attorney fee-shifting at the informal level will also equalize the bargaining power of the aggrieved employee and the employer. While arguably the wise attorney and complainant will stipulate to attorney's fees, this is not a satisfactory response to the unavailability of fees for informal dispute resolution. First, the employer has the upper hand in this situation because fee awards are often rejected after the parties have reserved this issue for a future time.[244] Second, an employer can negotiate a settlement that incorporates a waiver of attorney's fees.[245] Thus, there is no reason for an employer to agree to pay the complainant's attorney's fees except out of good faith, unless Congress amends Title VII or the Supreme Court creates a bad faith exception to such waivers.[246]

The lack of any reference in section 706(k) or its legislative history to whether attorney fee-shifting should apply to administrative proceedings or informal dispute resolution indicates that Congress did not foresee this problem. While the Supreme Court has discerned Congress' intent to permit fee awards for services rendered during state administrative remedies, it has not extended this to informal dispute resolution, despite the statutory emphasis on these types of proceedings. Congress, therefore, must intervene and amend section 706(k) to specify that fee awards are permissible for a prevailing party in formal dispute proceedings brought to enforce Title VII.

Textually, the proposed amendment to Title VII should provide that:

> In any action or proceeding under this subchapter [42 U.S.C. § 2000e] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.
>
> *A court may award such fees to a party who has prevailed in any proceedings, brought to enforce a claim under this title, including (but not limited to):*
>
> *1. judicial proceedings;*
>
> *2. federal, state, or local administrative proceedings; and*

244. *See, e.g.*, Webb v. County Bd. of Educ., 471 U.S. 234 (1985) (reserving issue of recovery of attorney's fees, which were later denied); Chrapliwy v. Uniroyal, Inc., 509 F. Supp. 442 (N.D. Ind. 1981) (reserving issue of recovery of attorney's fees to the district court, which held such fees were not recoverable for the portion of the attorneys' work at the informal level), *rev'd*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983).

245. Evans v. Jeff D., 475 U.S. 717 (1986).

246. *See* Margaret Annabel de Lisser, Note, *Giving Substance to the Bad Faith Exceptions of* Evans v. Jeff D.*: A Reconciliation of* Evans *with the Civil Rights Attorney's Fee Awards Act of 1976* (1987) (discussing *Evan*'s bad faith exception which may prohibit the defendant who regularly negotiates fee waivers).

> *3. informal dispute resolution proceedings.*
>
> *Costs can only be recovered for a prevailing party if the company had adequate notice of the complaint's representation by counsel. Such adequate notice results when the complainant files with the Commission.*
>
> *Fees are recoverable regardless of whether the complainant resorts to an administrative proceeding or court action or whether a court action is filed.*[247]

This proposed amendment would provide clearer guidance for courts and at the same time allow courts to use their discretion to determine which proceedings enforce Title VII.

At a minimum, courts should acknowledge the goals underlying Title VII—to provide equal access for aggrieved employees to vindicate their rights to be free from employment discrimination—and interpret Title VII to allow fee awards for informal dispute resolution. Courts should recognize that in writing legislation, Congress cannot possibly conceive of every facet and ramification of an enactment.[248] In addition, the process of amending legislation is fraught with obstacles that make it difficult for Congress to modify current legislation.[249]

Congress should rectify and courts should recognize the integral role informal dispute resolution plays in Title VII by awarding attorney's fees to prevailing complainants. To overlook the comprehensive remedial scheme of Title VII and the policies that perpetuate it is to hinder aggrieved employees, especially women, from bringing sexual harassment claims and redressing the violation of their civil rights.

V. CONCLUSION

Informal dispute resolution offers women the opportunity to resolve their claims of sexual harassment in the most informal, private manner. Elements that contribute to women's desire to keep sexual harassment a private claim are the psychological and economic effects of the harassment, as well as the legal ramifications of bringing a claim of harassment.

Women and employers both have an interest in resolving complaints of sexual harassment, but their interests are not always aligned. Although both parties want the harassment to subside in an expedited, private fashion, women may also want to preserve their causes of action, while employers want to shield themselves from liability. Because of these divergent interests and the role an attorney can play in protecting women's right to be free from sexual harassment, fee-shifting must be allowed in informal dispute resolution.

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247. Emphasis is on the proposed changes to section 706(k), 42 U.S.C. § 2000e-5(k).

248. *See* Silver, *supra* note 223, at 397 (reviewing the reasons for ambiguous statutory enactments).

249. *Id.*

The recent trend in the lower courts, however, is to deny recovery of attorney's fees for informal dispute resolution. This denial of fees undercuts the purpose of Title VII to redress the rights of victims of sexual harassment through various remedial measures, including informal dispute resolution. Congress, therefore, should amend Title VII to incorporate attorney fee-shifting for informal dispute resolution in order to provide women with a more private, less adversarial forum to redress violations of sexual harassment.