CREST: JUDICIAL PRECLUSION OF AN INDEPENDENT SUIT SOLELY FOR ATTORNEYS’ FEES UNDER TITLE VII?

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A request for attorney’s fees should not result in a second major litigation.¹

I. INTRODUCTION

In the United States, parties to a lawsuit ordinarily pay their own attorneys’ fees regardless of who prevails.² The United States Supreme Court has expressly held that only Congress, not the courts, may create exceptions to this general rule.³ Accordingly, absent a recognized exception to this rule,⁴ a federal court may not award attorneys’ fees unless Congress has specifically provided, by statute, the power to do so.⁵

Congress has provided for fee-shifting in favor of prevailing parties in over 130 statutes,⁶ including the Civil Rights Act of 1964 (title VII) and the Civil Rights Attorney’s Fees Awards Act of 1976

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⁴ A court possesses the inherent power to assess attorneys’ fees for willful disobedience of a court order, when a losing party has acted in bad faith, or upon application of the “common benefit” exception which spreads the cost of litigation to those benefiting from it. Pennsylvania v. Delaware Valley Citizens’ Council, 478 U.S. 546, 562 n.6 (1986); Alyeska Pipeline, 421 U.S. at 245, 258-59; Denbo Iron & Metal Co. v. Transportation Ins. Co., 792 F. Supp. 1234, 1237 (N.D. Ala. 1992); Aguinaga v. United Food & Commercial Workers Int’l, 142 F.R.D. 328, 331 (D. Kan. 1992).
⁵ Clarke, 960 F.2d at 1152. See also Wilder v. Bernstein, 965 F.2d 1196, 1201 (2d Cir. 1992) (“Unless Congress empowers it, a federal court has no authority to award attorneys’ fees to prevailing parties.”); Panola Land Buying Ass’n v. Clark, 844 F.2d 1506, 1510 (11th Cir. 1988) (stating that, absent specific statutory authority, a federal court may not realign the American rule’s allocation of attorneys’ fees).
(Fees Awards Act). Under both statutes, one may be entitled to attorneys' fees as a "prevailing party" even if the judicial action is resolved by settlement, offer of judgment, or if the action merely serves as a catalyst for obtaining relief.

A question that remains unresolved, however, is whether title VII permits a prevailing party to bring suit solely for attorneys' fees when the complaint is resolved prior to the initiation of a judicial action addressing the substantive merits of the underlying discrimination complaint. The resolution of this issue will have a profound impact on the manner in which corporate defendants approach informal resolution of employee discrimination complaints. Neither the statute itself nor the legislative history surrounding its enactment specifically addresses this question. However, in language that appeared to encompass title VII, the Supreme Court held, in *North Carolina Department of Transportation v. Crest St. Community Council,* that such suits may not be brought pursuant to the Fees Awards Act.

It would be a natural extension of judicial treatment of the two statutes to expand the Court's holding in Crest to title VII. The Fees

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7. The two statutes read, in relevant part, as follows:
   
   In any action or proceeding under this title [42 U.S.C.S. § 2000e] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.


   8. Evans v. Jeff D., 475 U.S. 717, 725 & n.9 (1986) (holding that the Fees Act requires an award of fees to a plaintiff who prevails by settlement); Maher v. Gagne, 448 U.S. 122, 129 (1980) (awarding fees to a plaintiff who prevailed by settlement); Lyte v. Sara Lee Corp., 950 F.2d 101, 105 (2d Cir. 1991) ("No adjudication of rights or admission of fault is necessary for a fee award."); Dover v. Rose, 709 F.2d 436, 439 (6th Cir. 1983) (recognizing that a plaintiff may qualify as a prevailing party through settlement, or "if his lawsuit acts as a 'catalyst' which causes the defendant to make significant changes in its past practices"); Sullivan v. Pennsylvania Dep't of Labor, 663 F.2d 443, 448 (3d Cir. 1981), cert. denied, 455 U.S. 1020 (1982) (basing fee award on whether the plaintiff's suit 'acted as a 'catalyst' for the vindication of her constitutional rights'); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429-30 (8th Cir. 1970) (awarding fees because the plaintiff's suit acted as a catalyst).

Awards Act was patterned after title VII; consequently, the language of the statutes are similar. Additionally, Congress intended that the standards for awarding attorneys’ fees be the same for both statutes. Finally, the courts use judicial precedents interpreting the two fee-shifting statutes interchangeably. Thus, the unique historical link between title VII and the Fees Awards Act, and the synonymous treatment generally afforded them by the courts, requires the conclusion that the Supreme Court’s holding in Crest is authoritative in the title VII context.

II. The Carey, Webb, Crest Trilogy

Three Supreme Court cases addressing the availability of attorneys’ fees pursuant to the Fees Awards Act and title VII for work done at the pre-judicial level delineate the contours of attorneys’ fees entitlements. In New York Gaslight Club, Inc. v. Carey, the plaintiff brought an action in federal court for a violation of title VII. Prior to filing the action, the plaintiff had exhausted title VII’s mandatory administrative proceedings. Title VII requires a complainant to first present the discrimination charge to the Equal Employment Opportunity Commission (EEOC) or, if applicable, to the appropriate state or local fair employment agency. Addressing the plaintiff’s request for attorneys’ fees incurred in administrative proceedings before the appropriate state agency, the Supreme Court held that because the administrative proceedings were mandatory under title VII, attorneys’ fees incurred in such proceedings should be compensable.

The Court also noted:

10. See infra notes 36-44 and accompanying text.
11. See infra notes 36-44 and accompanying text.
12. See infra notes 36-44 and accompanying text.
15. 42 U.S.C. § 2000e-5(c) (1989). See also Cobb v. Anheuser Busch, Inc., 793 F. Supp. 1457, 1483 (E.D. Mo. 1990) (acknowledging that filing a complaint with the EEOC, or the appropriate state or local agency, is required prior to invoking federal court jurisdiction); Hiduchenko v. Minneapolis Medical & Diagnostic Ctr., 467 F. Supp. 103, 107 (D. Minn. 1979) (holding that the EEOC must defer to a state counterpart that is empowered to act on discrimination claims). See generally Mack A. Player, Employment Discrimination Law §§ 5.71-.73(a) (1988) (discussing the general administrative procedures to be followed in filing discrimination claims).
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. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.\(^\text{17}\)

In a concurring opinion, however, Justice Stevens stated that "[i]t is by no means clear that the statute [title VII], which merely empowers a 'court' to award fees, would authorize a fee allowance when there is no need for litigation in the federal court to resolve the merits of the underlying dispute."\(^\text{18}\)

In *Webb v. County Board of Education*,\(^\text{19}\) the parties had entered into a consent decree successfully resolving the plaintiff's claims under 42 U.S.C. section 1983. The plaintiff then sought statutory fees under section 1988 for work performed at the administrative level, before the local board of education, prior to the filing of his judicial complaint.\(^\text{20}\) Unlike title VII, in this case the statute contained no exhaustion of administrative remedies requirement and any work performed at the administrative level was optional.\(^\text{21}\) On the basis of section 1988's language "any action or proceeding," the Court held that the plaintiff was not entitled to automatic compensation for work performed in optional administrative proceedings that were established to enforce rights created by state law and were "not any part of the proceedings to enforce § 1983."\(^\text{22}\) The Court opined that hours spent in optional administrative proceedings might be compensable, however, if they were "reasonably expended on the litigation."\(^\text{23}\) It is important to note that in both *Carey* and *Webb* the

\(^{17}\) *Id.* at 66.

\(^{18}\) *Id.* at 72. This situation would arise "if, before any federal litigation were commenced, an aggrieved party had obtained complete relief in the administrative proceedings." *Id.*

\(^{19}\) 471 U.S. 234 (1985).

\(^{20}\) *Id.* at 239-40.

\(^{21}\) *Id.* at 240-41 (quoting Smith v. Robinson, 468 U.S. 992 (1984)).

\(^{22}\) *Id.* at 241.

\(^{23}\) *Id.* at 242.
plaintiffs had filed suit addressing the merits of their complaints before their charges were resolved out of court.

In North Carolina Department of Transportation v. Crest St. Community Council, the Court held that a court may not award attorneys' fees under the Fees Awards Act in a separate federal action brought solely to recover attorneys' fees. In Crest, the plaintiff's civil rights action was settled prior to filing a federal suit in an agreement in which the plaintiff did not waive any right to attorneys' fees. Plaintiff then filed an action in district court solely for attorneys' fees under the Fees Awards Act, which action was denied. The Fourth Circuit reversed and remanded, holding that section 1988 allowed a separate action for fees. In so doing, the court emphasized the similar enforcement schemes of titles VI and VII "in that they both rely heavily on administrative proceedings in the first instance."

Significantly, the Supreme Court did not examine whether the negotiations constituted "proceedings" under the statute, but instead reversed based on the reasoning that section 1988's language dictated, first, that the judicial action be one designed to "enforce" the enumerated civil rights laws, and, second, that only the court actually entertaining the substantive claim of a civil rights violation may award attorneys' fees. The majority believed it "entirely reasonable to limit the award of attorney's fees to those parties who, in order to obtain relief, found it necessary to file a complaint in court." The Supreme Court reasoned that such a holding would create "a legitimate incentive for potential civil rights defendants to resolve disputes expeditiously, rather than risk the attorney's fees liability connected to civil rights litigation."

25. Id. at 11.
28. Id.
30. Id. at 12. See also Erika Geetter, Attorney's Fees for § 1983 Claims in Fair Hearings: Rethinking Current Jurisprudence, 55 U. Chi. L. Rev. 1267, 1285 (1988) (stating that the plaintiff must seek to enforce civil rights laws listed in § 1988 and "the court that awards the attorney's fees must be the same court in which a complaint that includes a civil rights violation is filed").
32. Id. at 15.
III. Crest Applies to Title VII

Although the Court in Crest focused on addressing entitlement to attorneys' fees pursuant to the Fees Awards Act, it made specific reference to title VII in the context of attorneys' fees. The Court characterized as "dicta" that portion of the decision in Carey which suggested that a title VII plaintiff could maintain an independent suit solely for attorneys' fees. The Court also rejected as dicta that portion of White v. New Hampshire Department of Employment Security, which had relied on Carey to hold 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.'"

In reaching its decision in Crest, the Court relied upon the "plain language" and legislative history of section 1988. Part of this plain language highlighted by the Court was the phrase "the court." The majority believed that such language limited awards of attorneys' fees to situations in which the parties had first initiated a lawsuit addressing the merits of the underlying complaint. In their dissent, the minority noted and objected to such a rule of statutory interpretation:

The Court holds that the plain language of § 1988 reveals that an award of attorney's fees is authorized only for parties who substantially prevail on a civil rights claim in a lawsuit . . . the Court reasons that § 1988, by its own terms, contemplates that only "the court" which has also entertained the substantive claim of a civil rights violation may award attorney's fees. Certainly nothing in the language of § 1988 requires this outcome.

Although the Court in Crest was responding to an attorneys' fees petition under 42 U.S.C. section 1988, the Fees Awards Act

34. 455 U.S. 445 (1982).
36. Id. at 12.
37. Id.
38. Id. at 17 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting).
"is 'similar in purpose and design to Title VII's fee-shifting provision," and the language of the two statutes is viewed as synonymous. The Court noted that section 1988 employs phraseology virtually identical to that used in Title VII fee provisions. Further, Congress intended to model section 1988 after the Title VII fee provision, and courts have generally held that opinions concerning fees under the Fees Awards Act are authoritative in the Title VII context. Indeed, in Coulter v. Tennessee, the Sixth Circuit stated that it "considered the legislative history of § 1988 to be indicative of congressional intent relative to § 2000e-5(k)."

Given the number of times that the Crest Court addressed the Carey decision, it would be incongruous for the holding in Crest to be limited to attorneys' fees awards pursuant to section 1988.


40. North Carolina Dep't of Transp. v. Crest St. Community Council, 479 U.S. 6, 15 (1986) (noting that the fees provision language of the Fees Awards Act and Title VII is "identical"). See also Sullivan, 663 F.2d at 447 n.5, cert. denied, 455 U.S. 1020 (1982) (noting that § 1988 "is worded identically to section 706(k)"). Cf. Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (finding that because the statutes' language is substantially the same, there is a strong indication that they should be interpreted alike); Wilder v. Bernstein, 965 F.2d 1196, 1201 (2d Cir. 1992) (relying on the Zipes court's assertion that the statutes' substantially similar language indicates that they should be interpreted alike).

41. Hanrahan v. Hampton, 446 U.S. 754, 758 n.4 (1980); Hensley v. Eckhart, 461 U.S. 424, 433 n.7 (1983) (relying on the Hanrahan Court's assertion that "[t]he provision for counsel fees in § 1988 was patterned upon the attorney's fees provision[ ] of title VII"); Coulter, 805 F.2d at 149 n.3; Zabkowicz v. West Bend Co., 789 F.2d 540, 549 n.9 (7th Cir. 1986) ("Congress intended that the standards for awarding fees under both section 2000e-5(k) and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, be the same.").

42. Hensley, 461 U.S. at 433 n.7; Parton v. GTE North, Inc., 971 F.2d 150, 155 n.3 (8th Cir. 1992); Lyte, 950 F.2d at 103; In re Burlington Northern, Inc. Employment Practices Litig., 832 F.2d 422, 424 (7th Cir. 1987). Cf. Grant v. Martinez, 973 F.2d 96 (2d Cir. 1992) (applying the statutes' case law interchangeably); Fadhl v. City & County of San Francisco, 859 F.2d 649, 650 n.1 (9th Cir. 1988) (holding that the standards are the same); Ciechon, 686 F.2d at 525 ("[C]ourts have freely applied Title VII attorneys' fees precedents to Section 1988 actions."); Salone v. United States, 645 F.2d 875, 879 (10th Cir. 1981) (reasoning of a case interpreting § 1988 should apply to Title VII attorneys' fees awards); Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127, 129 n.2 (10th Cir. 1980) (stating that the identity of language and policy behind both statutes makes separate analyses unnecessary).

43. 805 F.2d 146 (6th Cir. 1986).

44. Id. at 149 n.3.

45. Crest, 479 U.S. at 11-15 (noting the "identical language of Title VII").
Indeed, other legal commentators agree that the Court in Crest either explicitly or implicitly rejected the reasoning of the Carey holding that seemed to permit a plaintiff to bring a separate action under title VII to recover fees for work performed in administrative proceedings regardless of the filing of a federal action. The plaintiff in Crest filed an action in district court solely for attorneys' fees under section 1988; title VII was not specifically implicated in the suit. Nevertheless, the Court elected to reject as dicta that statement in Carey that "section 706(f)(1)’s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney’s fees for legal work done in state and local proceedings."  

IV. THE MANDATORY/OPTIONAL EXHAUSTION DISTINCTION—PUTTING THE CART BEFORE THE HORSE IN A TWO-PART TEST

Although the Court did not make the distinction in Crest, one may arguably distinguish the claim for fees in Carey from the Crest decision by focusing on the title VII requirement that a claimant first exhaust administrative remedies prior to filing suit. This distinction rests on the premise that title VII, as articulated in Carey, views administrative proceedings as an integral part of civil rights enforcement, whereas statutes covered by the Fees Awards Act, as discussed in Webb, view administrative proceedings as optional or largely unrelated to the enforcement of civil rights laws in federal court.

46. Brand, supra note 2, at 325 ("Justice O'Connor limited Carey's holding that fees are recoverable for work performed in mandatory administrative proceedings by pronouncing that no fees may be recovered for any administrative work absent the filing of a civil action") (emphasis added); William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L. Rev. 1361, 1435 (1988) ("Court rejects 'dicta' in Carey and curtails its reasoning.").
47. Crest, 479 U.S. at 7.
48. 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, 393 (1989) (citing Carey, 447 U.S. at 66). See Crest, 479 U.S. at 13-14 (discussing the idea that "the authorization of attorney's fee awards only by a court in an action to enforce the listed civil rights laws would be anomalous").
50. Geetter, supra note 30, at 1286.
In the attorneys' fees context, however, the Court in *Crest* appeared to specifically reject this form of statutory analysis. As the Court noted, "An interpretation of [a statute] cannot be based on the assumption that 'an attorney would advise the client to forgo an available avenue of relief [e.g., settlement of a claim at the administrative level] solely because [the statute] does not provide for attorney's fees . . . ."  

*Crest*'s sweeping prohibition against the award of attorneys' fees, absent first filing suit on the merits, undercuts the mandatory/optional distinction argument. Like title VII, title VI of the Civil Rights Act of 1964, 42 U.S.C. section 2000d, mandates the filing of an administrative complaint prior to the filing of a lawsuit in district court; however, unlike title VII, title VI does not require that such administrative proceedings be exhausted as a prerequisite to filing suit. At least for the purposes of initiating an administrative complaint, title VI has a "mandatory" component to its associated administrative proceedings. The Court in *Crest* did not draw this type of mandatory/optional distinction in its holding, but instead pronounced that no fees may be recovered for any administrative work absent the filing of a federal suit.

This article does not contradict the proposition that the mandatory/optional exhaustion distinction is an important difference between the two statutes; however, for purposes of determining entitlement to title VII attorneys' fees in an independent suit filed to recover such fees for a complaint resolved administratively, it is a difference but not a distinction.

Taken together, the *Carey*, *Webb*, *Crest* trilogy of Supreme Court cases, coupled with normal canons of statutory construction, dictate a two-part test to determine entitlement to attorneys' fees for work performed at the administrative level, in which the exhaustion distinction factors into only the second part.

"The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'"  

Further, in interpreting a statute courts must give effect

51. *Crest*, 479 U.S. at 15.
to every word used by the legislature.\textsuperscript{55} Because both title VII and the Fees Awards Act indicate that only "the court"\textsuperscript{56} may award fees, and neither statute possesses clearly expressed legislative intent to the contrary,\textsuperscript{57} the plaintiff must first file suit in federal court on the substantive merits of the underlying discrimination complaint before a court may award attorneys' fees.\textsuperscript{58}

A plaintiff should not be permitted to circumvent this requirement by filing a protective suit prior to the exhaustion of title VII's administrative avenues of redress.\textsuperscript{59} It is axiomatic that a party must exhaust available administrative remedies before seeking judicial re-

\textsuperscript{55} In re Kitchin Equip. Co. of Va., 960 F.2d 1242, 1247 (4th Cir. 1992). See also United States v. Menasche, 348 U.S. 528, 538-39 (1955) (holding that a court has a duty "to give effect, if possible, to every clause and word of a statute") (quoting Montclair v. Ransdell, 107 U.S. 147, 152 (1882)); Beisler v. Commissioner of Internal Revenue, 814 F.2d 1304, 1307 (9th Cir. 1987) (en banc) (noting that a court "should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress").

\textsuperscript{56} See 42 U.S.C. § 2000e-5(k) (1989) ("[T]he court . . . may allow the prevailing party . . . a reasonable attorney's fee . . . ."); id. § 1988 ("[T]he court . . . may allow the prevailing party . . . a reasonable attorney's fee . . . .").

\textsuperscript{57} See Carey, 447 U.S. at 63 (noting § 706(k)'s "sparse" legislative history), 71 (finding it doubtful that Congress intended suit solely for attorneys' fees) (Stevens, J., concurring); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420 (1978) (noting § 706(k)'s "sparse legislative history"); Silver, supra note 48, at 386-87 (commenting that the legislative history regarding attorneys' fee awards for work done at the administrative level is unclear).

\textsuperscript{58} See Crest, 479 U.S. at 12 (emphasizing the word "court"); Carey, 447 U.S. at 72 (Stevens, J., concurring) (commenting that "[i]t is by no means clear that the statute, which merely empowers a 'court' to award fees, would authorize a fee allowance when there is no need for litigation in the federal court to resolve the merits of the underlying dispute"). Cf. Latino Project, 701 F.2d at 264 (indicating that "Congress' use of the term 'court' within the same sentence that contains the words 'civil action or proceeding' leads us to believe that Congress had in mind only a lawsuit when it used those words"); Brand, supra note 2, at 325 (noting Justice O'Connor's reasoning in Crest "that because the Fees Act provides that 'the court' may award fees, '[o]n its face, § 1988 does not authorize a court to award attorneys' fees except in an action to enforce the listed civil rights laws'").

\textsuperscript{59} The concern that a plaintiff would file such a protective suit was originally raised in Carey, but later rejected in Crest. Crest, 479 U.S. at 14-15. The Court in Crest also rejected the argument that "competent counsel" would forego the administrative route in order to pursue attorneys' fees, where the administrative procedures have not been completed in a timely fashion. Id.
view; otherwise, filing such a suit would permit a plaintiff to completely circumvent the procedures established by the statute, undermining the purpose of the exhaustion requirement. Suits filed prior to exhausting title VII’s mandatory exhaustion requirement are routinely dismissed. If a court elects to dismiss the premature suit without prejudice, such dismissal has the legal effect of leaving the situation as if the action had never been filed. Further, if plaintiff seeks provisional relief, such as a Temporary Restraining Order (TRO), that is not an adjudication on the merits but rather


61. See Babrocky v. Jewel Food Co. & Retail Meatcutters Union, 773 F.2d 857, 863 (7th Cir. 1985) (holding that the purpose is investigation, conciliation, and notice to employer); Parsons v. Yellow Freight System, Inc., 741 F.2d 871, 873 (6th Cir. 1984) (finding that the purpose is to give an “opportunity to attempt conciliation and voluntary settlement”); Garcia v. Gardner’s Nurseries, Inc., 585 F. Supp. 369, 373 (D. Conn. 1984) (noting that the purpose is “to give notice to the employer of the alleged discriminatory actions, and to facilitate voluntary compliance should the EEOC find cause for the complaint”); Warren v. Halstead Indus., 33 Fair Empl. Prac. Cas. (BNA) 1416, 1421 (M.D.N.C. 1983) (holding that the purpose is “notice and an opportunity to resolve [discrimination claims] through administrative conciliation”); Thompson v. Board of Educ., 71 F.R.D. 398, 413 (W.D. Mich. 1976) (same).


is merely designed to maintain the status quo, the filing of such a pleading would also not satisfy this portion of the test. If a plaintiff, under either statute, has filed suit in federal court addressing the merits of the underlying discrimination complaint before the action was resolved, then the second portion of the test—the mandatory/optimal exhaustion distinction—would be invoked. A prevailing plaintiff would be entitled to fees for work performed in mandatory administrative proceedings, but would be entitled to fees for work performed at optional administrative proceedings only if such work was "reasonably expended on the litigation." To establish this entitlement, a plaintiff must prove that the work in the optional proceedings was "both useful and of a type ordinarily necessary to advance the civil rights litigation . . . ."

The two-part entitlement test approach, as dictated by the trilogy of Supreme Court cases, has not been disturbed by recent court cases addressing statutory provisions for attorneys' fees. In Sullivan v. Hudson, the Supreme Court held that a claimant could receive attorneys' fees under the Equal Access to Justice Act (EAJA) for work performed at the administrative level following a remand by the district court. The EAJA authorizes a court to award reasonable attorneys' fees to a "prevailing party" in a "civil action" or "judicial review of agency action," unless the position taken by the United States in the contested proceeding was "substantially justified" or

64. See Libby v. Illinois High School Ass'n, 921 F.2d 96, 99 (7th Cir. 1990) (finding that a TRO was merely a procedural victory designed to maintain the status quo, it was not a decision on the merits) (citations omitted); Paragould Music Co. v. City of Paragould, 738 F.2d 973, 975 (8th Cir. 1984) (noting that a TRO "was in no way a determination on the merits and merely preserved the status quo") (quoting Bly v. McLeod, 605 F.2d 134, 137 (4th Cir. 1979), cert. denied, 445 U.S. 928 (1980)).

65. Webb, 471 U.S. at 242 (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Cf. Chralpliwy v. Uniroyal, Inc., 670 F.2d 760, 767 (7th Cir. 1982), cert. denied, 461 U.S. 956 (1983) (holding that title VII should be interpreted to permit attorneys' fees to prevailing parties for services in collateral proceedings that "contribute to the ultimate termination of the Title VII action"). Contra Manders, 875 F.2d at 267 n.3 (disallowing recovery of attorneys' fees for an optional internal grievance procedure because "it would tend to discourage private employers, as well as public employers . . . from instituting such potentially ameliorative procedures").


“special circumstances make an award unjust.” Relying upon Carey and other decisions interpreting fee-shifting statutes, the Court held that because of the “mandatory” nature of the administrative proceedings that were “intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.”

Because Hudson’s claim had been before the district court on its substantive merits prior to being remanded to the administrative level, the first prong of the attorneys’ fees entitlements test was satisfied. Accordingly, to determine fee entitlement, the Court in Hudson was only required to determine if the administrative proceedings were mandatory in nature or of a type necessary to advance the litigation. The Court subsequently dispelled any doubts about the applicability of this two prong analysis in Melkonyan v. Sullivan.

In Melkonyan, the Court addressed the issue of whether an administrative decision rendered following a remand from district court was a “final judgment” within the meaning of the EAJA for purposes of filing for attorneys’ fees. The Court determined that the most natural reading of the EAJA’s language dictated that the court before which the civil action is pending must render such a “final judgment”...

69. Id. § 2412(d)(1)(A). The statute reads, in relevant part: Except as otherwise specifically provided by statute, a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

70. Hudson, 490 U.S. at 888. The Court also cited Webb, Crest, and Pennsylvania v. Delaware Valley Citizen’s Council, 478 U.S. 546 (1986). Hudson, 490 U.S. at 888-89. In Delaware Valley, the Court found that because § 304(d) of the Clean Air Act and § 1988 were similar in language and purpose, they should be interpreted in the same manner. Delaware Valley, 478 U.S. at 559. Accordingly, the Court held that an attorney’s work performed in extra-judicial proceedings was compensable. Id. at 560. Significantly, the plaintiff had filed suit in federal court to compel the Commonwealth of Pennsylvania to implement provisions of the Clean Air Act. Id. at 549. The Court limited its holding, noting that it “express[ed] no judgment on the question whether an award of attorney’s fees is appropriate in federal administrative proceedings when there is no connected court action in which fees are recoverable.” Id. at 560 n.5.


72. Id. at 2159.
before the thirty day filing period commenced. While engaged in its analysis, the Supreme Court expressly restricted the qualifying administrative proceedings addressed in Hudson to those ‘where a suit has been brought in a court,’ and where ‘a formal complaint within the jurisdiction of a court of law’ remains pending and depends for its resolution upon the outcome of the administrative proceedings.”

V. Policy Considerations

In Jones v. American State Bank, the Eighth Circuit expressed concern that the foreclosure of a title VII cause of action solely for attorneys’ fees would force a complainant “to either forego representation [at the administrative level] or to settle quickly on the employer’s terms.” The Court in Crest appeared to reject such policy arguments. The legislative history of the Fees Awards Act clearly indicates that Congress passed the legislation to remedy the shortage of legal counsel in the wake of “substantial evidence that civil rights lawyers were refusing cases because of an inability to recover attorneys’ fees.” Notwithstanding such clear congressional intent, the Court refused to interpret the statute based on the assumption that the actions of an attorney would be driven by the availability of attorneys’ fees. In both the majority opinions of Crest and Webb, as well as the dissent in Carey, the Court professed a belief that counsel would be motivated by the best interests of their

73. Id. at 2161.
74. Id. at 2162 (quoting Hudson, 490 U.S. at 892). After remand to the administrative level, Melkonyan was successful in his pursuit of Supplemental Security Income disability benefits. Id. at 2158. Subsequently, Melkonyan applied for attorneys’ fees under the EAJA. Id.
75. 857 F.2d 494 (9th Cir. 1988).
76. Id. at 499.
clients rather than by the prospects of compensation. "Competent counsel will be motivated by the interests of the client to pursue . . . administrative remedies when they are available and counsel believes that they may prove successful." The Court refused to "assume that an attorney would advise the client to forgo an available avenue of relief merely because [section] 1988 does not provide for attorney's fees for work performed in the state administrative forum."

In an earlier case addressing the appropriateness of a waiver of attorneys' fees under the Fees Awards Act as a condition for settlement on the merits, the Court clearly dictated the ethical obligations of counsel when a client's best interests conflict with an attorney's financial interests in the litigation. In Evans v. Jeff D., the Court held that an attorney's "ethical duty was to serve his clients loyally and competently;" counsel "must not allow his own interests, financial or otherwise, to influence his professional advice." In Crest, the Supreme Court also recognized that the looming threat of an independent suit for attorneys' fees could actually discourage resolution of discrimination at the pre-judicial level. Ofentimes, an employer will attempt to resolve a complaint at the informal level, even when it believes that no discrimination has occurred. Because early resolution of a discrimination complaint is usually less costly in terms of both money and resources than a subsequent settlement or lawsuit, employers have a great incentive to make concessions in hopes of an early resolution. Awards of such items as improved performance evaluations, priority consideration for future promotions and training, or even something as basic as a mere apology, require minimal expenditure, prompting employers to make such concessions in order to resolve the complaint and avoid litigation. Additionally, the parties may include a provision

79. Silver, supra note 48, at 419 (citing Crest, 479 U.S. at 14-15; Webb, 471 U.S. at 241 n.15; Carey, 447 U.S. at 71 (White & Rehnquist, JJ., dissenting)). Professor Silver criticized the Court's position as unrealistic because lawyers practice law, first and foremost, to make a living. Id. at 420.
81. Webb, 471 U.S. at 241 n.15.
82. 475 U.S. 717 (1986).
83. Id. at 728.
84. Id. at 728 n.14.
85. Crest, 479 U.S. at 15. See also Evans, 475 U.S. at 736-37 (stating that unresolved attorneys' fees liability may hamper settlement).
for complete or partial attorneys’ fees as part of the settlement agreement.87

An employer’s potential liability for fees in a civil rights action can be formidable, and can sometimes dwarf any potential liability on the merits.88 When an employer cannot resolve the issue of attorneys’ fees as part of a negotiated settlement and is faced with a potential lawsuit for such fees after resolving the discrimination charge, informal settlement is less likely to occur, particularly when the employer believes its position would be defensible in court.89

In Evans, the Supreme Court recognized the danger that unresolved attorneys’ fees liability posed to informal resolution of civil rights claims. The Court believed “that parties to a significant number of civil rights cases will refuse to settle if liability for attorney’s fees remains open, thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants.”90 Further, in Marek v. Chesny,91 in an effort to promote both the goals of settlement and vindication of civil rights, the Court “implicitly acknowledged ... the possibility of a trade off between merits relief and attorneys’ fees” when it upheld a lump sum offer of full relief under Federal Rules of Civil Procedure 68 that resolved all issues in the case, including any liability for attorneys’ fees and costs.92

In Crest, the Court found that eliminating attorneys’ fees liability at the informal stage actually provided an incentive for the civil rights defendant to resolve the dispute expeditiously.93 From a policy standpoint, providing such a settlement incentive supports Congress’

87. See Silver, supra note 48, at 424 (citing Evans v. Jeff D., 475 U.S. 717 (1986)).
88. Evans, 475 U.S. at 734. See also Grant v. Martinez, 973 F.2d 96 (2d Cir. 1992) (discrimination case settled for $60,000; court awards $498,922.34 in attorneys’ fees); Randy C. Gepp, Offers in Judgment in Civil Rights Actions: Analysis and Strategy, 22 GA. SR. B.J. 146, 148 (Feb. 1986) (“In civil rights litigation, the final total award sought by a plaintiff may substantially exceed his actual proven damages because of large attorney’s fees awards under fee-shifting statutes. In fact, it is not uncommon for the attorney’s fee award to approach or exceed the damages awarded.”).
89. Cf. Evans, 475 U.S. at 731 n.20 (stating that title VII attorneys’ fees may serve as a bargaining chip for plaintiffs to encourage settlement when the prospect of winning at trial is doubtful).
90. Id. at 736-37.
92. Evans, 475 U.S. at 733.
93. Crest, 479 U.S. at 15. Cf. Evans, 475 U.S. at 732 (“[W]e believe that a general proscription against negotiated waiver of attorney’s fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement.”).
intention that an employer discover and voluntarily correct discrimination at the administrative level before the complainant be permitted to file a lawsuit.\textsuperscript{94}

The primary purpose of title VII is to eliminate discrimination from the workplace and ensure individual equality of employment opportunity.\textsuperscript{95} Title VII's fee-shifting provision was designed to further this goal by encouraging a plaintiff with limited funds to bring a meritorious civil rights case;\textsuperscript{96} it was neither enacted for the benefit of the Bar,\textsuperscript{97} nor designed to encourage attorneys' fees cases or to otherwise serve as a relief fund for lawyers.\textsuperscript{98} As the Eleventh Circuit stated in \textit{Panola Land Buying Association v. Clark},\textsuperscript{99} "It has not been unusual for those of us in the legal profession subjectively to consider that such fee provisions were enacted for the benefit of the Bar, but that is not the case. They were enacted for the benefit of the persons the statutes are designed to reach."\textsuperscript{100}

VI. LIMITED PRECEDENT

In \textit{Jones v. American State Bank},\textsuperscript{101} the defendant bank challenged the district court's authority to award attorneys' fees and costs in recognition of Jones' successful title VII prosecution of a sex discrimination complaint before a state agency. The bank did not argue the applicability of \textit{Crest} to title VII suits. Instead, it merely asserted that the \textit{Carey} decision left the question open\textsuperscript{102} because Carey, unlike


\textsuperscript{95} International Bhd. of Teamsters v. United States, 431 U.S. 324, 348 (1978).

\textsuperscript{96} \textit{Christiansburg Garment}, 434 U.S. at 420.

\textsuperscript{97} \textit{Panola Land Buying}, 844 F.2d at 1511.

\textsuperscript{98} Coulter, 805 F.2d at 149 n.4, 151.

\textsuperscript{99} 844 F.2d 1506 (11th Cir. 1988).

\textsuperscript{100} Id. at 1511.

\textsuperscript{101} 857 F.2d 494 (8th Cir. 1988).

\textsuperscript{102} Id. at 496.
Jones, had originally filed a judicial action seeking an adjudication on the merits.\textsuperscript{103}

Relying upon "themes which pervade title VII interpretation" and "policy arguments in Carey"—including the anomaly argument rejected in Crest\textsuperscript{104}—the Eighth Circuit held that a title VII suit could be maintained solely for attorneys' fees. The court's discussion of Crest was relegated to a footnote distinguishing title VII from other civil rights laws based upon title VII's mandatory administrative exhaustion requirement.\textsuperscript{105}

On at least two separate occasions, the issue of Crest's applicability to title VII has been directly before the circuit courts, but for various reasons the issue was not addressed. In Ball v. Abbott Advertising, Inc.,\textsuperscript{106} a successful title VII litigant before a Kentucky state agency filed suit solely for an award of attorneys' fees. The district court granted summary judgment for the defendant, concluding that the holding in Crest precluded such a suit.\textsuperscript{107} On appeal, the Sixth Circuit found it unnecessary to decide whether Crest applied to title VII because it determined that the suit was otherwise barred by the applicable statute of limitations.\textsuperscript{108}

In Alexander v. Stone,\textsuperscript{109} the parties resolved the plaintiff's discrimination complaint at the administrative level in a settlement agreement that provided for reasonable attorneys' fees to be calculated by the Secretary of the Army, or his designee, in accordance with Army regulations.\textsuperscript{110} Dissatisfied with the amount of the fee award, the plaintiff filed a lawsuit solely for an increased award.\textsuperscript{111} The Army moved for summary judgment, arguing, in part, that the reasoning of Crest was applicable to title VII and precluded an independent suit for attorneys' fees.\textsuperscript{112}

\textsuperscript{103. Id. at 496-97 (citing Carey, 447 U.S. at 71 (Stevens, J., concurring)).}
\textsuperscript{104. Id at 498.}
\textsuperscript{105. Id. at 498 n.10.}
\textsuperscript{106. 864 F.2d 419 (6th Cir. 1988) (per curiam).}
\textsuperscript{107. Id. at 420.}
\textsuperscript{108. Id. Plaintiff failed to file suit within 90 days of the EEOC's issuance of a notice of right to sue. Id. at 421.}
\textsuperscript{109. Plaintiff's Complaint at 5, Alexander v. Stone, No. 91-2685 (D.N.J. Mar. 8, 1992).}
\textsuperscript{110. Id. at 2.}
\textsuperscript{111. Id. at 3.}
\textsuperscript{112. Id. at 4.}
The district court agreed with the Army's position, holding that Crest applied to title VII, and granted defendant's motion to dismiss.\textsuperscript{113} As a preliminary matter, the district court noted that the fee provisions of section 1988 and title VII are generally given identical treatment.\textsuperscript{114} The district court stated that "Crest itself blurred the distinction between the two statutes."\textsuperscript{115} Additionally, the district court noted that the Crest Court had rejected the concern in Carey that because of the mandatory/optimal exhaustion distinction between the two statutes, potential complainants would be discouraged by the prospect of having to bear the expense of an administrative proceeding before going to court.\textsuperscript{116} This, the district court noted, would cause attorneys to find a pretext upon which to file some form of protective suit in federal court.\textsuperscript{117}

Continuing its analysis, the district court determined that "the Court in Crest rejected the dicta in Carey which suggested [an independent] title VII action could be maintained solely for attorneys' fees."\textsuperscript{118} It stated that the "value of dicta in a 1980 opinion is minimal at best when it has been specifically criticized in a subsequent opinion by the same court."\textsuperscript{119} The district court then held that the language of title VII providing that "the court ... may allow the prevailing party ... a reasonable attorney's fee as part of the costs ...", requires that attorneys' fees be awarded only by the court in which the action or proceeding occurred, and title VII's "sparse" legislative history did not compel a contrary result.\textsuperscript{120}

The plaintiff appealed the grant of summary judgment to the United States Court of Appeals for the Third Circuit. However, before the Third Circuit could address the issue, the parties resolved the litigation in a settlement agreement, which included a provision vacating the district court's holding.

\textsuperscript{113} Id.; Alexander v. Stone, No. 91-2685 (D.N.J., May 4, 1992) (Motion for Reconsideration, Memorandum and Order).
\textsuperscript{114} Stone, No. 91-2685, at 3 (D.N.J., May 4, 1992) (Motion for Reconsideration, Memorandum and Order) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983)).
\textsuperscript{115} Id. (citing Crest, 479 U.S. at 11, 13).
\textsuperscript{116} Id. (citing Crest, 479 U.S. at 14; Carey, 447 U.S. at 63, 66 n.6).
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 4-5.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
VII. Handicapped Children’s Protection Act

In 1986, Congress enacted the Handicapped Children’s Protection Act (HCPA), that provides attorneys’ fees to parents who prevail in complaints raised pursuant to the Education of the Handicapped Act (EHA). The EHA authorizes federal funds to states that provide free appropriate public education to handicapped children and concomitant administrative procedures to safeguard the right to such education. Parents are entitled to legal representation at the EHA administrative hearings and may file a judicial challenge to any adverse administrative determination.

Because the majority of courts have held that the HCPA, which contains an attorneys’ fee provision similar to that found in title VII, allows an independent suit solely for fees, plaintiffs’ attorneys may argue by analogy that title VII also permits such independent suits. However, while the statutory language of the HCPA is similar to the fee-shifting language of title VII, the legislative history of the two statutes is sufficiently different, and the historical link between title VII and the Fees Awards Act is sufficiently close, that the HCPA analogy must fail.

A. Statutory Language

As noted earlier, the first step in statutory analysis is to examine the statute’s plain language. The statutory language of the HCPA is closer to title VII than to section 1988. However, a comparison of the language of the three fee-shifting statutes, standing alone, is

124. Id.
126. Stone, No. 91-2685, at 5 (D.N.J. May 4, 1992) (Motion for Reconsideration, Memorandum and Order).
127. See supra note 54 and corresponding text.
inconclusive, requiring reference to the statutes' legislative history as well.

All three statutes contain the terms "action or proceeding" and "court" in the same sentence. The Third Circuit held that, as a matter of statutory construction, when Congress used those terms in the same sentence it intended to authorize the award of attorneys' fees only after the plaintiff has pursued the underlying merits of the claim in "a lawsuit." Likewise, the Supreme Court emphasized the word "court" in determining that a district court is not authorized to award attorneys' fees in an independent action brought solely to recover such fees.

The Fees Awards Act contains the language "to enforce" while title VII reads "under this subchapter" and HCPA reads "under this subsection." However, "under this subsection" in HCPA refers to subsection (e) of section 1415, and a facial reading of that statutory provision indicates that the only suit authorized in subsection (e) is the subparagraph (e)(2) federal suit on the merits of the controversy. Only by reading section 1415(e)(4)(B) in conjunction with other provisions of the HCPA have courts gleaned Congress' intent to apply this provision to both administrative and judicial proceedings.

128. Cf. supra note 7 for relevant portions of title VII and the Fees Awards Act. The HCPA reads, in relevant part, as follows: "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party." 20 U.S.C. § 1415(e)(4)(B).
129. Latino Project, 701 F.2d at 264.
132. See E.P. v. Union County Regional High Sch. Dist. No. 1, 741 F. Supp. 1144, 1147 n.2 (D.N.J. 1989) (looking to § 1415(e)(4)(D) to define terms of § 1415(e)(4)(B)); Chang, 685 F. Supp. at 98 n.2 (same). See also Moore, 907 F.2d at 167-72; Eggers, 854 F.2d at 895 (referring to § 1415(e)(4)(D)(i)); Newton, 673 F. Supp. at 420 (referring to §§ 1415(e)(3), (e)(4)(D) and (e)(4)(E)). In Moore, the D.C. Circuit stated:

It is true that the phrase "action or proceeding" need not invariably refer to the distinction between civil actions and administrative proceedings wherever that phrase appears in the legal universe. But in the particular statutory context that gives meaning to the words of HCPA, we find this to be the most natural reading.

Moore, 907 F.2d at 167.
Some courts have found the statutory language itself inconclusive as to whether the plain language of the HCPA permits an independent suit solely for attorneys' fees.\(^\text{133}\)

If a court were to examine the plain language of section 1415(e)(4)(B) in a vacuum, using normal canons of statutory construction, the statutory provision could easily be interpreted to preclude an independent suit for attorneys' fees. Only by reading section 1415(e)(4)(B) in conjunction with other statutory provisions and by examining the HCPA's legislative history, which clearly expresses a contrary legislative intent, can a court determine that Congress intended to provide for an independent action for attorneys' fees under the HCPA. Accordingly, the plain language of section 1415(e)(4)(B), by itself, fails to support the argument that a title VII plaintiff may maintain an independent suit for attorneys' fees.

\[\text{B. Legislative History}\]

The legislative history of the three statutes (title VII, section 1988 and HCPA) differ markedly. Unlike title VII and section 1988, Congress' clear intent in the HCPA was that a plaintiff, who had prevailed at the administrative level without first coming to federal court, could file a law suit solely for the purpose of obtaining attorney fees.\(^\text{134}\) The House Report specifically stated:

\[\text{[I]f a parent prevails on the merits at an administrative proceeding (and the agency does not appeal the decision), the parent may be awarded reasonable attorneys' fees, costs[,] and expenses incurred in such administrative proceeding. Usually, the amount of such fees, costs, and expenses will be agreed to by the public agency. If no agreement is possible, the parent may file a law suit for the limited purpose of receiving an award of reasonable fees, costs[,] and expenses.}\]

In drafting the HCPA, Congress also relied, in part, upon the very same dicta in \textit{Carey} concerning title VII that was subsequently

\(^{133}\) Turton v. Crisp County Sch. Dist., 688 F. Supp. 1535, 1537 (M.D. Ga. 1988) (ruling that varied use of the word "proceeding" raises a question as to the interpretation of the statute); Prescott v. Palos Verdes Peninsula Unified Sch. Dist., 659 F. Supp. 921, 923 (C.D. Cal. 1987) (holding that the statutory language is "not conclusive").


rejected in *Crest.* While the Court's interpretation of title VII in the 1980 *Carey* decision would be evidence of Congressional intent for the HCPA—enacted in 1980—it provides no evidence of such intent for title VII, enacted in 1964 and amended in 1972. It is also important to note that of the seven Supreme Court decisions that Congress eviscerated in the Civil Rights Act of 1991, *Crest* was not one of them.137

In contrast to the HCPA, the legislative history of title VII fails to support an assertion that Congress intended to allow a title VII plaintiff to bring an independent suit solely for attorneys' fees. In fact, in *Carey,* Justice Stevens clearly stated that it was "doubtful" that Congress intended to permit such suits under title VII.132 The majority opinion in *Crest* subsequently adopted Justice Stevens' interpretation of Congressional intent.133 Furthermore, Congress modeled section 1988—in which a plaintiff cannot maintain an independent suit for attorneys' fees—after title VII's attorneys' fees provision.160 Accordingly, the legislative history of title VII and the HCPA are markedly different; title VII's legislative history, as interpreted by

138. *Carey,* 447 U.S. at 71 (Stevens, J., concurring). Hubert Humphrey, a co-author of title VII, opined that § 706(k) was designed to "make it easier for a plaintiff of limited means to bring a meritorious suit." 110 Cong. Rec. 12,724 (1964) (emphasis added).
139. *Crest,* 479 U.S. at 13-14. The Court also rejected the dicta contained in footnote 13 of *White,* 455 U.S. at 451, which implied that a suit could be maintained solely for attorney fees under title VII. *Crest,* 479 U.S. at 14.
the Supreme Court, supports the position that Congress did not intend a title VII plaintiff to maintain an independent action solely for attorneys’ fees without first coming to court on the substantive merits of the underlying discrimination claim.

VIII. Breach of Agreement: An Alternative Cause of Action

Although application of the Court’s holding in Crest to title VII would foreclose a cause of action based solely upon an independent suit for attorneys’ fees, prevailing parties may still possess a cause of action to obtain fees for work performed at the administrative level premised upon a breach of a settlement agreement incorporating an award of attorneys’ fees.\(^\text{141}\)

It is axiomatic that law and public policy favor the settlement of disputes without litigation,\(^\text{142}\) and this principle is recognized as applicable to settlement of title VII cases.\(^\text{143}\) Title VII provides an interconnected system of administrative and judicial remedies in which administrative resolution and negotiated settlement are encouraged.\(^\text{144}\) In settling a discrimination claim, the plaintiff may waive

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\(^{141}\) In the federal sector, agency regulations provide for an award of attorneys’ fees to complainants who prevail at the administrative level without initiating a lawsuit. 29 C.F.R. § 1614.501(c)(e) (1992). Federal employees may be able to appeal an agency calculation of attorneys’ fees pursuant to the Administrative Procedures Act, 5 U.S.C. § 702 (1976). However, a plaintiff would not be entitled to a trial de novo. Instead, the court would merely conduct a review of the administrative record that was before the decision-making agency. Conference of State Bank Supervisors v. Office of Thrift Supervision, 792 F. Supp. 837, 842 (D.D.C. 1992); National Treasury Employees Union v. Seidman, 786 F. Supp. 1041, 1046 (D.D.C. 1992); Wisher v. Coverdell, 782 F. Supp. 703, 709-10 (D. Mass. 1992). Such judicial review would be conducted pursuant to the deferential “arbitrary, capricious” or “abuse of discretion” standard. 5 U.S.C. § 706(2)(A) (1977). See Conference of State Bank Supervisors, 792 F. Supp. at 842 (confirming that an agency decision will be upheld if a rational basis exists). Unless the plaintiff can offer evidence that the defendant agency articulated false reasons for the challenged decision, discovery would be inappropriate. Seidman, 786 F. Supp. at 1046.


her right to bring suit.\textsuperscript{145} Performance or satisfaction of the conditions of the accord extinguishes the underlying obligation and precludes a later suit on the same cause of action;\textsuperscript{146} if the defendant has not breached the agreement, the plaintiff may not accept its benefits and then sue on the underlying claim.\textsuperscript{147}

A title VII settlement agreement is essentially a contract in which general contract principles apply.\textsuperscript{148} The language of the settlement agreement must be read in the context of the dispute at hand,\textsuperscript{149} and "must be afforded the meaning derived from the contract by a reasonably intelligent person acquainted with the contemporary circumstances."\textsuperscript{150}

\begin{footnotesize}
\begin{enumerate}
\item[146.] Bowater N. Am. Corp. v. Murray Mach., Inc., 773 F.2d 71, 75 (6th Cir. 1985); Strozler v. GM Corp., 535 F.2d 424, 428 (5th Cir. 1976) (finding that acceptance of a settlement forecloses a lawsuit with respect to the underlying actions); United States v. Allegheny-Ludum Indus., Inc., 517 F.2d 826, 858 (5th Cir. 1975), cert. denied 425 U.S. 944 (1976); Lawrence v. IRS, 57 Fair Empl. Prac. Cas. (BNA) 1497, 1499 (D. Wyo. 1992); Grayer, 687 F. Supp. at 1160 (holding that "[t]he effect of the settlement is to bar all further action on the claims then raised"); Garvin, 553 F. Supp. at 687, aff'd 718 F.2d 1108 (8th Cir. 1983).
\item[147.] Kirby v. Dole, 736 F.2d 661, 663-64 (11th Cir. 1984); Gelsco, Inc. v. Honeywell, Inc., 682 F.2d 54, 57 (2d Cir. 1982); Lawrence, 57 Fair Empl. Prac. Cas. (BNA) at 1499; Sherman, 709 F. Supp. at 1437.
\item[148.] Miller v. Fairchild Indus., Inc., 797 F.2d 727, 733 (8th Cir. 1986); EEOC v. Safeway Stores, Inc., 714 F.2d 567, 574 (5th Cir. 1983), cert. denied, 467 U.S. 1204 (1984) (considering an EEOC conciliation agreement, the court held that the only restrictions on a court "are those derived from agreement itself and principles of contract law"); Burton v. Administrator, GSA, 59 Fair Empl. Prac. Cas. (BNA) 1159, 1161 (D.D.C. 1992); Mollinger v. Diversified Printing Corp., 51 Fair Empl. Prac. Cas. (BNA) 1365 (E.D. Pa. 1989) (applying contract principles); Echols, 586 F. Supp. at 469 (citing WILLISTON ON CONTRACTS § 600A (3d ed. 1961)). \textit{But see Dhalival}, 930 F.2d at 548 (applying general contract law but suggesting interpretation should be covered by federal common law); Snider v. Circle K Corp., 923 F.2d 1404, 1407 (10th Cir. 1991) (holding that "federal common law governs the enforcement and interpretation"); Hamilton, 725 F. Supp. at 648 (finding that it is "possible" that federal common law applies).
\item[149.] White v. Roughton, 689 F.2d 118, 119 (7th Cir. 1982), cert. denied, 460 U.S. 1070 (1983). \textit{See also} Miller, 797 F.2d at 734-35 (holding that omission of a term from a settlement agreement is not determinative if circumstances evidence intent).
\item[150.] Firestone Tire & Rubber Co. v. United States, 444 F.2d 547, 551 (Ct. Cl. 1971). \textit{See also} Arnold Palmer Golf Co. v. Fuqua Indus., Inc., 541 F.2d 584, 588 (6th Cir. 1976) (allowing extrinsic evidence to determine if parties intended to be bound by the agreement).
\end{enumerate}
\end{footnotesize}
A plaintiff who settles a discrimination charge cannot obtain relief, accept the fees negotiated by the parties, and later seek additional relief merely because he is dissatisfied with the amounts awarded.\textsuperscript{151}

If a court were to determine that a breach of the settlement agreement has occurred, the plaintiff's remedy for this breach would be limited by the terms of the agreement.\textsuperscript{152} The courts will enforce agreements that provide for the EEOC, rather than a district court, to determine whether a breach occurred.\textsuperscript{153} The courts will also enforce agreements mandating that in the event of a breach, the plaintiff's sole remedy is limited to reinstatement of the discrimination complaint for further processing from the point such processing ceased.\textsuperscript{154} Where the agreement fails to provide for consequences in the event of a breach, the plaintiff's remedy is limited to an action for breach of contract; he may not bring an action under title VII for the underlying claim.\textsuperscript{155}

**IX. Conclusion**

The Supreme Court's *Carey, Webb, Crest* trilogy sets forth a two-part analysis for determining entitlement to attorneys' fees for work performed at the administrative level. First, the plaintiff must file suit addressing the substantive merits of the underlying discrimination complaint. Second, the court originally entertaining such a suit must examine the mandatory/optional nature of the administrative proceedings. A prevailing party is presumptively entitled to fees for work performed in mandatory administrative proceedings, but is not

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\textsuperscript{151} *Strazier*, 635 F.2d at 426; *Allegheny-Ludhum*, 517 F.2d at 858; *Garvin*, 553 F. Supp at 687.

\textsuperscript{152} *Kirby*, 736 F.2d at 664; *Vermett* v. *Hough*, 606 F. Supp. 732, 746 (W.D. Mich. 1984); *Spiridigliozzi* v. *Bethlehem Mines Corp.*, 558 F. Supp. 734 (W.D. Pa. 1980). See also 29 C.F.R. § 1614.504(a) (1992) (allowing federal employees to request that the agreement be implemented or the complaint be reinstated for further processing); *Eatmon*, 769 F.2d at 1517-19 (enforcing relief provisions in EEOC conciliation agreement, including attorneys' fees if party establishes breach). Cf. *Snider*, 923 F.2d at 1408 (allowing employee to either reinstate original discrimination complaint or bring action for breach).

\textsuperscript{153} Cf. *Vermett*, 606 F. Supp. at 745 (ruling that "compliance will be determined by the EEOC" even though no clause in the settlement agreement gave EEOC that power); *Spiridigliozzi*, 558 F. Supp. at 736 n.1 (noting that the EEOC will determine compliance with a settlement agreement when it is so specified).

\textsuperscript{154} *Kirby*, 736 F.2d at 664.

\textsuperscript{155} *Sherman*, 709 F. Supp. at 1438 (dismissing title VII discrimination claim); *Vermett*, 606 F. Supp. at 746.
entitled to fees for work performed at optional proceedings unless the party can establish that such work was both useful and necessary to advance the litigation.

The fact that the Supreme Court intended its holding in *Crest* to embrace title VII fee suits is made evident by the Court’s repeated reference to title VII and its gratuitous repudiation of the dicta in *Carey* that appeared to permit independent suits for attorneys’ fees. Given title VII and the Fees Awards Act’s unique historical link, similar language and purpose, and synonymous treatment by the courts, the *Crest* Court’s preclusion of independent suits solely for attorneys’ fees under section 1988 should apply with equal force in the title VII context.